SUPPLEMENTAL OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

OF THE

UNITED STATES DEPARTMENT OF JUSTICE

CONSISTING OF SELECTED MEMORANDUM OPINIONS
ADVISING THE

PRESIDENT OF THE UNITED STATES,
THE ATTORNEY GENERAL,

AND OTHER EXECUTIVE OFFICERS OF
THE FEDERAL GOVERNMENT

IN RELATION TO

THEIR OFFICIAL DUTIES

EDITOR
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2013

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FOREWORD

The authority of the Office of Legal Counsel ("OLC") to render legal opinions is derived from the authority of the Attorney General. The Judiciary Act of 1789 authorized the Attorney General 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 OLC 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 or her function as legal adviser to the President, and providing opinions to the Attorney General and the heads of the various organizational units of the Department of Justice. 28 C.F.R. § 0.25. The Attorney General has directed the Office to publish selected opinions for the convenience of the Executive, Legislative, and Judicial Branches of the government, and of the professional bar and the general public.

I.

This volume begins what the Office of Legal Counsel intends to become a continuing supplement to its primary series of published opinions, covering all years during which the Office has been in existence. Students of history may be aware that the Office traces its origins to the Independent Offices Appropriation Act of 1933, Pub. L. No. 73-78, § 16(a), 48 Stat. 283, 307 (June 16, 1933), which created "in the Department of Justice an Assistant Solicitor General to assist the Solicitor General in the performance of his duties." Attorney General Homer Cummings immediately delegated to this new office the responsibility to draft legal opinions and to provide legal counsel to other agencies in the Executive Branch. Att'y Gen. Order No. 23,507 (Dec. 30, 1933). During its first year, the Office of the Assistant Solicitor General issued 83 opinions and another 70 memoranda regarding the legality of executive orders. Att'y Gen. Rep. 1934, at 120. The Office continued with and expanded these functions until 1950, when the position of the Assistant Solicitor General was abolished and replaced by an Assistant Attorney General. Reorganization Plan No. 2 of 1950, 64 Stat. 1261. This new component was initially called the Executive Adjudications Division ("EAD"), but in 1953 Attorney General Herbert Brownell renamed it the Office of Legal Counsel. Att'y Gen. Order No. 9-53 (Apr. 3, 1953).

The writings preserved in OLC archives thus date back to 1933. They comprise numerous memoranda and correspondence to the President, the Attorney General, and client agencies and officials throughout the Executive Branch, addressing "the more important and more troublesome questions arising in the administration of the executive branch of the Government." Att'y Gen. Rep. 1934, at 119. In the years after creation of the Office, Attorneys General continued to attach their names to many of its opinions, and some of these were ultimately published in the

primary series of Attorney General opinions. As their administrative responsibilities multiplied in the post-World War II era, however, it became increasingly difficult for Attorneys General to devote personal attention to writing opinions, and the rate of publication of Attorney General opinions declined accordingly. Only four volumes of Attorney General opinions (40-43 Op. Att'y Gen.) cover the years 1940 to 1982. During that same time period, the opinions issued by Assistant Solicitors General and heads of EAD or OLC steadily increased. With occasional exceptions, *see, e.g.*, Norbert A. Schlei, *Anticipatory Self-Defense*, 6 Green Bag 2d 195 (2003), these opinions have not been publicly released.

In January 1977, newly appointed Attorney General Griffin Bell recognized the value of the accumulating body of precedent within OLC and directed the Office to begin publishing certain of its opinions in a new series separate from the main line of Attorney General opinions. The first volume of this new series (1 Op. O.L.C., containing OLC opinions for the year 1977) was published in 1980. This series has supplanted the Attorney General series. The last volume of the Attorney General opinions (43 Op. Att'y Gen., covering the years 1974-82) was published in 1996. Now, when Attorneys General issue opinions in their own names, it is customary to publish these opinions at the front of the OLC volume for that year.

As this history shows, there are gaps in the public record of Attorney General and OLC opinions. The supplemental series we are commencing with the publication of this volume allows us to fill these gaps and make available to other government agencies and to the general public a significant number of legal opinions from a period when opportunities for publication were limited. It also allows us to make available opinions that for prudential reasons could not be published at or near the time of issuance. The vast majority of OLC writings are pre-decisional advice—they address the legality of contemplated action—and thus are covered by both the attorney-client and deliberative process privileges. Over time, the need for confidentiality may recede, and it may become possible to publish opinions that would not have been appropriate to include in the primary series of Attorney General and OLC opinions because of the proximity in time to the circumstances giving rise to the opinion requests.

This volume is subdivided into three sections: one for opinions by Attorneys General; one for opinions by Assistant Solicitors General and OLC (and EAD); and one for other memoranda and correspondence of a less formal nature. The volume includes at least one opinion by each Senate-confirmed Assistant Solicitor General or Assistant Attorney General of OLC (or EAD) from 1933 to 1977. Included in the last section of the volume are materials that would not typically be published in our primary series: for example, an early practices and procedures manual for the Office of the Assistant Solicitor General (remarkable in its detail and in its areas of commonality with the modern practices and procedures of OLC); a 1962 memorandum of uncertain provenance in the OLC files, perhaps drafted by the Deputy Legal Adviser for the Department of State, regarding possible responses to the Cuban missile crisis; and some action and file memos

that may not qualify as formal opinions of the Office but nevertheless elucidate important legal issues.

Not all of these selections reflect current law or the current position of the Office, of course. In some cases, they mark important signposts in the development of doctrine which will have been superseded by more recent judicial or OLC opinions. In certain opinions, we have added editor's notes to indicate where the law may have changed. Notwithstanding that some selections may no longer be good law, our hope is that all will prove to be of value to legal practitioners and legal historians.

II.

As always, the Office expresses its immense gratitude for the efforts of its paralegal and administrative staff—Elizabeth Farris, Melissa Kassier, Richard Hughes, Joanna Ranelli, Dyone Mitchell, and Lawan Robinson—in preparing this volume for publication. This project has been a particularly heavy lift for the staff. Many of the older OLC opinions have been preserved as ASCII text files in a searchable computer database, but these records are sporadic before 1950. Some opinions have been preserved only as onion-skin carbon copies in the OLC daybooks, or as typewritten transcriptions in serial, hard-bound volumes in the OLC library.[1] In the past year, the Office has digitally re-imaged most of these records to ensure their continuing availability, but variations in the quality of the original have required the staff to manually retrieve and retype a number of the opinions in this volume. The staff has also patiently checked all the citations, just as they do for published opinions in the primary series, and have gone to great lengths to track down obscure source materials. They have invested many arduous hours in confirming the technical accuracy of the opinions and in putting them into publishable form.

We also wish to acknowledge the contributions of former Deputy Assistant Attorney General H. Jefferson Powell, now on the faculty at Duke University Law School. Professor Powell conceived of this project in the fall of 2011. He also did significant early spade work, combing through the OLC archives and selecting candidate opinions for publication. His initiative and efforts to bring this idea to fruition are deeply appreciated.

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[1] There are 16 such hard-bound volumes in our library, spanning the years 1933 to 1953. The later of the volumes overlap with the contents of our daybooks, which begin in 1945. The hard-bound volumes contain transcriptions of letters and memoranda that appear to have been chosen for their particular precedential value: often the transcriptions include cross-references to other relevant materials in the bound volumes, and they are accompanied by thorough topical indices. The hard-bound volumes consist predominantly of opinions of the Assistant Solicitor General (and later of EAD and OLC), but they also include some unpublished letters and memoranda of the Attorney General. We refer to these 16 hard-bound volumes collectively as the "Unpublished Opinions of the Assistant Solicitor General," and sometimes we cite them in our modern opinions as "Unpub. Op. A.S.G."

For us, this volume was truly a labor of love and respect for the history, traditions, and people of this Office and the Department of Justice.

VIRGINIA A. SEITZ
Assistant Attorney General
Office of Legal Counsel

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SUPPLEMENTAL OPINIONS

OF THE

ATTORNEY GENERAL OF THE UNITED STATES

Legality of an Executive Order Requiring Executive Departments and Independent Establishments to Make Monthly Financial Reports

Although the regulations prescribed by the proposed executive order, requiring executive departments and independent establishments to provide the Secretary of the Treasury with monthly financial reports, are not expressly authorized by any statute, the President has authority to issue the order by virtue of his inherent power as Chief Executive.

September 25, 1934

Through the Secretary of State

THE PRESIDENT
THE WHITE HOUSE

My Dear Mr. President:

I am herewith transmitting a revised draft of a proposed Executive Order submitted by the Acting Director of the Budget under date of September 13, 1934.

The proposed order, presented by the Secretary of the Treasury, prescribes regulations requiring every executive department and independent establishment to furnish the Secretary of the Treasury a monthly statement of all bonds, notes, and other evidences of indebtedness held by it for the account of the United States, and requiring every corporation in which the government has a proprietary interest to furnish a monthly statement of its assets, liabilities, etc. The order further requires the Secretary of the Treasury to publish monthly on the Daily Statement of the United States Treasury a combined statement of the assets, liabilities, etc., reported pursuant to the provisions of the order, and authorizes the Secretary to prescribe such regulations as may be necessary for carrying the order into effect.

The evident purpose of the proposed order is to enable the Secretary of the Treasury, who is the chief fiscal officer of the government, to secure from the other executive agencies of the government data and information which will enable the President, through the Secretary, to determine more readily and accurately the financial condition of the government.

Although the regulations prescribed by the order are not expressly authorized by any statute, it is my view that the President has authority to issue the order by virtue of his inherent power as Chief Executive. The proposed regulations do not in any wise limit or control discretionary powers specifically vested in executive officers of the government by the Congress. The regulations are necessary to enable the President to properly exercise his executive functions in performing the duty placed upon him by the Constitution to take care that the laws are faithfully executed. The general principle involved is aptly stated by the Supreme Court in *Myers v. United States* as follows:

> The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone. . . . Of course there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance.

272 U.S. 52, 135 (1926).

I have revised the draft of the order submitted in the interest of form but no change has been made in the substance.

The revised draft of the proposed order has my approval as to form and legality.

HOMER S. CUMMINGS
Attorney General

Authority of the Federal Communications Commission to Deny a Broadcast License to a Newspaper Owner

The Federal Communications Commission does not have authority under the Communications Act of 1934 to refuse to grant broadcasting licenses on the ground that the ownership of the proposed facilities is in, or in common with, a newspaper.

It is doubtful that Congress has the power to broaden the Act to provide the FCC with such authority.

Such a provision would not violate the First Amendment clauses protecting the freedom of speech and of the press, but it would probably be held arbitrary and violative of the Fifth Amendment.

January 6, 1937

THE PRESIDENT
THE WHITE HOUSE

My Dear Mr. President:

Referring to the inquiry as to whether the Federal Communications Commission under the present Act* may refuse to grant broadcasting licenses on the ground that the ownership of the proposed facilities is in, or in common with, a newspaper, and, if this is answered in the negative, as to whether the insertion of such provision in the Act would be within the power of the Congress, I hand you herewith a brief memorandum.**

I think the answer to the first part of the inquiry is a definite "no." I have more doubt on the question of the power of Congress so to broaden the Act.

Such a regulation could be enacted only under the Commerce Clause. While congressional power under this clause is plenary, it must be exercised in a manner to attain permitted ends, i.e., regulation of interstate broadcasting and not ownership as such. The case of *R.R. Retirement Bd. v. Alton R.R. Co.*, 295 U.S. 330 (1935), points a limit to congressional powers even under the Commerce Clause. The closest analogy is the Hepburn Commodities Amendment to the Interstate Commerce Act, forbidding transportation of carrier-owned freight. This was reluctantly upheld after the Supreme Court drastically curtailed its obvious meaning. *United States v. Del. & Hudson Co.*, 213 U.S. 366 (1909).

I do not believe such a provision would violate the clauses protecting the freedom of speech and of the press.

To uphold the separation of newspapers from radio broadcasting privileges, we would need to support the proposition that separation tended toward equality of opportunity in the dissemination of news; or, to phrase it in terms of monopoly of

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* Editor's Note: The "Act" to which this letter opinion refers is the Communications Act of 1934, Pub. L. No. 73-416, §§ 301–329, 48 Stat. 1064, 1081–92.

** Editor's Note: The referenced memorandum begins on page 5 and is dated approximately one month earlier.

interstate communication facilities, we would need to make it clear that to permit the newspapers, the great organs of information now existent, to draw to themselves another great instrumentality of news service might lead to an undesirable control or monopoly of this essential public service. If this conclusion were well-founded and if the drastic measure of absolute separation was reasonably necessary to achieve the end in view, the statute would probably come within the commerce power of Congress.

My opinion is that if this proposal were enacted into law it would probably be held arbitrary and violative of the Fifth Amendment. A reasonable argument for its validity, however, can be made.*

HOMER S. CUMMINGS
Attorney General

* Editor's Note: In *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775 (1978), the Supreme Court ruled that the FCC had authority under the Communications Act to issue a regulation prospectively barring formation or transfer of co-located newspaper-broadcast combinations. The Court also upheld the regulation against challenge under the First Amendment and the Administrative Procedure Act.

December 9, 1936

MEMORANDUM FOR THE SOLICITOR GENERAL

I. Is It at Present Within the Power of the Federal Communications Commission to Refuse Licenses to Radio Stations Owned by Newspapers?

The authority to regulate radio broadcasting was conferred upon the Federal Communications Commission by the Communications Act of 1934, Pub. L. No. 73-416, §§ 301–329, 48 Stat. 1064, 1081–92 (codified at 47 U.S.C. §§ 301–329). Previously the regulating authority had been vested in the Federal Radio Commission and the Secretary of Commerce by the Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162.

Among the duties of the Communications Commission is that of issuing licenses to radio broadcasting stations. Section 307(a) of the Communications Act provides:

> The Commission, if *public convenience*, *interest*, *or necessity* will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

47 U.S.C. § 307(a) (emphasis supplied).

No section of the Act imposing this duty specifically authorizes the Commission to refuse to issue a license to a particular station simply because it is owned by a newspaper. Quaere, may the Commission deny a request for a license upon the ground that the "public interest, necessity and convenience"[1] will not be served by the participation of the press in the radio business?

The phrase "public interest, necessity, and convenience" does not confer unlimited authority, *Fed. Radio Comm'n v. Nelson Bros. Bond & Mortg.*, 289 U.S. 266, 285 (1933), and there are no reported decisions in which an application has been rejected because the applicant belonged to a particular class of people or was engaged in a particular business. However, licenses have been refused upon the ground that the "public interest" would not be served by their issuance where the applicant was insolvent, *Sproul v. Fed. Radio Comm'n*, 54 F.2d 444 (D.C. Cir. 1931); *Boston Broad. Co. v. Fed. Radio Comm'n*, 67 F.2d 505 (D.C. Cir. 1933),

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[1] The catch-all phrase "public convenience, interest, or necessity" is not new, similar words being found in the Radio Act of 1927. Section 9 of that Act provided:

> The licensing authority, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

44 Stat. at 1166.

where the area to be served by the applicant station was already adequately supplied with broadcasting facilities, *Goss v. Fed. Radio Comm'n*, 67 F.2d 507 (D.C. Cir. 1933), and where the programs transmitted under a previous license were uninteresting or objectionable, *KFKB Broad. Ass'n. v. Fed. Radio Comm'n*, 47 F.2d 670 (D.C. Cir. 1931); *Trinity Methodist Church, S. v. Fed. Radio Comm'n*, 62 F.2d 850 (D.C. Cir. 1932).[2]

Whether or not the policy of insuring the distribution of unbiased information via the radio will serve the public interest sufficiently to warrant the Commission's refusal to license stations owned by newspapers is a question of fact, which will not be discussed in this memorandum. However, assuming for the purpose of legal discussion that the policy will serve the public interest, the Commission may, consistent with authority, exclude objectionable members of the press from the radio field.

In *KFKB*, a broadcasting unit, owned and operated by a physician, applied to the Commission for a renewal of its license. The evidence showed that the station was operated solely for the benefit of the physician-owner and that a considerable portion of the broadcasting period was devoted to "quack" medical programs, in which certain prescriptions, known only by numbers and sold exclusively by drug stores owned by the physician, were recommended to persons who had written letters describing their symptoms and asking for medical advice. The Commission in refusing the request expressed the opinion that such programs were detrimental to the public health and did not serve the public interest. 47 F.2d at 671. Upon appeal, the ruling of the Commission was sustained. The court said:

> When Congress provided that the question whether a license should be issued or renewed should be dependent upon a finding of public interest, convenience, or necessity, it very evidently had in mind that broadcasting should not be a mere adjunct of a particular business but should be of a public character. Obviously, there is no room in the broadcast band for every business or school of thought.

Id. at 672.

It was contended by the applicant station that the refusal to issue the license because of the nature of past programs amounted to censorship in violation of section 326 of the Communications Act. *Id.* That section reads as follows:

> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or con-

[2] It should be noted that all of these exemplary cases were litigated under the Radio Act of 1927. However, it is submitted that they are on point because the licensing provision of the Act is identical with that of the Communications Act.

> dition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication. No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.

47 U.S.C. § 326.

In overruling the contention the court said:

> Appellant contends that the attitude of the commission amounts to a censorship of the station contrary to the provisions of section 29 of the Radio Act of 1927 (47 U.S.C.A. § 109). This contention is without merit. There has been no attempt on the part of the commission to subject any part of appellant's broadcasting matter to scrutiny prior to its release. In considering the question whether the public interest, convenience, or necessity will be served by a renewal of appellant's license, the commission has merely exercised its undoubted right to take note of appellant's past conduct, which is not censorship.

47 F.2d at 672. Further, in *Nelson Bros.*, the Court indicated that the "public interest, necessity, and convenience" requirement entailed a supervision of the "scope, character, and quality of services" rendered by the radio. 289 U.S. at 285.

In *Trinity Methodist*, station KGEF of Los Angeles, California, applied for a renewal of its license. The request was denied because the evidence showed that the station was owned and dominated by a Methodist minister who had twice been convicted of contempt of court because of statements broadcast through this station, that its facilities had been used for bitter attacks on the Catholic Church and the Jewish race, and that the programs were generally sensational rather than instructive. The ruling was sustained by the court of appeals on the ground that the public interest was served by the denial of the license. 62 F.2d at 852.

It was argued that the Commission's refusal to renew the license because of the nature of the programs transmitted under the prior permit interfered with the constitutional right of free speech guaranteed by the First Amendment. *Id.* at 851. However, the contention was overruled, and the court said:

> If it be considered that one in possession of a permit to broadcast in interstate commerce may, without let or hindrance from any source, use these facilities, reaching out, as they do, from one corner of the country to the other, to obstruct the administration of justice, offend the religious susceptibilities of thousands, inspire political distrust and civic discord, or offend youth and innocence by the free use of words suggestive of sexual immorality, and be answerable for slander only at the instance of the one offended, then this great sci-

> ence, instead of a boon, will become a scourge, and the nation a theater for the display of individual passions and the collision of personal interests. This is neither censorship nor previous restraint, nor is it a whittling away of the rights guaranteed by the First Amendment, or an impairment of their free exercise. Appellant may continue to indulge his strictures upon the characters of men in public office. He may just as freely as ever criticize religious practices of which he does not approve. He may even indulge private malice or personal slander—subject, of course, to be required to answer for the abuse thereof—but he may not, as we think, demand, of right, the continued use of an instrumentality of commerce for such purposes, or any other, except in subordination to all reasonable rules and regulations Congress, acting through the Commission, may prescribe.

62 F.2d at 852–53.

If the Commission should refuse to issue an original license to a station simply because it was owned by a newspaper, an objection that the order deprived the applicant of his property without due process of law could be successfully interposed. Even granting the public propriety of the policy of distributing unbiased information, it can hardly be assumed that every newspaper applicant will operate its station in a manner calculated to offend the policy, when it is a matter of common knowledge that many papers are scrupulously careful to publish accurate and uncolored accounts of the news of the day. The participation of such papers in the radio broadcasting business would promote the Commission's policy, and their exclusion without a trial would be arbitrary and unreasonable.

This arbitrary interference with desirable members of the press can be avoided by a plan of probation. The period during which the license to broadcast shall be effective is within the Commission's discretion, provided it does not exceed three years. 47 U.S.C. § 307(d). By restricting the original license to a period of relatively short duration, the Commission could put each applicant on trial, and, if its broadcasting tactics offend the policy, a renewal permit may be denied. Such a plan would not only meet the due process test of reasonableness but it would also be expedient and consistent with authority. *Trinity Methodist*, 62 F.2d 850; *KFKB*, 47 F.2d 670.

In conclusion, the ultimate answer to the question of the Commission's power to refuse to license newspaper-owned stations is dependent upon whether or not the policy of insuring the distribution of unbiased information will serve the public interest. Assuming an affirmative answer to this question of fact, it is apparent that the Commission may refuse to renew the licenses of stations who have abused the policy under a prior permit, but there are constitutional objections to a refusal where the applicant has had no trial.

II. Would the Statute Authorizing the Federal Communications Commission to Refuse to License Radio Stations Owned by Newspapers Be Constitutional?

Radio communication constitutes interstate commerce and is subject to regulation by the federal government. In *Fisher's Blend Station, Inc. v. Tax Comm'n of Wash.*, 297 U.S. 650 (1936), the United States Supreme Court said:

> By its very nature broadcasting transcends state lines and is national in its scope and importance—characteristics which bring it within the purpose and protection, and subject it to the control, of the commerce clause.

Id. at 655.

The power of Congress to regulate interstate commerce has been held to include the power to prohibit, in certain cases, the interstate movement of persons or things. For example, Congress lawfully forbade the interstate transportation of lottery tickets, *Champion v. Ames*, 188 U.S. 321 (1903), of diseased livestock, *Missouri, Kan. & Tex. Ry. v. Haber*, 169 U.S. 613 (1898), of adulterated or misbranded foods, *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911), of white slaves, *Hoke v. United States*, 227 U.S. 308 (1913), of prize fight films, *Weber v. Freed*, 239 U.S. 325 (1915), of intoxicants outlawed by the state of destination, *Clark Distilling Co. v. W. Md. Ry.*, 242 U.S. 311 (1917), and of stolen automobiles, *Brooks v. United States*, 267 U.S. 432 (1925).

In all these exemplary cases the power sustained was addressed directly to the interstate transportation of an inherently dangerous person or thing. The prohibitions did not extend to the ownership of the subject of commerce or the means of transportation. The proposed statute, however, would go beyond a regulation of the actual movement of commerce and deny a newspaper the privilege of owning an instrument of interstate communication.

The power of Congress to regulate interstate commerce extends only to that commerce which is defined as "intercourse for the purpose of trade" and includes the transportation, purchase, sale, and exchange of goods between citizens of different states. *Carter v. Carter Coal Co.*, 298 U.S. 238, 298 (1936). There is no authority to sustain an extension of the power to include the ownership of the means of interstate communication, and a recent decision, *id.* at 298–303, construing the scope of the Commerce Clause, is concrete evidence of the narrow confines to which the regulatory power is restricted.

Assuming, however, that the proposed statute would be within the commerce power, there remains the question of the propriety of the regulation. It is axiomatic that the federal government, in the exercise of any delegated power, such as the power to regulate interstate commerce, is subject to the constitutional limitation of due process. *Del., Lackawanna & W.R.R. v. United States*, 231 U.S. 363 (1913);

Hamilton v. Ky. Distilleries & Warehouse Co., 251 U.S. 146 (1919). The requirements of due process are satisfied if the regulation is not unreasonable, arbitrary, or capricious and if it has a real and substantial relation to the object sought to be attained. *Nebbia v. New York*, 291 U.S. 502 (1934).

The result of any application of the due process test is largely dependent upon the facts adduced in each particular case. In his opinion in *Nebbia*, Mr. Justice Roberts indicates that the United States Supreme Court is aware of this factor, for he wrote:

> It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts.

Id. at 525.

Thus, any decision upon the validity of the proposed statute will depend largely upon what data the Commission could produce to prove that it is in the public interest to exclude newspapers from the radio broadcasting field. The due process requirements could probably be satisfied if there are facts to show that newspapers in the past have abused the broadcasting privilege by using the facilities of their stations to transmit objectionable programs, or that the ownership of broadcasting stations by the press is inherently dangerous to the public health, safety, or morals.

It should be noted also that a newspaper does not have an absolute right to engage in radio broadcasting. The privilege of engaging in a particular business or occupation is a property right, of which a citizen may not be deprived without due process of law, *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105 (1928), but there is no constitutional guarantee that the privilege will be unrestricted, *Nebbia*, 291 U.S. 502. In the interest of the public welfare, certain types of business have been prohibited altogether, *Powell v. Pennsylvania*, 127 U.S. 678 (1888), while participation in others has been conditioned, *Dent v. West Virginia*, 129 U.S. 114 (1889). Due process only requires that the regulation be reasonable. *Smith v. Texas*, 233 U.S. 630 (1914).

The possibility that the proposed statute will violate the First Amendment is entitled to but little consideration. Since the scope of the Act does not extend beyond the exclusion of a certain class of people from the broadcasting business, there would be no interference with the right of free speech. If the Act entailed a censorship of the material transmitted or denied a newspaper the right to express its editorial policies by way of the radio, the interference would be apparent, but as proposed it contains no provisions of this nature. At most, ownership, not usage, is regulated.

Further, broadcasting is not an incident of the newspaper business, and the prohibitory provisions of the statute would not affect a newspaper until it had left its usual sphere of activity. Even then, the newspaper would be subject to regula-

tion only in its capacity as a radio station owner, and any interference would be with the freedom of the radio broadcasting, not with the freedom of the press.

In conclusion, it is submitted that the proposed statute is probably unconstitutional because it attempts to regulate matters beyond the scope of interstate commerce. Even though the Commerce Clause should be said to embrace the power to enact the proposed statutes, the regulation might not meet the requirements of due process, and it undoubtedly would be subjected to wide publicity and bitter criticism. Therefore, it is suggested that the most expedient means of handling the problem is to adopt the plan of probation heretofore discussed, which may be put into operation under the present Act.

NEWMAN A. TOWNSEND, JR.[*]
Special Attorney
Office of the Assistant Solicitor General

[*] Editor's Note: The author was a judge who served on the staff of the Office of the Assistant Solicitor General for many years, including as Acting Assistant Solicitor General from 1941–42. *See* Robert H. Jackson, *That Man: An Insider's Portrait of Franklin D. Roosevelt* 95 (John Q. Barrett ed., 2003) (describing Townsend as "a hard-headed, conservative, and forthright former judge").

Presidential Authority to Direct Departments and Agencies to Withhold Expenditures From Appropriations Made

Neither the Economy Act of 1933 nor any other statute authorizes the President to direct departments and agencies, either on a percentum basis or with reference to specific items, to withhold expenditures from appropriations made.

In the absence of legislative sanction, an executive order withholding expenditures from appropriations made would not be binding on the disbursing officers in the event that a department head or other authorized official should desire funds from the amount ordered to be withheld.

The President may request or direct the heads of the departments and agencies to attempt to effect such savings as may be possible without violation of a duty prescribed by law.

May 27, 1937

THE PRESIDENT
THE WHITE HOUSE

My Dear Mr. President:

I have the honor of referring to your memorandum of May 17, 1937, in which you inquire as to the scope of your authority to direct departments and agencies, either on a percentum basis or with reference to specific items, "to withhold expenditures from appropriations made."

The statute to which you particularly refer is the Economy Act of March 3, 1933 (47 Stat. 1513). I do not find in that Act, or in any other, authorization for the President to direct the withholding of such expenditures.

To answer your inquiry, it is, therefore, necessary to consider the extent, under the Constitution, of the President's powers over the various departments and agencies of government and the officers thereof. The scope of such powers, while long the subject of discussion, has not yet been absolutely defined, and perhaps is susceptible of delimitation only as particular powers are drawn into question. However, it seems quite clear that the Constitution confers on the Congress the power to establish departments and agencies in the Executive Branch of the government and to define the duties and functions of the officers who are to administer them; and that, when the Congress has so done, the President, in the absence of legislative authority, has no legal power to interfere with the administration of such departments or agencies, further than to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.

Several opinions of the Attorneys General have pointed out that, when a statutory duty devolves primarily upon an officer other than the President, the latter's sole obligation is to see that the officer performs such duty or to replace him. Thus, in *The President and Accounting Officers*, 1 Op. Att'y Gen. 624, 625–26 (1823), Attorney General Wirt said:

> The constitution of the United States requires the President, in general terms, to take care that the laws be faithfully executed; that is, it places the officers engaged in the execution of the laws under his general superintendence: he is to see that they do their duty faithfully; and on their failure, to cause them to be displaced, prosecuted, or impeached, according to the nature of the case. . . . But it could never have been the intention of the constitution, in assigning this general power to the President to take care that the laws be executed, that he should in person execute the laws himself. For example: if a marshal should either refuse to serve process altogether, or serve it irregularly, that the President should correct the irregularity, or supply the omission, by executing the process in person. To interpret this clause of the constitution so as to throw upon the President the duty of a personal interference in every specific case of an alleged or defective execution of the laws, and to call upon him to perform such duties himself, would be not only to require him to perform an impossibility himself, but to take upon himself the responsibility of all the subordinate executive officers of the government—a construction too absurd to be seriously contended for. But the requisition of the constitution is, that he shall *take care* that the *laws* be executed. If the laws, then, require a particular officer by name to perform a duty, not only is that officer bound to perform it, but no other officer can perform it without a violation of the law; and were the President to perform it, he would not only be not taking care that the laws were faithfully executed, but he would be violating them himself. The constitution assigns to Congress the power of designating the duties of particular officers: the President is only required to take care that they execute them faithfully. . . . He is not to perform the duty, but to see that the officer assigned by law performs his duty *faithfully*—that is, *honestly*: not with perfect correctness of judgment, but *honestly*.

In *Power of the President Respecting Pension Cases*, 4 Op. Att'y Gen. 515, 516 (1846), Attorney General Mason, referring with approval to the opinion from which the above quotation is taken, said:

> It is the constitutional duty of the President to take care that the laws be faithfully executed. But the constitution assigns to Congress the power of designating the duties of particular subordinate officers; and the President is to take care that they execute their duties faithfully and honestly. He has the power of removal, but not the power of correcting, by his own official act, the errors of judgment of incompetent or unfaithful subordinates.

The same conclusion is found in the words of Attorney General Miller, *Eight-Hour Law*, 19 Op. Att'y Gen. 685, 686–87 (1890):

> The President has, under the Constitution and laws, certain duties to perform, among these being to take care that the laws be faithfully executed; that is, that the other executive and administrative officers of the Government faithfully perform their duties; but the statutes regulate and prescribe these duties, and he has no more power to add to, or subtract from, the duties imposed upon subordinate executive and administrative officers by the law, than those officers have to add or subtract from his duties.

These views are confirmed by the opinion of the Circuit Court in *United States v. Kendall*, 26 F. Cas. 702, 752, 754 (C.C.D.C. 1837) (No. 15,517), wherein the court said:

> In the United States, by the constitution, all offices are to "be established by law." The president cannot appoint an officer to any office not established by law. The legislature may prescribe the duties of the office, at the time of its creation, or from time to time, as circumstances may require. If those duties are absolute and specific, and not, by law, made subject to the control or discretion of any superior officer, they must be performed, whether forbidden or not, by any other officer. If there be no other officer who is, by law, specifically authorized to direct how the duties are to be performed, the officer, whose duties are thus prescribed by law, is bound to execute them according to his own judgment. That judgment cannot lawfully be controlled by any other person. He is the officer, not of the president who appoints him, but the officer of the sovereign power of the nation. He is the officer of the United States, and so called in the constitution, and in all the acts of congress which relate to such officers. He is responsible to the United States, and not to the president, further than for his fidelity in the discharge of the duties of his office, unless the president is, by express law, authorized to assign him duties over and above those specially prescribed by the legislature. Such an officer is the postmaster-general. As the head of an executive department, he is bound, when required by the president, to give his opinion, in writing, upon any subject relating to the duties of his office. The president, in the execution of his duty, to see that the laws be faithfully executed, is bound to see that the postmaster-general discharges, "faithfully," the duties assigned to him by law; but this does not authorize the president to direct him how he shall discharge them. In that respect, the postmaster-general must judge

> for himself, and upon his own responsibility, not to the president, but to the United States, whose officer he is. . . .
>
> . . . .
>
> The court, therefore, is confirmed in its opinion, . . . that the postmaster-general, in the faithful discharge of those duties which are prescribed by law, is not lawfully subject to the control of the president. The president's power of controlling an officer in the exercise of his official functions, is limited, we think, to those functions which are by law to be exercised according to the will of the president . . . .

In affirming the decision of the lower court, the Supreme Court said:

> The executive power is vested in a President; and as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power. But it by no means follows, that every officer in every branch of that department is under the exclusive direction of the President. Such a principle, we apprehend, is not, and certainly cannot be claimed by the President.
>
> There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President.

Kendall v. United States, 37 U.S. (12 Pet.) 524, 610 (1838).

As the Supreme Court said in *United States v. Midwest Oil Co.*, 236 U.S. 459, 505 (1915):

> The Constitution does not confer upon him [the President] any power to enact laws or to suspend or repeal such as the Congress enacts. *Kendall v. United States*, 12 Pet. 524, 613. The President's powers are defined by the Constitution of the United States, and the Government . . . freely concedes the general proposition as to the lack of authority in the President to deal with the laws otherwise than to see that they are faithfully executed.

It appears to follow from these authorities that in the absence of legislative sanction an order by you withholding expenditures from appropriations made would not be binding on the disbursing officers in the event that a department head or other authorized official should desire funds from the amount ordered to be withheld. Further doubt regarding the existence of the power to make such an order arises from the fact that the power would in effect enable the President to overcome the well-settled rule that he may not veto items in appropriation bills.

Opinions of the Attorney General indicate that presidential power over appropriations must find its source in legislation. While there has apparently been no ruling on the particular point here presented, various Attorneys General in a long line of opinions have uniformly decided questions of presidential power over appropriations by reference to legislation to ascertain whether the power sought has been conferred upon the President by Congress. *Authority of President to Reallot Unexpended Balances of Appropriations*, 32 Op. Att'y Gen. 359 (1920); *Samoan Islands—Appropriation*, 20 Op. Att'y Gen. 484 (1892); *Transfers of Surplus of Appropriations*, 5 Op. Att'y Gen. 273 (1850); *Transfers of Surplus of Appropriations*, 5 Op. Att'y Gen. 90 (1849); *Transfers of Appropriations for the Naval Service*, 4 Op. Att'y Gen. 310 (1844); *Transfers of Appropriations for the Navy Department*, 4 Op. Att'y Gen. 266 (1843); *Transfers of Specific Appropriations of House of Representatives to Contingent Fund*, 3 Op. Att'y Gen. 442 (1839).

The opinions just cited clearly indicate, however, and there would appear to be no doubt, that Congress can validly authorize you to direct withholding of expenditures. Even in the absence of legislative authority, it is, of course, entirely legal for you in an endeavor to accomplish the desired ends to request or direct the heads of the departments and agencies to attempt to effect such savings as may be possible without violation of or interference with the proper performance of any duty prescribed by law.

HOMER S. CUMMINGS
Attorney General

Authority to Establish System of Universal Military Training

If Congress enacts legislation along the lines of either of two proposals for the establishment of a system of universal military training, supported by appropriate declarations of policy and findings of fact, such legislation would be well within the constitutional powers of the federal government.

May 22, 1947

LETTER OPINION FOR THE CHAIRMAN
ADVISORY COMMISSION ON UNIVERSAL TRAINING

You have submitted to me two proposals for the establishment of a system of universal training in this country, one prepared by the War Department, embodying the so-called "Army Plan for Universal Military Training"; the second prepared by the American Legion, embodying the features of the so-called "Legion Plan."

You say, in general: "The Commission itself has as yet come to no conclusion on the question of whether a universal military training program should or should not be adopted or as to the precise form such training should take if any program is favored." You add, regarding the Army proposal: "The War Department emphasized to me that this draft is in a constant state of revision as to detail and that it should not be considered as in anywise a finished product"; and regarding the Legion proposal: "Legion officials have also emphasized that their draft is not as yet ready for submission to the Congress."

You ask my opinion "whether the enactment of either of these bills is within the constitutional authority of the Federal Government." You suggest also that in the event I conclude that either or any part of these bills could not be legally enacted by the Congress, I indicate my views "as to what constitutional amendment or amendments would be required in order to place the authority to enact such legislation in the Federal Government."

I.

The two proposals, to which I shall refer, respectively, as the "Army bill" and the "Legion bill," resemble each other closely both as to purpose and scope. The Army bill, if enacted, would create a Universal Military Training Corps, into which the young men of the nation, within certain age groups, would be inducted, on a compulsory basis, to be trained in the arts of war for a twelve-month period by the personnel and under the direction of the Armed Forces of the United States. The Legion bill has a similar general design. It would create a corps, under the name of National Security Training Corps, into which induction is also to be compulsory, its membership likewise to undergo "military or related training" by armed forces personnel. Those subject to induction, in each case, would be male

citizens and non-citizens between the ages of seventeen and twenty. The periods of training differ, but not substantially. Under both proposals, trainees are permitted options and alternatives as to training.

Each proposal visualizes a nationwide system of local boards, approximately on the pattern utilized in World Wars I and II. The Army bill specifically charges the system established by the President under authority of the Selective Training and Service Act of 1940 (Pub. L. No. 76-783, 54 Stat. 885) with "(1) the registration, classification, selection and delivery of registrants to the armed forces for training, (2) maintaining a current inventory of the manpower resources of the nation, and (3) such other duties and functions as may be required under authority of this Act." The Legion bill would achieve essentially the same results through the creation of a civilian commission which, among other duties, would "establish in each county, or comparable political subdivision . . . one or more local boards . . . to make determinations with respect to the rights, privileges and obligations of individuals under this Act"; to "call and register"; and to "keep current information with respect to the registration status and training status, of all individuals residing within their respective jurisdictions who are required to undergo training."

The Army and Legion bills, equally, though with differences as to detail, include provision for hospitalization, surgical, medical and dental services; insurance and dependency allowances; and a small monthly "compensation." Each bill makes special provisions for conscientious objectors. Each provides substantial penalties for failure to comply with its requirements.

In these aspects, the two proposals resemble closely the patterns of the Selective Draft Act of 1917 (Pub. L. No. 65-12, 40 Stat. 76) and the Selective Training and Service Act of 1940 (Pub. L. No. 76-783, 54 Stat. 885). In other respects, however, the two bills diverge from the earlier patterns. The trainees are not available for combat service. And, unlike the situation in the past, when drafted men became an integral part of the Army once they were inducted and accepted (section 1 of the National Defense Act of 1916, Pub. L. No. 64-85, § 1, 39 Stat. 166, 166, as amended by section 3 of the Act of December 13, 1941, Pub. L. No. 77-338, § 3, 55 Stat. 799, 800, *codified at* 10 U.S.C. § 2; *cf. Patterson v. Lamb*, 329 U.S. 539 (1947)), the trainees under these bills would not become full-fledged members of the Army or Navy, though in some respects they would have like rights and obligations.

Thus, the Army bill provides for "training for duty with the Armed Forces of the United States" and adds that "upon successful completion of one full year's training in the Corps or the equivalent of one year's training as provided in Section 101 of this Act, trainees will not be subject to further compulsory military training or service, but will revert to full civilian status, and as such are liable to call for further training or service as members of the armed forces only during a national emergency expressly declared by Congress or by the President." "Trainees," the bill provides, "shall be inducted . . . only for training."

The Legion bill provides for a National Security Training Corps, to be composed of individuals "undergoing military or related training under this Act otherwise than as (a) members of the Regular Military or Naval Establishment or any of the reserve components thereof, (b) the Reserve Officers Training Corps, or (c) Cadets at the United States Military Academy, Coast Guard Academy, or Merchant Marine Academies, or midshipmen at the United States Naval Academy." "Every individual who undergoes training under this Act and, in the judgment of those in authority over him, satisfactorily completes such training shall be entitled to a certificate to that effect, which shall include a record of any special proficiency or merit attained."

II.

The constitutionality of either of the above programs if enacted into law by the Congress is best tested by an examination of the selective draft and selective training and service legislation of World Wars I and II. The pertinent provisions of the Constitution lie in Section 8 of Article I:

> The Congress shall have Power To . . . provide for the common Defence and general Welfare of the United States; . . .
>
> To declare War . . . ;
>
> To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
>
> To provide and maintain a Navy;
>
> To make Rules for the Government and Regulation of the land and naval Forces; . . .
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . .

That these enumerated powers were ample to sustain the Selective Draft Act of 1917 was definitely and firmly established in the *Selective Draft Law Cases*, 245 U.S. 366 (1918). There the constitutionality of the statute, which was attacked from every standpoint, was sustained by a unanimous Supreme Court. The opinion is too long even to be summarized, but it is rested, basically, on the congressional power to raise and support armies; and it is significant that Chief Justice White, who spoke for the Court, said:

> It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the

> citizen to render military service in case of need and the right to compel it.

Id. at 378.

So comprehensive and powerful was the opinion in the *Selective Draft Law Cases* that when Congress enacted the Selective Training and Service Act of 1940 more than 14 months prior to the entry of the United States into World War II, the only new point which it was possible to raise was the circumstance that this second act had been passed when the United States was at peace. The argument against the statute was that Congress lacked power to draft the nation's manpower for military training and service prior to an actual declaration of war.

That contention was consistently rejected by the courts. The constitutionality of the Selective Training and Service Act of 1940, as applied prior to and after the declaration of war, was sustained in every federal court that passed upon it. *See United States v. Lambert*, 123 F.2d 395 (3d Cir. 1941); *United States v. Herling*, 120 F.2d 236 (2d Cir. 1941) (per curiam); *United States v. Rappeport*, 36 F. Supp. 915 (S.D.N.Y. 1941); *Stone v. Christensen*, 36 F. Supp. 739 (D. Or. 1940); *United States v. Cornell*, 36 F. Supp. 81 (D. Idaho 1940); *United States v. Garst*, 39 F. Supp. 367 (E.D. Pa. 1941).

The Court of Appeals for the Third Circuit in *Lambert* flatly answered the contention that Congress could not provide measures of manpower mobilization in time of peace. The court said:

> The power granted to Congress by the Constitution to "provide for the common Defence" and "to raise and support Armies" is not to be interpreted in a way which will make the power ineffective against an enemy, actual or potential. We are not precluded from preparing for battle, if battle must come, until such time as our preparation would be too late.

123 F.2d at 396.

While the precise question was never passed upon by the Supreme Court, the opinion in the *Selective Draft Law Cases* and the language of the Court in discussing that decision and in dealing generally with the war power make it perfectly clear that the power of Congress to raise armies by selective draft even prior to the declaration of war cannot be successfully challenged. *See, e.g.*, *N. Pac. Ry. Co. v. North Dakota*, 250 U.S. 135, 149–50 (1919); *United States v. Williams*, 302 U.S. 46, 48 (1937); *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 305 (1942); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 n.19 (1943); *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943). It is significant, in my judgment, that no litigant in any case heard on the merits in the Supreme Court ever questioned the pre-Pearl Harbor application of the 1940 Selective Service Act.

III.

Is, then, the plan, as embodied either in the Army bill or the Legion bill, sufficiently close, in type and purpose, to those embodied in the Acts of 1917 and 1940, and would the circumstances of enactment be deemed sufficiently similar, to warrant the conclusion that such legislation would be constitutional? I have no doubt these questions should be answered in the affirmative.

I wish to point, first of all, to the contemplated legislative findings.

The Army bill provides:

> That (a) Congress hereby declares that in keeping with the fundamental objective to provide for the common defense expressed in the preamble to the Constitution of the United States, and in order to assure the peace and security of future generations, it is a sound and democratic principle that each physically and mentally fit male citizen and alien residing in the United States, owes an obligation to this country to undergo military training which will fit him to protect it in an emergency; That adequate preparedness will prevent aggressive wars against this country and the needless sacrifice of human life; That a well trained citizenry is the keystone of preparedness, and that such preparedness can best be assured through a system of military training for the youth of the nation; That it is essential to maintain an alert and trained citizenry capable of prompt mobilization to meet and deal with any national emergency as is declared by the Congress.
>
> (b) That Congress further declares that in a free society the obligations and privileges of military training should be shared universally in accordance with a fair and just system of selection.

In the Legion bill,

> Congress hereby declares
>
> (1) That to provide the common defense for which the Constitution of the United States was ordained and established every male citizen of the United States and every other male person residing in the United States owes to our country an obligation to undergo training which will fit him to contribute to its protection in time of emergency;
>
> (2) That adequate preparedness will prevent wars against this country and the needless sacrifice of human life; and

> (3) That a citizenry trained for defense is the bulwark of democracy and the keystone of preparedness and can best be assured through youth training for national security.

The design under both the Army bill and the Legion bill falls short of the full system of induction and training embodied in legislation previously upheld by the courts. This does not operate to invalidate either proposal. The Supreme Court, in the *Selective Draft Law Cases*, made it clear that "[b]ecause the power of Congress to raise armies was not required to be exerted to its full limit but only as in the discretion of Congress it was deemed the public interest required, furnishes no ground for supposing that the complete power was lost by its partial exertion." 245 U.S. at 383–84.

The events of the past decade have amply demonstrated that it is too late to improvise armies when war starts or is declared—the latter generally after the attack has started and the enemy invasion is well under way. And the latest scientific developments foreshadow a time when an even shorter period of grace will be available to nations whose peaceable intentions and limitless resources invite aggressive action from without. Chief Justice Hughes has pointed out that the war power of the federal government is the "power to wage war successfully." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934). The power to "provide for the common Defense" must be the power to provide in time of peace for the protection of the Nation. "In time of peace prepare for war" is not only good sense, it is also sound constitutional law.

Both the necessity for action and the kind of action to be taken must be determined by the Congress. I do not hesitate to say that if Congress enacts legislation along the lines of either of these two proposals, supported by appropriate declarations of policy and findings of fact, such legislation would in my opinion be well within the constitutional powers of the federal government.

TOM C. CLARK
Attorney General

SUPPLEMENTAL OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

INCLUDING THE

OFFICE OF THE
ASSISTANT SOLICITOR GENERAL

AND THE

EXECUTIVE ADJUDICATIONS DIVISION

Whether a Three-Day Recess by One Chamber of Congress Constitutes an Adjournment for Purposes of the Pocket Veto Clause

It is doubtful that a three-day recess by the Senate, with the House continuing in session, constitutes an adjournment by Congress that would "prevent [the] Return" of a bill that has been presented to the President under the Pocket Veto Clause of the Constitution.

March 16, 1934

LETTER OPINION FOR THE EXECUTIVE CLERK OF THE WHITE HOUSE

Following up our conversation, I have not had time to make a complete or satisfactory investigation of the important and interesting question presented by you, but we agree that the Bill to which you referred will become a law today "unless the Congress by their Adjournment prevent its Return," as provided in the Constitution.

The question then is whether a three-day recess by the Senate, with the House continuing in session, constitutes an adjournment by the Congress. Manifestly such a recess for three days constitutes a temporary adjournment by the Senate, but I doubt if an adjournment of the Congress thereby results.

The *Pocket Veto Case* clearly states that "the determinative question in reference to an 'adjournment' is not whether it is a final adjournment of Congress or an interim adjournment, such as an adjournment of the first session, but whether it is one that 'prevents' the President from returning the bill to the House in which it originated within the time allowed," 279 U.S. 655, 680 (1929), but it must be observed that there was in that case an actual adjournment of both Houses, and therefore of the Congress, which is not the situation before us now.

I find no clear decision, but if the President wishes to make sure of his veto, I think he should follow Senator Robinson's suggestion of disapproving[*] and returning the Bill, but if he should wish to obtain a clear-cut decision on the question presented, the opportunity is an excellent one for that purpose.[**] I should perhaps add that I have not had the opportunity of discussing this question with the Attorney General.

ANGUS D. MACLEAN
Assistant Solicitor General

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[*] Editor's Note: The Unpublished Opinions of the Assistant Solicitor General include a cross-reference here to the opinion on the next page (*Exercising the Pocket Veto*, 1 Op. O.L.C. Supp. 26 (June 26, 1934)).

[**] Editor's Note: Four years later, in *Wright v. United States*, 302 U.S. 583 (1938), the Supreme Court addressed this precise question and ruled that a three-day recess by the Senate, while the House remained in session, did not constitute an adjournment that prevented the return of a bill.

Exercising the Pocket Veto

When the President wishes to disapprove a bill, and Congress's adjournment has prevented the President's return of the bill, the safer course for the President to exercise his power of disapproval is through a pocket veto, instead of endorsing the bill with the word "disapproved" and the President's signature.

June 26, 1934

MEMORANDUM OPINION FOR THE EXECUTIVE CLERK
WHITE HOUSE*

The view appears to be correct that the President's powers and duties in respect of the approval or disapproval of bills presented to him by the Congress are to be exercised strictly, since he is acting in this behalf as a part of the law making power, and the method of exercise is fixed by the Constitution itself, the immediately pertinent provision being: "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 . . . . If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law." U.S. Const. art. I, § 7.

"The only duty required of the President by the Constitution in regard to a bill which he approves is, that he shall sign it. Nothing more. The simple signing his name at the appropriate place is the one act which the Constitution requires of him as the evidence of his approval, and upon his performance of this act the bill becomes a law. . . . Even in the event of his approving the bill, it is not required that he shall write on the bill the word approved, nor that he shall date it." *Gardner v. The Collector*, 73 U.S. (6 Wall.) 499, 506 (1867). *Compare also* 59 C.J. *Statutes* §§ 112–113 (1932).

"When exercising these powers [of governor] he is a special agent with limited powers, and, as in the case of other special agents, he can act only in the specified mode, and can exercise only the granted powers. If he attempts to exercise them in a different mode, or to exercise powers not given, his act will be wholly ineffectual and void for any and every purpose. When he goes beyond the limits of these powers in the attempt to exercise them, his acts, so far as they transcend the powers, are of no force." *Lukens v. Nye*, 105 P. 593, 594 (Cal. 1909).

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* Editor's Note: The Unpublished Opinions of the Assistant Solicitor General contain a footnote here cross-referencing the letter on the previous page (*Whether a Three-Day Recess by One Chamber of Congress Constitutes an Adjournment for Purposes of the Pocket Veto Clause*, 1 Op. O.L.C. Supp. 25 (Mar. 16, 1934)). That letter expresses doubt about whether a three-day recess by the Senate, while the House remains in session, can be considered an "Adjournment" that "prevent[s] [the] Return" of a bill under Article I, Section 7 of the Constitution.

The foregoing, it may be observed, relates to the method of approval of a bill, while your question relates to disapproval and arises upon endorsement on the bill of the word "disapproved," followed by the President's signature. I agree with you that such endorsement and signature are unnecessary, when disapproval is to be given, but I also think they may be regarded as surplusage, provided the President shall pocket veto the bill in the usual manner, and this is the safer course to pursue. It may be said that since the method of approval is strictly prescribed, the method of disapproval is equally so and should be observed.

ANGUS D. MACLEAN
Assistant Solicitor General

Removal of the Assistant Secretary of Commerce by the Appointment of a Successor

The removal from office of the Assistant Secretary of Commerce can be properly effected merely by the appointment of a successor by the President with the advice and consent of the Senate.

June 10, 1935

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

In accordance with your request I have considered the question whether the removal from office of Assistant Secretary of Commerce Mitchell can be effected by the appointment by the President of his successor and confirmation of the appointment by the Senate.

It appears that Mr. Mitchell was appointed to the office of Assistant Secretary of Commerce by the President by and with the advice and consent of the Senate pursuant to section 8 of the Act of May 20, 1926, Pub. L. No. 69-254, 44 Stat. 568, 573. This section in no wise restricts the authority of the President to remove an incumbent from such office. It is understood that the resignation of Mr. Mitchell has been requested but that he has declined to resign, and that the President desires, if it can legally be done, to remove him from office merely by the appointment of his successor.

The question involved was considered by the Supreme Court of the United States in *Ex Parte Hennen*, 38 U.S. (13 Pet.) 230 (1839). That case involved the validity of the appointment of a clerk of the District Court of the United States for the Eastern District of Louisiana by the Judge of the District Court. While Hennen was serving as clerk of that Court, to which office he had been duly appointed, the judge of the district court executed and delivered to John Winthrop a commission appointing him as clerk. Proceedings in mandamus were brought to require the judge to restore Hennen to the office. Discussing the effect of the appointment of Hennen's successor, the Court said:

> The law giving the District Courts the power of appointing their own Clerks, does not prescribe any form in which this shall be done. The petitioner alleges that he has heard and believes that Judge Lawrence did, on the 18th day of May, 1838, execute and deliver to John Winthrop, a commission or appointment as clerk of the District Court for the eastern district of Louisiana, and that he entered upon the duties of the office, and was recognised by the judge as the only legal clerk of the District Court. And in addition to this, notice was given by the judge to the petitioner, of his removal from the office of clerk, and the appointment of Winthrop in his place; all of which was amply sufficient, if the office was held at the discretion of the Court, The power vested in the Court was a continuing power; and the mere

> appointment of a successor would, per se, be a removal of the prior incumbent, so far at least as his rights were concerned. How far the rights of third persons may be affected is unnecessary now to consider. There could not be two clerks at the same time. The offices would be inconsistent with each other, and could not stand together.

Id. at 261.

The *Hennen* case is cited with approval in *Blake v. United States*, 103 U.S. (13 Otto) 227 (1880). In that case suit was instituted in the Court of Claims by Blake to recover the amount alleged to be due him by way of salary as post-chaplain in the Army from April 28, 1869, to May 14, 1878. On December 24, 1868, Blake wrote a letter of complaint which was treated by the Secretary of War as a resignation from office. His successor was appointed by the President and the appointment was confirmed by the Senate. Blake contended that at the time his letter was addressed to the Secretary of War he was insane to the extent that he was irresponsible for his acts, and consequently that his supposed resignation was inoperative and did not have the effect of vacating the office. The question passed upon by the Court was: "Did the appointment of Gilmore, by and with the advice and consent of the Senate, to the post-chaplaincy held by Blake, operate, *proprio vigore*, to discharge the latter from the service, and invest the former with the rights and privileges belonging to that office?" *Id.* at 230.

The Court answered the question in the affirmative, and in the course of its opinion stated:

> It results that the appointment of Gilmore, with the advice and consent of the Senate, to the office held by Blake, operated in law to supersede the latter, who thereby, in virtue of the new appointment, ceased to be an officer in the army from and after, at least, the date at which that appointment took effect,—and this, without reference to Blake's mental capacity to understand what was a resignation. He was, consequently, not entitled to pay as post-chaplain after July 2, 1870, from which date his successor took rank. Having ceased to be an officer in the army, he could not again become a post-chaplain, except upon a new appointment, by and with the advice and consent of the Senate.

Id. at 237.

This principle is also recognized in *Wallace v. United States*, wherein the Court states:

> While, thus, the validity and effect of statutory restrictions upon the power of the President alone to remove officers of the Army and Navy and civil officers have been the subject of doubt and discussion, it is settled, *McElrath v. United States*, 102 U.S. 426; *Blake v.*

> *United States*, 103 U.S. 227; *Keyes v. United States*, 109 U.S. 336; *Mullan v. United States*, 140 U.S. 240, that the President with the consent of the Senate may effect the removal of an officer of the Army or Navy by the appointment of another to his place, and that none of the limitations in the statutes affects his power of removal when exercised by and with the consent of the Senate. Indeed the same ruling has been made as to civil officers. *Parsons v. United States*, 167 U.S. 324.

257 U.S. 541, 545 (1922).

The practice of removing incumbents from office by the appointment of their successors by the President and the confirmation of such appointments by the Senate has existed from an early date. In *Myers v. United States*, Mr. Justice Brandeis, in his dissenting opinion, states:

> From the foundation of the Government to the enactment of the Tenure of Office Act, during the period while it remained in force, and from its repeal to this time, the administrative practice in respect to all offices has, so far as appears, been consistent with the existence in Congress of power to make removals subject to the consent of the Senate. The practice during the earlier period was described by Webster in addressing the Senate on February 16, 1835:
>
> > "If one man be Secretary of State, and another be appointed, the first goes out by the mere force of the appointment of the other, without any previous act of removal whatever. And this is the practice of the government, and has been, from the first. In all the removals which have been made, they have generally been effected simply by making other appointments. I cannot find a case to the contrary. There is no such thing as any distinct official act of removal. I have looked into the practice, and caused inquiries to be made in the departments, and I do not learn that any such proceeding is known as an entry or record of the removal of an officer from office; and the President could only act, in such cases, by causing some proper record or entry to be made, as proof of the fact of removal. I am aware that there have been some cases in which notice has been sent to persons in office that their services are, or will be, after a given day, dispensed with. These are usually cases in which the object is, not to inform the incumbent that he is *removed*, but to tell him that a successor either is, or by a day named will be, appointed." 4 Works, 8th ed., 189.

> In 1877, President Hayes, in a communication to the Senate in response to a resolution requesting information as to whether removals had been made prior to the appointment of successors, said:
>
> > "In reply I would respectfully inform the Senate that in the instances referred to removals had not been made at the time the nominations were sent to the Senate. The form used for such nominations was one found to have been in existence and heretofore used in some of the Departments, and was intended to inform the Senate that if the nomination proposed were approved it would operate to remove an incumbent whose name was indicated. R.B. Hayes." 7 Messages and Papers of the President, 481.
>
> Between 1877 and 1899, the latest date to which the records of the Senate are available for examination, the practice has, with few exceptions, been substantially the same. It is, doubtless, because of this practice, and the long settled rule recently applied in *Wallace v. United States*, 257 U.S. 541, 545, that this Court has not had occasion heretofore to pass upon the constitutionality of the removal clause.

272 U.S. 52, 259–61 (1926) (emphasis in original; footnotes omitted).

In footnote 28 of Mr. Justice Brandeis's dissenting opinion, it is stated:

> Since the enactment of the Tenure of Office Act various forms have been used to nominate officials to succeed those whose removal is thereby sought. Examination of their use over a period of thirty-two years indicates that no significance is to be attached to the use of any particular form. Thus the nomination is sometimes in the form A.B. vice C.D. "removed"; sometimes it is "to be removed"; sometimes "removed for cause"; sometimes "whose removal for cause is hereby proposed."

Id. at 259–60.

In view of the foregoing, I am of the opinion that the removal of Mr. Mitchell from office can be properly effected by the appointment of his successor by the President and confirmation thereof by the Senate.

ANGUS D. MACLEAN
Assistant Solicitor General[*]

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[*] Editor's Note: The version of this opinion in the Unpublished Opinions of the Assistant Solicitor General contains the following postscript: "Mr. Mitchell's commission contains no fixed term, according to my information, but provides that he is to hold 'subject to the conditions prescribed by law.'—A.D.M."

Filling the Vacancy Following the Death of the Secretary of War

The performance of the duties of the Secretary of War by an acting secretary may not extend beyond thirty days from the date of the death of the late Secretary of War, and it will be necessary for a new Secretary of War to be appointed in accordance with the provisions of the Appointments Clause of the Constitution to perform those duties after that date.

There is some doubt whether the duties specifically imposed by Congress upon the Secretary of War may be performed by the President, as Commander in Chief of the Army, or by any other person not serving as the Secretary of War.

September 21, 1936

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

Reference is made to the request of Mr. Marvin H. Mclntyre, Assistant Secretary to the President, for your opinion concerning the necessity of the appointment of a successor to the late Secretary of War.*

The Act of August 7, 1789, ch. 7, § 1, creating the Department of War, provides:

> That there shall be an executive department to be denominated the Department of War, (a) and that there shall be a principal officer therein, to be called the Secretary for the Department of War, who shall perform and execute such duties as shall from time to time be enjoined on, or entrusted to him by the President of the United States . . . .

1 Stat. 49, 49–50.

This statute is silent as to the method of appointing the Secretary, and no subsequent legislation relative thereto has been enacted. The appointment of the Secretary is therefore left under the provisions of Article II, Section 2 of the Constitution, which, in prescribing the duties of the President, provides in part:

> [H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper,

* Editor's Note: The version of this opinion that was transcribed in the Unpublished Opinions of the Assistant Solicitor General contained a footnote here cross-referencing another short memorandum regarding the President's authority to recess-appoint a Secretary of War. That memorandum, dated September 25, 1936, is included at the end of this opinion.

> in the President alone, in the Courts of Law, or in the Heads of Departments.
>
> The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Provision is made by sections 177 and 179 of the Revised Statutes for the temporary filling of the office of the head of a department. Those sections read as follows:

> In case of the death, resignation, absence, or sickness of the head of any Department, the first or sole assistant thereof shall, unless otherwise directed by the President, as provided by section one hundred and seventy-nine, perform the duties of such head until a successor is appointed, or such absence or sickness shall cease [§ 177].
>
> In any of the cases mentioned in the two preceding sections, except the death, resignation, absence, or sickness of the Attorney-General, the President may, in his discretion, authorize and direct the head of any other Department or any other officer in either Department, whose appointment is vested in the President, by and with the advice and consent of the Senate, to perform the duties of the vacant office until a successor is appointed, or the sickness or absence of the incumbent shall cease [§ 179].

Rev. Stat. §§ 177, 179 (2d ed. 1878), 18 Stat. pt. 1, at 28 (repl. vol.), *recodified at* 5 U.S.C. §§ 4, 6 (1934).

The filling of such office under sections 177 and 179 of the Revised Statutes, however, is temporary only, and section 180 (as amended) reads as follows:

> A vacancy occasioned by death or resignation must not be temporarily filled under the [three preceding sections] for a longer period than thirty days.

5 U.S.C. § 7 (1934).

Reading sections 177, 179, and 180 together, it is my opinion that the temporary filling of a vacancy occasioned by the death or resignation of the head of a department may not be for a period of more than 30 days. This view has long been adhered to by your predecessors. (Section 178 pertains only to bureaus.)

In an opinion dated December 31, 1880, Attorney General Devens, replying to a letter of the Secretary of the Treasury informing him that the period of 10 days, for which Honorable Alexander Ramsey, Secretary of War, was designated to act as Secretary of the Navy under the provisions of sections 177 and 180 of the

Revised Statutes, expired the day before, and inquiring whether any person after such expiration could properly sign requisitions as Acting Secretary of the Navy for payments on account of the Navy, stated:

> In answer, I would say that, in my opinion, the vacancy in the office of the Secretary of the Navy created by the resignation of Hon. R.W. Thompson cannot be filled by designation of the President beyond the period of ten days. This power of the President is a statutory power, and we must look to the statute for its definition. An examination of the statutes which precede that statute of 1868 embodied in section 180 Revised Statutes satisfactorily shows that the period for which the vacancy can be filled by designation is limited to ten days. It would not, therefore, be in the power of the President, after such ten days, to designate another officer, or the same officer, to act for an additional period of ten days. The statutory power being exhausted, the President is remitted to his constitutional power of appointment. No appointment has been made, and there is, and can be, no person authorized by designation to sign requisitions upon the Treasury Department on account of Navy payments as Acting Secretary of the Navy.

Appointments Ad Interim, 16 Op. Att'y Gen. 596, 596–97 (1880).

In an opinion to the President dated March 31, 1883, Attorney General Brewster, construing sections 177, 178, 179, and 180 of the Revised Statutes with reference to the necessity of appointing a successor to Postmaster General Howe, deceased, said:

> [T]hose sections have received an interpretation by Mr. Attorney-General Devens, as appears on reference to volume 16 of Attorney-Generals' opinions, pages 596 and 597.
>
> It was there held by that officer that the President has power to temporarily fill by an appointment *ad interim*, as therein prescribed, a vacancy occasioned by the death or the resignation of the head of a Department or the chief of a bureau therein, for a period of ten days only. When the vacancy is thus temporarily filled once for that period, the power conferred by the statute is exhausted; it is not competent to the President to appoint either the same or another officer to thereafter perform the duties of the vacant office for an additional period of ten days.
>
> After carefully reading those sections and examining the history of their enactment, I concur in that opinion.

Appointments Ad Interim, 17 Op. Att'y Gen. 530, 530–31 (1883).

In an opinion to the President dated September 11, 1884, rendered in connection with the death of Secretary of the Treasury Folger, Attorney General Brewster, referring to his former opinion of March 31, 1883, submitted upon the death of Postmaster General Howe, affirmed that opinion and advised that the conclusions therein applied to the case under consideration. *Performing Duties of Vacant Office*, 18 Op. Att'y Gen. 58, 58–59 (1884).

In an opinion to the President dated January 31, 1891, rendered in connection with the death of Secretary of the Treasury Windom, Attorney General Miller said:

> It seems to me impossible to escape the effect of section 180 in limiting to a period of ten days the time during which the vacant office may be filled, either by the statutory succession provided in section 177, or the designation by the President provided in section 179, or by both.

Vacancy in Head of Departments, 20 Op. Att'y Gen. 8, 9 (1891).

At and prior to the time the opinion of Attorney General Miller above referred to was rendered, the limitation in section 180 was 10 days. After that opinion was rendered, the Congress, by the Act of February 6, 1891, ch. 113, 26 Stat. 733, 733, amended the section so as to extend the time to 30 days, but did not otherwise change the section.

In an opinion dated March 15, 1920, Acting Attorney General Ames, in answer to the letter of the Undersecretary of State advising that the 30 days of his incumbency as Acting Secretary of State expired on that date and inquiring what action would be appropriate for him and other officers of the department to take pending the confirmation by the Senate of the nomination of Mr. Colby as Secretary of State, stated:

> The President not having "otherwise directed," you held as "the first or sole assistant" under section 177. While that section provides that such an assistant shall "perform the duties of such head until a successor is appointed," this language must be construed in connection with section 180 as amended, which limits the time to 30 days. The vacancy to be filled under section 177 is manifestly to be filled only "temporarily," whether filled by the assistant or in such other manner as the President may direct. It can not be properly held that the 30 days' limitation applies only to a case in which the President otherwise directs and not to a case in which the assistant is acting under the statute, because the person acting in either contingency is acting temporarily, and because section 180 as amended specifically limits the period for temporary action to 30 days.

> . . . .
>
> In the absence of a specific case it is difficult to suggest what course you and the other officers of the department should take pending the confirmation of Mr. Colby's nomination. It is probably safer to say that you should not take action in any case out of which legal rights might arise which would be subject to review by the courts.

Vacancy in Office of Secretary of State, 32 Op. Att'y Gen. 139, 141 (1920).

An examination of the legislative history of the act of February 6, 1891, changing the limitation in section 180 from 10 days to 30 days, is instructive. The opinion of Attorney General Miller advising the President that it was necessary to appoint a successor to Secretary of the Treasury Windom within 10 days was dated January 31, 1891. *Vacancy in Head of Departments*, 20 Op. Att'y Gen. 8 (1891). On the same date President Harrison addressed to the Congress the following message:

> The sudden death of the honorable William Windom, Secretary of the Treasury, in New York, on the evening of the 29th instant, has directed my attention to the present state of the law as to the filling of a vacancy occasioned by the death of the head of a Department.
>
> I transmit herewith an opinion of the Attorney-General, from which it will be seen that under the statutes in force no officer in the Treasury Department, or other person designated by me, can exercise the duties of Secretary of the Treasury for a longer period than ten days. This limitation is, I am sure, unwise and necessarily involves, in such a case as that now presented, undue haste and even indelicacy. The President should not be required to take up the question of the selection of a successor before the last offices of affection and respect have been paid to the dead. If the proprieties of an occasion as sad as that which now overshadows us are observed possibly one-half of the brief time allowed is gone before, with due regard to the decencies of life, the President and those with whom he should advise can take up the consideration of the grave duty of selecting a head for one of the greatest Departments of the Government.
>
> Hasty action by the Senate is also necessarily involved, and geographical limitations are practically imposed by the necessity of selecting some one who can reach the Capital and take the necessary oath of office before the expiration of the ten days.

> It may be a very proper restriction of the power of the President in this connection that he shall not designate, for any great length of time, a person to discharge these important duties who has not been confirmed by the Senate; but there would seem to be no reason why one of the Assistant Secretaries of the Department wherein the vacancy exists might not discharge the duties of Secretary until a successor is selected, confirmed, and qualified. The inconvenience of this limitation was made apparent at the time of the death of Secretary Folger. President Arthur, in that case, allowed one of the Assistant Secretaries, who had been designated to act in the absence of the Secretary, to continue in the discharge of such duties for ten days, then designated the same person to discharge the duties for a further term of ten days, and then made a temporary appointment as Secretary, in order to secure the consideration that he needed in filling this important place.
>
> I recommend such a modification of the existing law as will permit the first or *sole* Assistant, or, in the case of the Treasury Department, where the Assistants are not graded, that one who may be designated by the President to discharge the duties of the head of the Department until a successor is appointed and qualified.

22 Cong. Rec. 2015 (message to Senate), 2060 (identical message to House).

Upon the receipt of this message in the House, Mr. McKinley introduced a bill (H.R. 13453) to amend section 180 of the Revised Statutes to read as follows:

> A vacancy occasioned by death or resignation must not be temporarily filled under the three preceding sections for a longer period than thirty days.

22 Cong. Rec. 2064 (Feb. 2, 1891).

When motion to suspend the rules and pass the bill was seconded by Mr. McMillin, the bill was by unanimous consent considered and passed by the House without being referred to a committee. *Id.* at 2065. Mr. McKinley, in presenting the bill, stated:

> [T]he President of the United States on last Saturday sent a message to the House of Representatives, as well as to the Senate, calling the attention of Congress to the fact that under existing law he could designate an officer to a Cabinet place for ten days, and ten only, and recommended that an extension of the time be given by public law. Doubtless gentlemen on both sides of the House have read the message in question and are aware of the occasion which led to its

> transmission to Congress. The bill I have sent to the desk proposes to amend section 180 of the Revised Statutes, which reads as follows:
>
> > Sec. 180. A vacancy occasioned by death or resignation must not be temporarily filled under the three preceding sections for a longer period than ten days.
>
> Section 177 applies to the case which gives rise to this bill and is in the following words:
>
> > Sec. 177. In case of the death, resignation, absence, or sickness of the head of any Department the first or sole Assistant thereof shall, unless otherwise directed by the President, as provided by section 179, perform the duties of such head until a successor is appointed or such absence or sickness shall cease.
>
> Section 180 limits the power of the President to appoint a successor until a permanent appointment is made and confirmed by the Senate, limiting it to a period of ten days, in which time the appointment must be made.
>
> Now, this bill follows the language of section 180, which is in the same words, except that we insert "thirty" instead of "ten" days, so that it gives the President thirty days' time within which he may designate a head of a Department to hold until his successor is qualified or appointed and confirmed.

Id. at 2064–65.

Mr. McMillin, who had seconded the motion for suspension of the rule and passage of the bill, stated:

> Mr. Speaker, lest my demand for a second on the motion of the gentleman from Ohio should be misunderstood, I wish to say that I do not see any reason why this bill may not be passed.
>
> If I remember correctly this is one of the statutes placed on the books in order to control President Johnson. I am not sure about it, but that is my memory.
>
> I do not, however, assent to the reasoning embodied in the President's message and am unable to see how he can reason as he does to reach the conclusion at which he has arrived. The principal part of the message is taken up with a statement that it is indecorous to the dead to proceed to carry out the statutes for the benefit of the living. I do not think that would be an act of indecorum; and hence I should

> not vote for this proposition on that ground. But I can see that the period of ten days is a limit too short for the action which may be necessary in the appointment of the head of an Executive Department, and the Chief Executive might find himself at a great disadvantage in making that calm and judicious decision which should characterize his action.

Id. at 2065.

In the Senate the bill as passed by the House was referred to the Committee on Finance which reported an amendment striking out all after the enacting clause and thereafter considerably revising sections 177, 178, and 179 of the Revised Statutes and repealing section 180.

The following is a part of the discussion of the Senate Finance Committee amendment on the floor of the Senate:

> MR. GORMAN. I ask the Senator from Vermont if that [referring to the part of the amendment which repealed section 180, Revised Statutes] is not a very radical change and whether there ought not to be some limitation. We all know that gentlemen are selected for assistants of these Departments, for the great Treasury Department, and there might be some question as to whether favorable action was to be had in selecting a head of that Department. It does not seem to me that there ought to be a limit. Formerly I understand the time was six months, and afterwards during President Johnson's time it was limited to ten days. Now, we are going back and throwing it open and permitting these officers to be designated and to act for any length of time.
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> . . . .
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> MR. HALE. I should be very glad to have the Senator who reports this bill state to the Senate what reasons there were for going so largely into the question of the tenure of certain officers and their appointment. The emergency that arose was one that was clearly defined and was the subject of a special message from the President. The House of Representatives evidently took the matter up in that spirit, and passed a simple bill of a few lines, which I am bound to say suits me very much better than this long bill reported by the Senator from Vermont and sought to be put through now certainly without my being able to understand it. It occurs to me that the better thing to do would be to do just what the House of Representatives did, take that simple bill and pass it without any amendment.
>
> . . . .

MR. EVARTS. Mr. President, I have made a careful examination of the clauses in the statute book now relating to this subject, and have come to the conclusion, without reference to the bill introduced into the Senate, which I had not seen nor heard of till this morning, that all that is necessary either for permanent legislation or for this exigency is to enlarge the period within which authority for temporary appointment is needed. This I understand now has been provided for by a bill which passed the other House, simply by substituting the word "thirty" for "ten," as the statute now reads. Whether any new regulations should be made hereafter (and I can not foresee their necessity) this measure is all that is needed for this exigency, and so far as I can see all that is necessary for any supervening exigencies hereafter.

. . . .

MR. ALLISON. If the Senator will allow me, the provisions of the amendment are perfectly clear as proposed by the Senate committee. Instead of making the term thirty days, an Assistant Secretary is appointed who shall hold indefinitely until the President shall have selected a Secretary. That is the difference between the House bill and the Senate amendment, and the only difference.

MR. REAGAN. The effect of that might be that we should have the head of a Department holding indefinitely without the consent of the Senate, and I do not think that ought to be. I prefer the House bill.

. . . .

MR. HALE. It appears to me that the very fact that this debate has arisen here and that doubts have come up in the minds of Senators as to the operation of this amendment is in itself a conclusive argument against the amendment. The other branch of the national Legislature took the subject up at once and unanimously passed the simple bill that disposes of the question, the only real question that there is in it, as the President desired undoubtedly—I do not pretend to speak for him—but that seems to be his desire as indicated by his message.

I do not understand that there has been any serious inconvenience in the Departments heretofore, excepting upon this ten days' limitation, and the only thing that was sought to be done in the other branch was to relieve that, and I, for one, hope we may follow in the line they have taken.

. . . .

MR. DAWES. I should like to hear from the Committee on Finance the reasons they have to give for extending the time indefinitely; why it is better to put it in the power of the President to have an adviser without the consent of the Senate than to have one for thirty or forty days, a time sufficient for all the purposes that could be expected or desired except for the purpose of having an adviser without the consent of the Senate.

. . . .

MR. GORMAN. Mr. President, I have not looked into the subject particularly and it is comparatively new. My understanding, however, is that originally in the very first act passed upon this subject, during General Washington's Administration, six months was the limit.

MR. MORRILL. It was.

MR. GORMAN. I understand from the Senator from Vermont that I am correct in that statement. Congress was jealous about this matter and would not permit a designation to extend beyond the period of six months. So we ran along until we came to the exciting scenes during President Johnson's Administration, when the majority of Congress at that time thought there was some abuse by the President, even within that limit, in the appointment of his Cabinet officers and designating others to act in their place, and at that time a law was passed limiting the designations to ten days. From that period until now we have had a great many cases where the Administration, I have no doubt, has been embarrassed. I think we had one in the case of Secretary Manning, who was sick for quite a long time. Secretary Folger also during his service as Secretary of the Treasury was sick and afterwards died.

MR. EDMUNDS. If the Senator from Maryland will pardon me right on that point, in the instance of Secretary Manning, Mr. Fairchild was the Assistant Secretary, whose office was fixed by law and who had been confirmed by the Senate under the law and with the idea that, in the illness of his chief, the duty would devolve upon him by operation of law, and not necessarily by any designation of the President. It is the law which provides it. Therefore, in my opinion, as the law now stands, an Assistant Secretary may proceed until the President chooses to oust him by designating somebody else, or, which is the same thing, the business of any Department can go on

> indefinitely by the deputy named by law, as distinguished from the selection by the President, until the vacancy is filled, and in that way Mr. Fairchild was enabled to go on. The only difficulty is in what I think is a wrong construction placed by a former Attorney General in a very brief opinion upon this right of the lawful deputy or assistant to act for more than ten days, who held in one instance under the law that the Assistant Secretary could only act for ten days, which I think is a great mistake; but as the committee has reported this amendment, instead of leaving the law to operate upon the Assistant Secretary upon whom the duty is devolved, namely, the First Assistant, it authorizes the President to step in and take his choice for an indefinite period, which I do not think is right.

Id. at 2078–79.

The amendment proposed by the Senate Finance Committee was rejected and the bill as sent over by the House was passed by the Senate. *Id.* at 2079. From this action by the Congress under the circumstances existing, and especially in view of the discussion of the bill and the proposed Senate Finance Committee amendment on the floor of the Senate, it seems clear that Attorney General Miller's construction of the statute correctly represents the intent of the Congress.

In view of the above, it is my opinion that the performance of the duties of the Secretary of War by an acting secretary may not extend beyond thirty days from the date of the death of the late Secretary of War, and that it will be necessary for a Secretary of War to be appointed in accordance with the provisions of Article II, Section 2 of the Constitution to perform those duties after that date.

It has been suggested that the President, as Commander in Chief of the Army, would be authorized under his constitutional powers to perform the duties of the Secretary of War. It will be noted, however, that in addition to the original duties placed upon the Secretary of War by the Act of August 7, 1789, creating the Department of War, to "perform and execute such duties as shall from time to time be enjoined on, or entrusted to him by the President of the United States," 1 Stat. at 50, the Congress has from time to time imposed upon the Secretary of War specific statutory duties, as will be seen by reference to sections 184–219, title 5, U.S. Code; to title 32, U.S. Code, relating to the National Guard; and to various other statutes. It cannot, of course, be contemplated that the President will actually serve as Secretary of War, and I have some doubt whether the duties specifically imposed by the Congress upon the Secretary of War as such officer can be performed by any person not serving as Secretary of War.

Moreover, it seems to me that the Constitution and the acts of Congress together evince the intent that the President shall appoint a successor to a deceased or resigned Secretary of War within thirty days from the time the office becomes vacant. In my opinion his failure to do this will subject him to unfavorable criticism, and will be immediately seized upon by those who have persistently

sought to create the impression that the President has no regard for the Constitution and the laws. This is particularly true in view of the legislative history of the statutes and the many published opinions of the Attorneys General construing them.

Should the President not desire to make the permanent appointment until after the convening of the next Congress, a resignation would not be necessary, since the appointment at that time by the President of a new Secretary of War, concurred in by the Senate, would *ipso facto* vacate the office as of the date the new appointment became effective. *See Blake v. United States*, 103 U.S. 227, 237 (1880). If the President may appoint a Secretary of War, it would seem that the President at his pleasure at any time may require his resignation and appoint someone else as Secretary of War to fill such vacancy.

It may be that the President could, if he so desired, designate the person appointed at this time as Acting Secretary of War, as an indication that the appointment was to be in the nature of a temporary one. Such an appointee would, however, in my opinion, be Secretary of War, and if elevated to that office from some other position in the Department I have serious doubt whether he could later resume his former office without reappointment and, if the nature of the office required it, confirmation by the Senate. Moreover, such an appointment might result in the President being charged with subterfuge, and might subject him to the same kind of unfavorable criticism as that to which he would probably be subject if no appointment were made at this time.

GOLDEN W. BELL
Assistant Solicitor General

September 23, 1936

SUMMARY OF MEMORANDUM OPINION FOR ATTORNEY GENERAL*

I. The Act of August 7, 1789, creating the Department of War provides that "there shall be a principal officer therein, to be called the Secretary for the Department of War."

The statute does not provide the method of appointing a secretary nor has any subsequent legislation done so. Such appointment therefore is governed by Article II, Section 2 of the Constitution under which the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint" the Secretary of War.

The same section provides that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."

II. The only statutory authority for the President in the event of the death or resignation of the head of a department to designate a person to perform the duties of the vacant office until a successor is appointed is to be found in sections 177 and 179 of the Revised Statutes, the former providing that "the first or sole assistant thereof shall, unless otherwise directed by the President, perform the duties of such head until a successor is appointed"; and the latter (except in case of death or resignation of the Attorney General) that the President may authorize "the head of any other Department or any other officer in either Department, whose appointment is vested in the President, by and with the advice and consent of the Senate, to perform the duties of the vacant office until a successor is appointed."

III. Section 180 of the Revised Statutes, referring to sections 177 and 179 (also section 178 which pertains only to bureaus), provides that "a vacancy occasioned by death or resignation must not be filled under the three preceding sections for a longer period than 30 days." Since sections 177 and 179 contain the sole authorization to the President to designate someone to perform the duties of the Department whose head has died or resigned, the President is restricted to designating one of the persons therein described to act during the vacancy. He therefore has no authority to appoint to act during the vacancy a person who does not fall within the categories specified in sections 178 and 179.

IV. The Opinions of the Attorneys General from 1880 to the present time have construed the above-mentioned sections to mean that in case of a vacancy occasioned by the death or resignation of the head of a department the President may not designate a person to perform the duties of such head for a period of more than 30 days.

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* Editor's Note: This summary, dated two days later, appears immediately after the full memorandum opinion in the Unpublished Opinions of the Assistant Solicitor General.

V. The legislative history of the above-mentioned provisions shows that originally the period during which the duties of a deceased or resigned head of a department might be performed by a person properly designated by the President was six months; that later the period was reduced to 10 days for the purpose of controlling appointments of President Johnson; that President Harrison protested the period of 10 days as too short; that thereupon an endeavor was made to repeal the restrictive legislation to permit the president to designate such officers to act for any length of time; that such endeavor was unsuccessful but the time was extended from 10 to 30 days—the existing provision.

VI. While the original duties placed upon the Secretary of War by the act of August 7, 1789, "to perform and execute such duties as shall from time to time be enjoined, on, or entrusted to him by the President of the United States," might be performed by the President as Commander in Chief of the Army during a vacancy in the office, subsequent legislation has from time to time imposed upon the Secretary of War specific statutory duties. Since it was not contemplated that the President should in fact serve also as Secretary of War, it is at least doubtful whether the duties specifically imposed by the Congress upon the Secretary as such can be performed by one who is not in fact serving as Secretary.

VII. Since the intent of the Constitution and the above-mentioned acts of Congress seems to be to require the President to appoint a successor to a deceased or resigned Secretary of War within 30 days from the time the office becomes vacant, failure by the President to do so within that time will probably result in criticism of the President.

VIII. Should the President desire not to appoint a permanent Secretary of War until after the convening of the next Congress, he could now appoint a Secretary of War and appoint another person as such after the convening of the Congress, which latter appointment, if concurred in by the Senate, ipso facto, would vacate the office as of the date the new appointment becomes effective. *Blake v. United States*, 103 U.S. 227, 237 (1880).

IX. If the President may appoint a Secretary of War, it would seem that the President at his pleasure at any time may require his resignation and appoint someone else as Secretary of War to fill such vacancy.

GOLDEN W. BELL
Assistant Solicitor General

September 25, 1936

MEMORANDUM FOR THE ATTORNEY GENERAL*

Mr. Forster of the White House telephoned me this afternoon, advising that the President had concluded to appoint a Secretary of War to fill the existing vacancy. He inquired whether in preparing the commission it would be proper to insert in it a clause indicating that it was an "interim" appointment or restricting it to a certain time. I informed him that in my opinion it would not be proper for this to be done, since there is no authority for the President to limit the term of one appointed to this office, and in view of the fact that after appointment, he is removable, in any event, at the pleasure of the President.

There has been no call for a formal opinion, and I assume that final disposition of the matter has thus been made, unless it shall be later brought to your attention.

GOLDEN W. BELL
Assistant Solicitor General

* Editor's Note: This follow-up memorandum included a postscript: "Bell—Your view is correct, I am sure.—HSC." Presumably "HSC" was Attorney General Homer S. Cummings. On the same date, President Roosevelt recess-appointed Harry H. Woodring as Secretary of War to fill the vacancy left by the passing of George J. Dern on August 27, 1936.

Censorship of Transmission of Trotzky Speech From Mexico

The Federal Communications Commission does not have statutory authority to censor the telephone transmission from Mexico into the United States of a speech by Leon Trotzky.

February 8, 1937

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

Reference is made to your request of this date that I investigate the possible statutes relative to the proposed speech to be made tomorrow night in Mexico by Leon Trotzky and transmitted from that place to New York City by telephone.

There do not seem to be any statutes applicable to the situation. Sections 137 and 155 of title 8, U.S. Code, relate to certain seditious utterances, but these sections apply only to aliens. They provide for the exclusion of aliens known to entertain certain views on political questions and for the arrest and deportation of aliens who utter seditious statements after admission. They also provide for fine or imprisonment of such aliens if, after such arrest and deportation or after exclusion, they again attempt to enter the United States.

The Federal Communications Act gives no authority to the Federal Communications Commission to censor telephone communications. Section 326 of that Act, which relates to censorship of radio communications, is significant. That section reads:

> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication. No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.

47 U.S.C. § 326.

Section 33 of title 50, U.S. Code, makes it unlawful willfully to cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States, or to obstruct the recruiting or enlistment service of the United States to the injury of the service of the United States, and section 34 of said title makes a conspiracy to violate the provisions of section 33 unlawful; but these sections apply only when the United States is at war.

The nearest approach to the subject of any statute that I have been able to find is that of section 4 of title 18, U.S. Code, which provides:

> Whoever *incites*, sets on foot, *assists*, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be imprisoned not more than ten years or fined not more than $10,000, or both . . . .

(Emphasis supplied.)

If this section is applicable, those who assist in the transmission and delivery of the speech in New York City would probably be guilty of violating it. I am of the opinion, however, that it is not applicable to the present situation, as it is not probable that the speech will incite to rebellion or insurrection.

There would seem to be a field here in which the privilege of free speech may be abused, but apparently there is no present statute prohibiting such abuse. Until such time as Congress shall see fit to enact legislation on the subject, it would seem that the only remedy available is through diplomatic relations with the country from which the abuse emanates.

GOLDEN W. BELL
Assistant Solicitor General

The President's Power in the Field of Foreign Relations

The first section of this memorandum canvasses the historical precedents that delineate the President's prerogatives vis-à-vis Congress in foreign relations. These precedents tend to fall into one of two categories: those reflecting the Hamiltonian view that the President as Chief Executive has sole and unlimited authority to determine the nation's foreign policy, and those reflecting the Madisonian view that Congress as the law-making body has primary authority to determine the nation's foreign policy, which the President must take care to enforce.

The second section of this memorandum concludes that the power of the President to repel invasion is unquestioned. It would not be necessary to resolve the conflict between the Hamiltonian and Madisonian views in the event of an invasion, because statutes expressly provide that "whenever the United States shall be invaded or in imminent danger of invasion by any foreign nation," the President may use the military and naval forces to repel such invasion.

The third section of this memorandum discusses the application of the Neutrality Act of 1937 to the Spanish Civil War and the China-Japan conflict.

November 8, 1937

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL*

I. The President as the Depositary of the Executive Power

It is important to bear in mind that we are here dealing . . . with . . . the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress . . . .—Mr. Justice Sutherland

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There are two major contentions regarding the extent of the President's power in the field of foreign relations:

(1) That the President, as the Chief Executive, has the sole and unlimited power—that his designation in the Constitution as the depositary of the Executive Power is, in itself, a source of power.

(2) That while the President as the Chief Executive is the sole spokesman of the nation in the field of foreign relations, the Congress as the law-making body may prescribe the policy to be followed, and the President in dealing with foreign nations must keep within that policy.

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* Editor's Note: Some of the citations in the version of this memorandum that was transcribed in the Unpublished Opinions of the Assistant Solicitor General were missing, incomplete, or incorrect. We have endeavored to complete and correct these citations with sources that fit the proposition in text and were available at the time this memorandum was written.

The controversy between the exponents of these two views has existed since the beginning of our constitutional government. It reached bitter proportions during Washington's administration, with Alexander Hamilton championing the first position and James Madison championing the second. The occasion for their debate was the issuance by the President on April 22, 1793 of the proclamation of neutrality with respect to the war between certain nations, including Great Britain on the one part and France on the other. This proclamation was in direct conflict with the provisions of the treaty of alliance then existing between the United States and France, and as there was strong sentiment for France in this country at the time, the proclamation aroused severe criticism. It was charged that the President had failed in his constitutional duty to "take care that the laws be faithfully executed," in that he not only had failed to carry out the treaty but had committed the country to a policy in direct opposition to its terms.

In a series of articles signed "Pacificus,"[1] Hamilton came to the support of the President, justifying the action taken upon the ground that the President was the sole representative of the nation in its dealings with other nations, so that in this field no other arm of the government could interfere with or hamper his action. He took the position that in this field the President's power was supreme and unlimited, pointed out that the Constitution vests in the President *the Executive Power*, while it vests in the Congress only *such* legislative power as is *therein granted*. From this he argued that the executive power is complete except in so far as it is limited by the Constitution, and that the constitutional limitations must be strictly construed. He even inferred that the constitutional grant to the Congress of the power to declare war is not a limitation on the President's right to also exercise this strictly executive function, but that in this respect, the power granted to the Congress is concurrent with the inherent power of the President as the repository of *the Executive Power*.

Madison, at the request of Jefferson,[2] took issue with Hamilton and in a series of articles signed "Helvidius"[3] advanced the second contention set out above. He took the position that the President's powers, like those of the Congress, were strictly limited to those expressly granted by the Constitution and those necessarily implied therefrom, and that his duty "to take care that the laws be faithfully executed" required him to execute all laws enacted by the Congress including any bearing on the subject of foreign relations. He argued that the Constitution vested in Congress the exclusive right to regulate foreign commerce and to declare war, and that this was in direct conflict with Hamilton's views. He contended that if the President believed the laws as enacted by the Congress were improper or inade-

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[1] 7 *The Works of Alexander Hamilton* 76–117 (John C. Hamilton ed., 1851).

[2] 7 *The Works of Thomas Jefferson* 436–37 (Paul Leicester Ford ed., 1904).

[3] 6 *The Writings of James Madison* 138–88 (Gaillard Hunt ed., 1906).

quate his power was exhausted when he had convened the Congress and communicated his views to that body.

Madison twitted Hamilton with inconsistency by quoting from an earlier article published in *The Federalist*, in which Hamilton had said:

> The history of human conduct does not warrant that exalted opinion of human virtue, which would make it wise in a nation to commit interests of so delicate and momentous a kind, *as those which concern its intercourse* with the rest of the world, to the *sole* disposal of a magistrate created and circumstanced as would be a president of the United States.[4]

Hamilton could well have retorted that Madison, in a speech to the House of Representatives in 1789, upon the question of the President's power to remove from office, had said:

> The constitution affirms, that the executive power shall be vested in the president. Are there exceptions to this proposition? Yes, there are. The constitution says that, in appointing to office, the senate shall be associated with the president, unless in the case of inferior officers, when the law shall otherwise direct. Have we a right to extend this exception? I believe not. If the constitution has invested all executive power in the president, I venture to assert, that the legislature has no right to diminish or modify his executive authority.[5]

It is thus apparent that neither Hamilton nor Madison, the two early exponents of the opposing theories, was at all times consistent in his views on the subject.

History discloses that Thomas Jefferson, likewise, was at times inconsistent. While Secretary of State under President Washington he wrote an opinion, at the request of the President, in which he said:

> The transaction of business with foreign nations is Executive altogether. It belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly.[6]

This statement by Jefferson has been often quoted by exponents of the Hamiltonian theory. It is to be remembered, however, that Madison's series of articles on the subject were written at Jefferson's request. Moreover, although Jefferson as

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[4] *Id.* at 176 (quoting *The Federalist* No. 75) (emphasis added).

[5] *Quoted in* Edward S. Corwin, *The President's Control of Foreign Relations* 29 (1917).

[6] 3 *The Writings of Thomas Jefferson* 16 (Andrew A. Lipscomb & Albert Ellery Bergh eds., lib. ed. 1903).

President, without authority from Congress, sent the American fleet into the Mediterranean to wage war against Tripoli, after that fleet had engaged in a naval battle with the Tripolitan fleet he seemingly belied his authority for his action in a message to Congress of December 8, 1801, in which he said:

> Tripoli, the least considerable of the Barbary States, had come forward with demands unfounded either in right or in compact, and had permitted itself to denounce war, on our failure to comply before a given day. The style of the demand admitted but one answer. I sent a small squadron of frigates into the Mediterranean . . . with orders to protect our commerce against the threatened attack. . . . Our commerce in the Mediterranean was blockaded, and that of the Atlantic in peril. . . . One of the Tripolitan cruisers having fallen in with, and engaged the small schooner Enterprise . . . was captured, after a heavy slaughter of her men . . . . Unauthorized by the constitution, without the sanction of Congress, to go beyond the line of defence, the vessel being disabled from committing further hostilities, was liberated with its crew. The legislature will doubtless consider whether, by authorizing measures of offence, also, they will place our force on an equal footing with that of its adversaries. I communicate all material information on this subject, that in the exercise of the important function confided by the constitution to the legislature exclusively, their judgment may form itself on a knowledge and consideration of every circumstance of weight.[7]

Again, in the Louisiana Purchase, Jefferson acted first as only the broad theory of Hamilton would permit, and then left his deed to be ratified and paid for by the Congress. Afterwards in a letter to John Breckinridge, dated August 12, 1803, he declared:

> The Constitution has made no provision for our holding foreign territory, still less for incorporating foreign nations into our Union. The executive in seizing the fugitive occurrence which so much advances the good of their country, have done an act beyond the Constitution. The Legislature in casting behind them metaphysical subtleties, and risking themselves like faithful servants, must ratify and pay for it, and throw themselves on their country for doing for them unauthorized, what we know they would have done for themselves had they been in a situation to do it.[8]

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[7] *Id.* at 328–29.

[8] 10 *Writings of Thomas Jefferson*, *supra* note 6, at 411.

Hamilton, in an article signed "Lucius Crassus," howsoever inconsistently with his own theory of the powers of the Chief Executive, caustically commented on both Jefferson's action and his message in the Tripolitan affair:

> The doctrine of the Message includes the strange absurdity, that without a declaration of war by Congress, our public force may destroy the life, but may not restrain the liberty, or seize the property of an enemy. This was exemplified in the very instance of the Tripolitan corsair. A number of her crew were slaughtered in the combat, and after she was subdued, she was set free with the remainder. . . . [A] perfect illustration of the unintelligible right, to take the life but not to abridge the liberty, or capture the property of an enemy. . . . The principle avowed in the Message, would authorize our troops to kill those of the invader, if they should come within reach of their bayonets, perhaps to drive them into the sea, and drown them; but not to disable them from doing harm, by the milder process of making them prisoners, and sending them into confinement. Perhaps it may be replied, that the same end would be answered by disarming, and leaving them to starve. The merit of such an argument would be complete by adding, that should they not be famished, before the arrival of their ships with a fresh supply of arms, we might then, if able, disarm them a second time, and send them on board their fleet, to return safely home.[9]

The controversy has continued. From time to time it has been the occasion of discussion in the public press and of debate in the Congress, few administrations having passed without the question being raised in one form or another. Andrew Jackson maintained that the designation of the President as the depositary of the Executive Power is, in itself, a source of power. Webster denied, without qualification, that the President has any powers except those specified in the Constitution. Chancellor Kent and Justice Story adopted the Hamiltonian view; Alfred Conkling rejected it. The names of prominent men who have kept the discussion alive, some in the support of one and some of the other view, are too numerous to mention here. Many recent articles in the public press and some debates in the last session of the Congress show that the question still is one upon which there is much difference of opinion.

So acute did the question become during Lincoln's administration that the House of Representatives in 1864 adopted a resolution declaring:

> That Congress has a constitutional right to an authoritative voice in declaring and prescribing the foreign policy of the United States, as

[9] 7 *The Works of Alexander Hamilton* 747–48 (John C. Hamilton ed., 1851).

> well in the recognition of new Powers as in other matters; and it is the constitutional duty of the President to respect that policy not less in diplomatic negotiations than in the use of the national force when authorized by law; and the propriety of any declaration of foreign policy by Congress is sufficiently proved by the vote which pronounces it . . . .[10]

Sharp debate was heard on the question in the Senate in 1906. While participated in by many Senators, it was chiefly between Senator Spooner of Wisconsin and Senator Bacon of Georgia[11]—Senator Spooner supporting the broad theory of the President's powers and Senator Bacon advocating the opposite view. Many of the arguments advanced are reminiscent of those of Hamilton and Madison.

Senator Spooner, in the course of his argument quoted Mr. Justice Story as follows:

> That a power so extensive in its reach over our foreign relations could not be properly conferred on any other than the executive department will admit of little doubt. That it should be exclusively confined to that department without any participation of the Senate in the functions (that body being conjointly intrusted with the treaty-making power) is not so obvious. Probably the circumstance that in all foreign governments the power was exclusively confined to the executive department, and the utter impracticability of keeping the Senate constantly in session, and the suddenness of the emergencies which might require the action of the Government, conduced to the establishment of the authority in its present form. It is not, indeed, a power likely to be abused, though it is pregnant with consequences often involving the question of peace or war.[12]

Senator Spooner also quoted from Professor Pomeroy as follows:

> I repeat that the Executive Department, by means of this branch of its power over foreign relations, holds in its keeping the safety, welfare, and even permanence of our internal and domestic institutions. And in wielding this power it is untrammeled by any other department of the Government; no other influence than a moral one can

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[10] Cong. Globe, 38th Cong., 2d Sess. 65–66 (Dec. 19, 1864).

[11] 40 Cong. Rec. 1417–31 (Jan. 23, 1906); 40 Cong. Rec. 2125–48 (Feb. 6, 1906).

[12] 40 Cong. Rec. 1420 (1906) (quoting 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1567 (5th ed. 1891)).

> control or curb it; its acts are political, and its responsibility is only political.[13]

Senator Bacon, in support of the other view, said in part:

> The terms upon which foreign ships shall be allowed to enter our ports or do business with us is an important one in our foreign relations, but the power to fix and determine them is altogether with Congress.
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> . . . It is entirely within the competency of Congress to pass a law that no citizen of a given country shall come to this country, that no goods shall be received from it, that no merchandise shall go from this country to it, that no letters shall come from it, that there shall be no intercommunication of any kind whatever. Who doubts the power of Congress to do so?
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> In other words, it is within the power of Congress to absolutely sunder the relations between this country and any given foreign country. When that is said the whole thing is said; when that is said the whole argument is exhausted as to where rests the supreme power in foreign affairs, because the whole must include every part. If it is within the power of Congress to absolutely sunder all relations of every kind, commercial, social, political, diplomatic, and of every other nature, it is certainly within the power of Congress to regulate and control every question subsidiary to that and included within it. Congress and not the President is supreme under the Constitution in the control of our foreign affairs.
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> . . . .
>
> Compared to this great array of sovereign powers granted to Congress, those conferred upon the President present a most striking contrast. He is clothed with the great power and responsibility of the execution of the laws, but beyond this the only prerogative of sovereignty with which he is exclusively invested is the pardoning power, and even that is denied to him in cases of impeachment by the House and conviction by the Senate.[14]

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[13] *Id.* (quoting John Norton Pomeroy, *An Introduction to the Constitutional Law of the United States* § 672 (3d ed. 1875)).

[14] 40 Cong. Rec. 2132, 2134.

The broad powers which Hamilton declared to be vested in the Chief Executive have been exercised to a greater or lesser degree by many of the presidents. Washington's exercise of power in derogation of the treaty with France and Jefferson's actions in connection with the war with Tripoli and with the Louisiana Purchase have been noted heretofore. Other instances are the invasions of Mexico under Presidents Polk and Wilson; President McKinley's agreement with England, France, Italy, and Germany to suppress the Boxer Revolution and the sending of a joint expeditionary force into the heart of China; and President Theodore Roosevelt's action in connection with the Venezuela affair in 1901, and his armed assistance to Panama in its revolt against Columbia for the purpose of acquiring the Panama Canal Zone which he had been unable to acquire from Columbia. In all of these situations and in others of like character, the action taken was without authority from Congress, and that of Theodore Roosevelt in Panama was in direct conflict with the treaty with Columbia; yet in each instance the action met with the approval of the people and added to the prestige of the President.

In other instances Presidents have attempted to exercise similar powers without success. Notable examples are President Tyler's attempt to annex Texas in 1844; President Grant's attempt to annex Santo Domingo; and President Wilson's effort to make the United States a party to the League of Nations. On these and other occasions, the attempted exercise of broad powers was not approved by the people and the Presidents therefore failed of their purpose.

An outstanding example of the exercise of executive power in the field of foreign relations is to be found in the Monroe Doctrine. First promulgated by President Monroe in 1823, that Doctrine has been consistently adhered to and has been many times restated and reasserted. As sometimes interpreted, it is broad enough to constitute in advance a declaration of war against any European or Asiatic nation that attempts to interfere in the political affairs of any independent government on either of the American Continents. A few writers have attempted to justify it under the President's statutory authority to repel invasion or threatened invasion, but most have treated it as a purely executive declaration of the foreign policy of the United States. This Doctrine, unsupported for seventy-five years by any act of the Congress, has come to be almost, if not entirely, as much a part of our fundamental law as the Constitution itself. Daniel Webster said of it:

> I look upon it as a part of its treasures of reputation; and, for one, I intend to guard it. . . . I will neither help to erase it nor tear it out; nor shall it be, by any act of mine, blurred or blotted. It did honor to the sagacity of the government, and will not diminish that honor.[15]

President Cleveland referring to it said:

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[15] *Quoted in* Elihu Root, *The Real Monroe Doctrine*, 199 N. Am. Rev. 841, 843 (1914).

> It may not have been admitted in so many words to the Code of International Law, but . . . it has its place in the Code of International Law as certainly and as securely as if it were specifically mentioned.[16]

And in 1920, in its "resolution of ratification" of the Treaty of Versailles, the Senate incorporated therein, among others, the following reservation:

> The United States will not submit to arbitration or to inquiry by the assembly or by the council of the League of Nations, provided for in said treaty of peace, any questions which in the judgment of the United States depend upon or relate to its long-established policy, commonly known as the Monroe Doctrine; said doctrine is to be interpreted by the United States alone and is hereby declared to be wholly outside the jurisdiction of said League of Nations and entirely unaffected by any provision contained in the said treaty of peace with Germany.[17]

While, as has been indicated, many Presidents have asserted the right to exercise the broad powers outlined by Hamilton, other Presidents have expressly disavowed this right. President Buchanan's special message to the Congress, dated February 18, 1859, in connection with Central American affairs is an example of such a disavowal.[18] That message called attention to the lawless conditions existing in Central America, to the harsh and unlawful treatment of citizens of the United States and to the arbitrary and unwarranted seizure and confiscation of United States vessels and cargoes in that section of the world. It then declared that the President, unlike the executives of foreign nations, was wholly without authority in his own right to take any action. It disavowed any right in the President, without authority from the Congress, to exert any force to correct conditions or to redress the many grievous wrongs that had been, and were continuing to be, perpetrated against United States citizens and their property, and expressly requested the Congress to grant the President that right.[19]

What a contrast between this action and the action of other Presidents under similar circumstances!

The divergent views of different Presidents on the extent of the executive power are further illustrated by a comparison of statements made by Presidents

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[16] *Quoted in* Theodore S. Woolsey, *Monroe Doctrine Fundamentals*, 199 N. Am. Rev. 833, 834–35 (1914).

[17] 59 Cong. Rec. 4577.

[18] Special Message of the President on the Protection of the Transit Routes Across the Isthmus, *in The Messages of President Buchanan* 200 (J. Buchanan Henry comp., 1888).

[19] *Id.* at 201–02.

Theodore Roosevelt and William Howard Taft. Referring to his action in connection with the acquisition of the Panama Canal Zone, Mr. Roosevelt said:

> If I had followed traditional, conservative methods, I would have submitted a dignified state paper of probably two hundred pages to Congress and the debate on it would have been going on yet; but I took the Canal Zone and let Congress debate.[20]

Speaking in his autobiography of his action in 1905 in putting custom houses in Santo Domingo under American control, Mr. Roosevelt said:

> The Constitution did not explicitly give me power to bring about the necessary agreement with Santo Domingo. But the Constitution did not forbid my doing what I did. I put the agreement into effect, and I continued its execution for two years before the senate acted; and I would have continued it until the end of my term, if necessary, without any action by Congress. But it was far preferable that there should be action by Congress, so that we might be proceeding under a treaty which was the law of the land and not merely by a direction of the Chief Executive which would lapse when that particular executive left office. I therefore did my best to get the Senate to ratify what I had done.[21]

Mr. Roosevelt further said in his autobiography:

> The most important factor in getting the right spirit in my Administration, next to the insistence upon courage, honesty, and a genuine democracy of desire to serve the plain people, was my insistence upon the theory that the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by the Congress under its Constitutional powers. My view was that every executive officer, and above all every executive officer in high position, was a steward of the people bound actively and affirmatively to do all he could for the people, and not to content himself with the negative merit of keeping his talents undamaged in a napkin. I declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it. My belief was that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Con-

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[20] *Quoted in* Note, *Constitutional Law—Delegation of Powers—External Sovereignty*, 11 Temple L.Q. 418, 421 n.27 (1937).

[21] Theodore Roosevelt, *An Autobiography* 551 (1913).

> stitution or by the laws. Under this interpretation of executive power I did and caused to be done many things not previously done by the President and the heads of the departments. I did not usurp power, but I did greatly broaden the use of executive power. In other words, I acted for the public welfare, I acted for the common well-being of all our people, whenever and in whatever manner was necessary, unless prevented by direct constitutional or legislative prohibition. I did not care a rap for the mere form and show of power; I cared immensely for the use that could be made of the substance.[22]

Mr. Taft, on the other hand, in his book *Chief Magistrate*, published after his retirement from office, said:

> The true view of the Executive functions is, as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise. Such specific grant must be either in the Federal Constitution or in an act of Congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest, and there is nothing in the Neagle case and its definition of a law of the United States, or in other precedents, warranting such an inference. The grants of Executive power are necessarily in general terms in order not to embarrass the Executive within the field of action plainly marked for him, but his jurisdiction must be justified and vindicated by affirmative constitutional or statutory provision, or it does not exist.[23]

In the same book Mr. Taft, after quoting from President Roosevelt's autobiography the passage last quoted above, makes this statement:

> My judgment is that the view of . . . Mr. Roosevelt, ascribing an undefined residuum of power to the President[,] is an unsafe doctrine and that it might lead under emergencies to results of an arbitrary character . . . .[24]

For many years the Supreme Court did not definitely take either side in the controversy. It did hold that in matters of foreign relations the judiciary had no authority, such matters being political in their nature and committed solely to the charge of the political authorities of the government; but it did not distinguish

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[22] *Id.* at 388–89.

[23] William Howard Taft, *Our Chief Magistrate and His Powers* 139–40 (1916).

[24] *Id.* at 144.

between the Congress and the executive, nor designate which, if either, of these two political branches of the government had the higher authority.

Commentators on the subject cite many decisions of the Supreme Court as tending to support the one theory or the other. However, most decisions of that Court relating to matters in the field of foreign affairs, when carefully examined, involve both congressional and presidential action, and, therefore, involve some form of purported congressional delegation of power. Such decisions are not pertinent here, since the question, so far from being one of congressional delegation of power, is one of what powers the President may exercise without authority from Congress.

Of the decisions usually cited those in *Kansas v. Colorado*[25] and *In re Neagle*[26] have heretofore been most often relied upon by the exponents of the first mentioned theory, and that in *Little v. Barreme*[27] by the exponents of the second theory. These decisions, however, fall far short of being decisive of the question.

The decision in *Kansas v. Colorado* is much stressed by advocates of the Hamiltonian theory. That decision relates only to the powers of the judiciary, but in discussing and defining those powers the Court adopts much of the reasoning advanced by Hamilton in connection with the executive power, especially that based on the difference in the language of the several constitutional grants of powers.

The decision in the *Neagle* case is also urged in support of that theory. It holds that the President's duty to "take care that the laws be faithfully executed" is not "limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms*," but that it includes the "rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the Government under the Constitution[.]"[28] However, this part of the decision is dictum, since the court justified the action taken by the President in that case under an express congressional grant of authority.

The decision in *Little v. Barreme*, on the other hand, lends some comfort to the advocates of the Madisonian theory. Apparently it holds that in the field of foreign relations if the Congress has spoken, the President is controlled by the act of that body and by the policy prescribed thereby; but it seems to intimate, in a dictum, that if the Congress has not spoken the powers of the President as the Chief Executive are sufficient to enable him to meet any situation that may arise.[29]

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[25] 206 U.S. 46 (1907).

[26] 135 U.S. 1 (1890).

[27] 6 U.S. (2 Cranch) 170 (1804).

[28] 135 U.S. at 64.

[29] 6 U.S. at 177–78.

The most recent and far reaching decision of the Supreme Court on the question is that in *United States v. Curtiss-Wright Export Corp.*[30] In that decision, rendered December 21, 1936, the Court held:

> The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs.[31]

It further held that the government has powers of sovereignty not granted by the Constitution—powers which prior to the Declaration of Independence were in the English crown; that these powers were wrested from the crown by the colonies collectively and not individually; and that when so wrested from the crown they vested, not in the individual colonies, but in the colonies as a unit. The Court declared that among such powers was the power to deal with foreign nations.

The Court further held in the *Curtiss-Wright* case that in foreign affairs "the President alone has the power to speak or listen as a representative of the nation," being the "'sole organ of the nation in its external relations'" and responsible only to the Constitution for his conduct.[32] It then said:

> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.[33]

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[30] 299 U.S. 304 (1936).

[31] *Id.* at 315–16.

[32] *Id.* at 319 (quoting 10 Annals of Cong. 613 (1800) (remarks of John Marshall)).

[33] *Id.* at 319–20.

It must be remembered, however, that the *Curtiss-Wright* case involved, not the question of the President's power to act without congressional authority, but the question of his right to act under and in accord with an act of Congress. In that case the constitutionality of the act under which the President had proceeded was assailed on the ground that it delegated legislative powers to the President. Much of the decision is dicta, and the *ratio decidendi* is contained in the following language:

> When the President is to be authorized by legislation to act in respect of a matter intended to affect a situation in foreign territory, the legislator properly bears in mind the important consideration that the form of the President's action—or, indeed, whether he shall act at all—may well depend, among other things, upon the nature of the confidential information which he has or may thereafter receive, or upon the effect which his action may have upon our foreign relations. This consideration, in connection with what we have already said on the subject, discloses the unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed. As this court said in *Mackenzie v. Hare*, 239 U.S. 299, 311 [(1915)], "As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. *We should hesitate long before limiting or embarrassing such powers.*" (Italics supplied.)[34]

It is apparent, therefore, that the case leaves much of the controverted question still unsettled. It places internal and external affairs in separate categories, and holds that the strict rule applied by the court to congressional delegations of power to the President in connection with internal affairs does not apply to such delegations of power in connection with external affairs. It intimates that the President might act in external affairs without congressional authority, but it leaves undecided the question whether the Congress can enact a statute in derogation of the President's power in this field—for example, a mandatory embargo or neutrality act—which question involves the further question whether the President may, in dealing with foreign nations, entirely disregard a statute which the Congress has enacted, and which prescribes a policy to be followed.

On this point the decision of the Supreme Court in *Little v. Barreme* is of interest, and perhaps of importance. As before stated, it intimates that when the Congress has not spoken the President's powers over foreign affairs are unlimited, but apparently holds that when the Congress has spoken, his powers are limited to

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[34] *Id.* at 321–22.

the policy declared by the act of the Congress. Whether the Court would today hold this to be a correct statement of the law, or even the correct interpretation of its former decision, is a matter of conjecture.

In view of what has been said, it is apparent that from the beginning the question of the extent of the President's powers has been a controversial one, and that the answer to the question is to be found in the statement of Chief Justice Marshall in *Marbury v. Madison*:

> [T]he president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience.[35]

In any government, the exercise of political powers is dependent upon the will of the sovereign. In the United States the people constitute the sovereign, and therefore the successful exercise of any political power by the executive is dependent upon public opinion. For this reason it is doubtful if the question of the extent of the President's powers ever will be definitely determined. Public opinion is changeable; it may favor one thing today and another tomorrow. Therefore, the power which the public will permit the executive to exercise will vary from time to time according to the circumstances involved.

Like Hamilton and Madison, the average man is never consistently either a strict or a liberal constructionist. He views the Constitution and the government merely as instruments through which he may on the one hand secure the performance of those acts of which he approves and on the other prevent the performance of those acts of which he does not approve. Therefore, if the act sought to be done is one of which the general public approves it will accept any construction, however liberal, which permits the act to be done; but if the act is one of which it does not approve, it will accept any construction, however restricted, which prevents the act from being done.

This was strikingly illustrated during the Wilson administration. When President Wilson, without any authority from the Congress, seized Vera Cruz, and when he later sent an expeditionary force into Mexico, despite criticism in many quarters, the public generally approved those actions. But when later he took the leadership in establishing the League of Nations and in his dealings with European countries practically committed the United States to participation therein, public approval perceptibly waned and the Senate rejected the treaty. As a result thereof the President's prestige was greatly impaired, with consequences injurious to his political influence and to his health.

It follows that a President today, in the performance of an act of which the general public approves, may assume and exercise a power with the approbation

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[35] 5 U.S. (1 Cranch) 137, 165–66 (1803).

of the public; but tomorrow, in the performance of some act of which the public does not approve, he will exercise the same or a like power at his peril.

The question must be considered realistically. It is essentially practical and does not admit of a legalistic treatment that fails to take into account human nature in the individual and in the mass. If it be shocking to legal concept to conclude that a President at one time under the Constitution has the power to do an act in respect of foreign relations, and that the same or another President under the same Constitution has not the power to do such an act at another time, the trouble is not with the conclusion but with the concept. History corroborates the conclusion, while at the same time overturning any legal theory on the subject that does not accord with experience. Even when Conkling was bitterly attacking President Johnson for assuming unwarranted executive power he said:

> It is not like the assumption of a questionable power from good motives and for beneficent ends; . . . where the acquiescence of the nation may rightly be held a practical sanction and affirmation of the power.[36]

Presidents will continue in the future to draw their executive power respecting foreign relations from the Constitution, as they have done in the past, and to exercise it. When the people approve the exercise, the existence of the power under the Constitution will be proved; when they disapprove the exercise, the existence of the power under the Constitution will be disproved. In this sphere, indeed, "The event is a great teacher." The theory of Hamilton and the theory of Madison have been debated continuously—and the argument will persist. The two views have not been and cannot be reconciled in the realm of logic; in the practical world they converge. In the field of foreign relations, the Chief Executive moves in a zone of twilight[*] where he may proceed with assurance of his powers under the Constitution only when the people follow and approve. As said by Woodrow Wilson:

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[36] Alfred Conkling, *The Powers of the Executive Department of the Government of the United States* 134–35 (1866) (emphasis supplied).

[*] Editor's Note: Fifteen years later, Justice Robert Jackson used the same phrase—"a zone of twilight"—in his famous Steel Seizure Case concurrence, albeit in more specific reference to cases in which Congress has not spoken to a matter of foreign affairs but the President nevertheless determines to take action. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) ("When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."). In 1937, when Assistant Solicitor General Bell wrote this opinion, Jackson was the Assistant Attorney General for the Antitrust Division. In March 1938, Jackson was appointed Solicitor General; and in January 1940 he was appointed Attorney General of the United States.

> If he [the President] rightly interpret the national thought and boldly insist upon it, he is irresistible.[37]

II. The President's Power to Repel Invasion

Better to be awakened by the alarm-bell than to perish in the flames.—Burke

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Closely related to the subject discussed under Part I is the power of the President to repel invasion. That power is unquestioned. The exponents of the Hamiltonian theory contend that the power, without statutory authority, would be inherent in the President as the Chief Executive; but it is not necessary to rely on this view, since the statutes expressly provide that "whenever the United States shall be invaded or in imminent danger of invasion by any foreign nation," the President may use the military and naval forces to repel such invasion.

In the *Prize Cases*, the Supreme Court said:

> But by the Acts of Congress . . . he is authorized to call[] out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States.
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> If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority.[38]

In *Martin v. Mott*, the Supreme Court took a somewhat broader view of this power of the President. In that case Justice Story, speaking for the Court, said:

> For the more clear and exact consideration of the subject, it may be necessary to refer to the constitution of the United States, and some of the provisions of the act of 1795. The constitution declares, that congress shall have power "to provide for calling forth the militia, to execute the laws of the Union, suppress insurrections, and repel invasions": and also "to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States." In pursuance of this authority, the act of 1795 has provided, "that whenever the United States shall be invaded, or be in imminent danger of invasion from

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[37] Woodrow Wilson, *Constitutional Government in the United States* 68 (1908).

[38] 67 U.S. (2 Black) 635, 668 (1862).

any foreign nation or Indian tribe, it shall be lawful for the president of the United States to call forth such number of the militia of the state or states most convenient to the place of danger, or scene of action, as he may judge necessary to repel such invasion, and to issue his order for that purpose to such officer or officers of the militia as he may think proper." And like provisions are made for the other cases stated in the constitution. It has not been denied here, that the act of 1795 is within the constitutional authority of congress, or that congress may not lawfully provide for cases of imminent danger of invasion, as well as for cases where an invasion has actually taken place. In our opinion, there is no ground for a doubt on this point, even if it had been relied on, for the power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary and proper means to effectuate the object. One of the best means to repel invasions is to provide the requisite force for action, before the invader himself has reached the soil.

The power thus confided by congress to the president, is, doubtless, of a very high and delicate nature. A free people are naturally jealous of the exercise of military power; and the power to call the militia into actual service, is certainly felt to be one of no ordinary magnitude. But it is not a power which can be executed without a correspondent responsibility. It is, in its terms, a limited power, confined to cases of actual invasion, or of imminent danger of invasion. If it be a limited power, the question arises, by whom is the exigency to be judged of and decided? Is the president the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question, upon which every officer to whom the orders of the president are addressed, may decide for himself, and equally open to be contested by every militiaman who shall refuse to obey the orders of the president? We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the president, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union. . . .

If we look at the language of the act of 1795, every conclusion drawn from the nature of the power itself, is strongly fortified. The words are, "whenever the United States shall be invaded, or be in

> imminent danger of invasion, &c., it shall be lawful for the president, &c., to call forth such number of the militia, &c., as he may judge necessary to repel such invasion." The power itself is confided to the executive of the Union, to him who is, by the constitution, "the commander-in-chief of the militia, when called into the actual service of the United States," whose duty it is to "take care that the laws be faithfully executed," and whose responsibility for an honest discharge of his official obligations is secured by the highest sanctions. He is necessarily constituted the judge of the existence of the exigency, in the first instance, and is bound to act according to his belief of the facts.[39]

The use in the statutes and decisions of the term "imminent danger of invasion" raises another question. Assuming that the President's power to use force against a foreign nation is limited to his statutory power to repel an "invasion" or an "imminent danger of invasion," what constitutes an "imminent danger of invasion"? Under what circumstances may the President act, and how far may he go, under his authority to meet an "imminent danger of invasion"?

As mentioned in Part I of this memorandum, the Monroe Doctrine has sometimes been justified under the powers of the President to repel threatened invasions; but if this power be the sole justification for the Monroe Doctrine, how far may it be extended under present conditions? If at the time the Monroe Doctrine was announced—the day of coach by land and sail by sea—the interference of a foreign nation in South American affairs constituted a threat of invasion of the United States, what is necessary to constitute such a threat today in the world of the airplane and the submarine? In the light of present means of rapid transportation and destructive warfare, how far is the President justified in finding in military preparations and activities by foreign nations threat of invasion? Do the military activities and demonstrations of Japan, for example, constitute a threat of invasion of the Philippine Islands or of Hawaii? Could there be sufficient military developments and demonstrations on islands in the Pacific or Atlantic or on the European or the Asiatic Continent to constitute such a threat?

Moreover, what does the term "invasion" embrace? Is it limited to territorial invasion, or does it comprehend, also, invasion of the rights of this country as a sovereign nation, wherever committed?

Again, attention is called to President Jefferson's message to Congress in connection with the Tripolitan affair. Jefferson justified the action taken on the ground that he had sent the fleet to the Mediterranean "with orders to protect our commerce against the threatened attack."[40] Since, in the same document, he disclaimed

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[39] 25 U.S. (12 Wheat.) 19, 27–30, 31 (1827).

[40] 3 *Writings of Thomas Jefferson*, *supra* note 6, at 328.

any authority to act without authority from the Congress, perhaps he deemed his statutory authority to repel invasion or threatened invasion as sufficient authority.

The real answer here, also, is that the determination of when there is invasion or imminent danger of invasion and power to deal with the subject are political questions which can be resolved only through the exercise of the President's judgment supported by the will of the people. Woodrow Wilson said:

> [The President] may be both the leader of his party and the leader of his nation, or he may be one or the other. If he lead the nation, his party can hardly resist him. His office is anything he has the sagacity and force to make it.[41]

And as stated by Justice Story in *Martin v. Mott*:

> It is no answer, that such a power [the power to provide against the danger of invasion] may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the constitution itself. In a free government, the danger must be remote, since, in addition to the high qualities which the executive must be presumed to possess, of public virtue, and honest devotion to the public interests, the frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny.[42]

III. The President's Position in the Far Eastern and Spanish Affairs as Affected by the Neutrality Act of 1937

The transaction of business with foreign nations is Executive altogether.—Jefferson

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If the Hamiltonian theory of the President's powers be accepted in its broadest sense, the Neutrality Act of 1937 may be treated by him as advisory only, to be put into effect or not at a particular time as he may determine to be for the best interests of the country. If the Madisonian view be adopted, however, even with material qualifications, the Neutrality Act binds the President and makes it his constitutional duty to "take care" that it is enforced.

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[41] *Constitutional Government*, *supra* note 37, at 69.

[42] 25 U.S. at 32.

Since considerable misapprehension has appeared in the public press with respect to the effect of the Neutrality Act of 1937[43] upon prior existing treaties entered into between this country and foreign nations, it is to be observed at the outset that it is settled by the decisions of the Supreme Court that under the Constitution both treaties and acts of Congress are the supreme law of the land; that neither is superior to the other; and that in case of conflict, that which is later in date controls.[44] It follows that to the extent that the Neutrality Act of 1937 conflicts with any prior treaty, the treaty is abrogated by the Act. The legislative history of the Act is in accord with this doctrine.

During the session at which the Joint Resolution of February 29, 1936[45] was adopted, the House Committee on Foreign Affairs had reported a resolution (H.J. Res. 422) containing the following section:

> SEC. 16. If the President shall find that any of the provisions of this Act, if applied, would contravene treaty provisions in force between the United States and any foreign country before such provisions shall become applicable as to such foreign country or countries, he shall enter into negotiations with the government of such country for the purpose of effecting such modification of the treaty provisions as may be necessary, and if he shall be unable to bring about the necessary modifications, he may in his discretion, but before such provisions shall become applicable as to such foreign country or countries he shall give notice of termination and terminate the treaty in accordance with the terms thereof.

In connection therewith the Committee's report stated:

> Section 16. This section has created quite an argument in your committee, on the question as to whether or not any of the provisions of this bill would violate any treaties between the United States and any foreign countries. While this section provides that if the President shall find that any of the provisions of this act, if applied, would contravene treaty provisions in force between the United States and any foreign country, he may enter into negotiations with the government of such country for the purpose of effecting such modification of the treaty provisions which will be necessary, and if he shall be unable to bring about the necessary modifications, he may, in his discretion, give notice of the termination of the treaty. Many of our

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[43] 50 Stat. 121.

[44] *See Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox Ltd.*, 291 U.S. 138, 160 (1934); *Cook v. United States*, 288 U.S. 102, 118–19 (1933); *Ex Parte Webb*, 225 U.S. 663, 683 (1912); *Head Money Cases*, 112 U.S. 580, 597–99 (1884).

[45] 49 Stat. 1152.

> treaties with European countries have a provision of 1 year's notice of termination. The committee is very anxious to see that no treaty rights are violated . . . .[46]

The Committee later abandoned this more liberal resolution and reported a substitute resolution, which became the Joint Resolution of February 29, 1936. The Committee's report[47] made no explanation of the change of position but Chairman McReynolds explained on the floor of the House that a compromise had been necessary.[48] The Committee was accused of "retreat and surrender," and "abandonment of everything that committee stood for."[49] During the consideration of the substitute resolution in the House and in the Senate there was no mention of the question of the effect of the resolution on treaties. The Joint Resolution of February 29, 1936 was substantially reenacted in section 1 of the Neutrality Act of 1937.

A. The Spanish Situation

Section 1(c) of the Neutrality Act of 1937 provides as follows:

> Whenever the President shall find that a state of civil strife exists in a foreign state and that such civil strife is of a magnitude or is being conducted under such conditions that the export of arms, ammunition, or implements of war from the United States to such foreign state would threaten or endanger the peace of the United States, the President shall proclaim such fact, and it shall thereafter be unlawful to export, or attempt to export, or cause to be exported, arms, ammunition, or implements of war from any place in the United States to such foreign state, or to any neutral state for transshipment to, or for the use of, such foreign state.[50]

Acting under that provision, the President on May 5, 1937 found and proclaimed that

> a state of civil strife unhappily exists in Spain and that such civil strife is of a magnitude and is being conducted under such conditions that the export of arms, ammunition, or implements of war from the

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[46] H.R. Rep. No. 74-1928, at 8 (1936).

[47] H.R. Rep. No. 74-2001 (1936).

[48] 80 Cong. Rec. 2240 (1936).

[49] *Id.* at 2241.

[50] 50 Stat. at 121–22.

> United States to Spain would threaten and endanger the peace of the United States . . . .[51]

It is thus obvious that the President, with ample justification for his finding, followed, with respect to the civil strife existing in Spain, precisely the course which he was authorized by the Congress to take.

Under the facts any criticism of the President's action in this situation cannot be directed fairly to any unwarranted assumption of power. Nor can fault be found properly on the ground that circumstances in Spain did not justify his finding—everyone knows that they did, and in any event, the Congress left it to the President's sole discretion to judge whether the facts in a given situation justify such a finding and proclamation.

For the reason stated above, any earlier treaty with Spain inconsistent with the Neutrality Act of 1937 was abrogated by that Act and the President's action under it, to the extent of the inconsistency.

B. The Far Eastern Situation

Section 1(a) of the Neutrality Act of 1937 provides as follows:

> Whenever the President shall find that there exists a state of war between, or among, two or more foreign states, the President shall proclaim such fact, and it shall thereafter be unlawful to export, or attempt to export, or cause to be exported, arms, ammunition, or implements of war from any place in the United States to any belligerent state named in such proclamation, or to any neutral state for transshipment to, or for the use of, any such belligerent state.[52]

The President has not yet found under this section "that there exists a state of war between" China and Japan. Irrespective of whether the provisions of section 1 are mandatory, requiring the President to find the existence of a state of war when in fact it does exist, or discretionary, leaving it to him, when there exists a state of war, to determine whether and when he shall make a finding of its existence so as to make the Neutrality Act applicable to it, his position in not having made a finding that a state of war exists between China and Japan is fully justified, notwithstanding that to many people the existence of war in China is an accepted fact.

Japan has not formally declared war on China, nor has China formally declared war on Japan. So far has each refrained from that course, that diplomatic relations between the two countries have not even been severed but continue as in time of

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[51] 2 Fed. Reg. 776, 777.

[52] 50 Stat. at 121.

peace, each maintaining in the country of the other an ambassador and consuls, thus indicating that neither conceives that war exists between them. While diplomatic relations are often severed before war begins, the existence of diplomatic relations after the commencement of war would be novel. Moreover, no neutral nation has formally recognized the existence of a state of war as between China and Japan. Other circumstances inconsistent with a finding that there exists a state of war between these two nations are that the Japanese blockade is not that of a belligerent, being directed only against Chinese vessels, and that the United States and other countries continue to harbor their warships in Chinese waters, and to rescue and repatriate their nationals, as they could not do in case of war between the two nations.

Should the President find that there exists a state of war between China and Japan, this nation would become the first to characterize the conflict between them as war. Such a finding on the part of the President would have the effect of causing the Neutrality Act to abrogate the commerce features of the Nine Power Treaty—a result not lightly to be contemplated—while so long as he refrains, the Act and the Treaty are not in conflict and both are fully effective. Such a course would be tantamount to a declaration of war by this country between those two nations, notwithstanding that neither has formally declared war on the other and might well cause one or both to do so, to say nothing of causing repercussions among the other countries of the world, and such complications as would greatly lessen the possibilities of a peaceful solution of the difficulties involved—particularly through the influence of the United States. While the Neutrality Act does not disclose whether the President shall find that there exists a state of war only when there has been a formal declaration as between two nations, or also when a de facto state of war exists, the existing situation in the Far East is such that on either construction the course so far pursued by the President is sound and within his authority under the Act for the reasons heretofore indicated.

As to whether, when there exists a state of war, the Neutrality Act is mandatory upon the President to find its existence, the position may be taken that the act by its terms leaves to the President the discretion to find or not to find the existence of a state of war—or at least the discretion as to *when* to make a finding. This, however, would be a strained construction and not borne out by the legislative history of the Act.

The President at the time he approved the Neutrality Act of 1936 indicated by his statement that the provisions of section 1 were too inflexible, saying:

> The latter section terminates at the end of February 1936. This section requires further and more complete consideration between now and that date. Here again the objective is wholly good. It is the policy of this Government to avoid being drawn into wars between other nations, but it is a fact that no Congress and no Executive can foresee all possible future situations. History is filled with unfore-

> seeable situations that call for some flexibility of action. It is conceivable that situations may arise in which the wholly inflexible provisions of Section 1 of this Act might have exactly the opposite effect from that which was intended. In other words, the inflexible provisions might drag us into war instead of keeping us out. The policy of the Government is definitely committed to the maintenance of peace and the avoidance of any entanglements which would lead us into conflict.[53]

Upon this phase of the matter Congressman Johnson of the House Committee on Foreign Affairs, in explanation of the Joint Resolution of February 29, 1936, made the following explanation:

> Someone expressed opposition to the bill because it was not mandatory and delegated authority to the President. Five of its prohibitions are mandatory and the President has no discretion whatever, and only the two relating to the use of American ports by submarines and the travel of Americans on belligerent vessels are left to the President's discretion, and even in these the delegation of discretion is so circumscribed that it is practically mandatory, since he is required to act if either of a number of contingencies therein mentioned should arise.[54]

The mandatory provisions of that Resolution were reenacted as section 1 of the Joint Resolution of May 1, 1937,[55] without pertinent change of language. It seems clear, therefore, from the language of the Act and from its legislative history, that as to section 1(a) the Congress did not intend to leave anything to the discretion of the President, and did intend that the provisions of that section should be mandatory on him when it came to his knowledge that a state of war existed. The express granting of discretion in connection with section 1(c) emphasizes this construction.

Since the Act does not operate on a given situation until the President makes a finding, it always lies within his *power*, when there exists a state of war, so to find or not to find. He could not be fairly criticized, certainly, for not making such a finding until after the lapse of a reasonable time, under the circumstances, after the commencement of a state of war. In any view, he would be entitled to such a reasonable time to investigate, consider, come to his conclusion, and act. Should he delay, however, beyond such a reasonable time, he could justify his negative action only if the delay should meet with popular approval. Should there be,

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[53] *Quoted in* Allen W. Dulles & Hamilton Fish Armstrong, *Can We Be Neutral?* 150 (2d ed. 1936).

[54] 80 Cong. Rec. 2245.

[55] 50 Stat. 121.

instead, popular disapproval, his position (even if placed on the Hamiltonian view) would be difficult to defend. These considerations would become pressing in the event that Japan should formally declare war on China.

Another position which has been suggested is that the Neutrality Act of 1937 contemplates a finding that there exists a state of war only when there has been a *formal* declaration of war, and not in case of any de facto war. It is true that the practice of the Roman Empire was not to recognize the existence of a state of war until war had been formally declared; but that procedure fell into early disuse, and for many centuries it was the general custom not to formally declare war. The Supreme Court has declared that a state of war may exist without a formal declaration of war.[56]

The Second Hague Conference of 1907, in its Convention III, contains provisions looking toward reestablishment of the Roman practice:

> Article 1
>
> The contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war.
>
> Article 2
>
> The existence of a state of war must be notified to the neutral Powers without delay, and shall not take effect in regard to them until after the receipt of a notification, which may, however, be given by telegraph.[57]

But the effort was rendered largely nugatory by the last clause of Article 2, which provides:

> Neutral Powers, nevertheless, cannot rely on the absence of notification if it is clearly established that they were in fact aware of the existence of a state of war.[58]

The modern tendency seems to be for nations not to make formal declarations of their wars, and the suggested construction of the Act as contemplating a finding

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[56] *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862); *Bas v. Tingy (The Eliza)*, 4 U.S. (4 Dall.) 37, 40–41 (1800) (opinion of Washington, J.); *Miller v. United States*, 78 U.S. (11 Wall.) 268, 306 (1870); *The Pedro*, 175 U.S. 354, 363 (1899).

[57] Hague Convention (III) Relative to the Opening of Hostilities, Oct. 18, 1907, 36 Stat. 2259, 2271.

[58] *Id.*

by the President only in case of formally declared war is highly technical and unconvincing.

A practical course which the President may see fit to follow is that set by President Wilson in connection with the arming of American merchant vessels just prior to our entrance into the World War. On February 25, 1917, he went before the Congress and asked its approval of his decision to authorize merchant ships to carry defensive arms and to use them in the protection of lives and property in their legitimate and peaceful pursuits at sea. President Wilson said in part:

> No doubt I already possess that authority without special warrant of law, by the plain implication of my constitutional duties and powers; but I prefer in the present circumstances not to act upon general implication. I wish to feel that the authority and the power of the Congress are behind me in whatever it may become necessary for me to do. We are jointly the servants of the people and must act together and in their spirit, so far as we can divine and interpret it.[59]

So here, the President might submit the instant situation to the Congress in a message sufficiently setting forth the facts to show the serious complications involved and the undesirable results likely to flow from precipitate steps, together with an outline of such plan of action as he may wish to propose, requesting the Congress to cooperate with the Executive in dealing with the crisis.

Such a course would tend to abate any criticism of the President because he has not or does not find under section 1(a) of the Neutrality Act that there exists a state of war between China and Japan, and does not say why he fails to do so. It may be peculiarly adapted to the situation which will exist should Japan formally declare war on China. Should the policy outlined by the President in such a message meet with popular approval its purposes would be accomplished.

The law is the general will . . . .—Volney

GOLDEN W. BELL
Assistant Solicitor General

[59] *Quoted in* Corwin, *supra* note 5, at 152.

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Presidential Appearance as a Character Witness

Apparently there is no precedent for a President to appear as a character witness in a civil, criminal, or other kind of legal proceeding.

July 7, 1938

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

Reference is made to your note of July 6, 1938, referring to me a letter from Mr. Frederic William Wile in which he requests to be advised whether there is a precedent for a President to appear as a character witness in any civil, criminal, or other kind of legal proceeding.

The famous Aaron Burr trial seems to have established the precedent that the President of the United States is not obliged to honor subpoenas. In that case President Jefferson declined to appear under a subpoena issued by Justice Marshall. Apparently President Monroe, upon the advice of Attorney General Wirt, also declined to honor a subpoena. *See* Homer Cummings & Carl McFarland, *Federal Justice: Chapters in the History of Justice and the Federal Executive* 64 & n.31 (1937). There is also some indication that President John Quincy Adams took the view that he was not obliged to answer a subpoena. *See* 7 *Memoirs of John Quincy Adams* 35 (Charles Francis Adams ed., 1875).

A search of the records of this Department has failed to disclose any case wherein a President has appeared as a witness. The Law Librarian at the Library of Congress has advised that he has been unable to find a record of any case wherein a President has appeared as a witness. The Law Librarian also advised that he had consulted Messrs. William Tyler Page and John Fitzpatrick, who informed him that it is their belief that no President of the United States has ever appeared in any case as a witness.

Former President Theodore Roosevelt appeared as a character witness in the Riggs Bank case here in Washington, but that case was tried after he had left the White House. He also appeared in a libel suit filed by him against George A. Newett, publisher of *The Iron Ore*, Ishpeming, Michigan, but that was in 1913, after he had left the White House.

Apparently there is no precedent for a President to appear as a character witness.

NEWMAN A. TOWNSEND
Acting Assistant Solicitor General

Presidential Authority to Order the Removal of the Original Engrossed Constitution From the Library of Congress

The custody of the original engrossed Constitution of the United States is now vested by statute in the Library of Congress, and no statute authorizes the President to interfere with that custody or to prescribe rules governing it. Therefore, an executive order authorizing the removal of the Constitution from the Library of Congress could neither compel such removal nor make it legal.

March 2, 1939

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

The Congress undoubtedly has authority to provide by statute for the custody of the Constitution (U.S. Const. art. IV, § 3, cl. 2), and apparently it has done so.

The Continental Congress on March 22, 1777, created the office of Secretary of Congress and committed to the incumbent the custody of all journals, papers, and documents of the Congress. 7 *Journals of the Continental Congress* 193–94.

The original engrossed Constitution of the United States was received by the Continental Congress and passed into the custody of its Secretary on September 28, 1787. 33 *id.* at 549.

After the Constitution was ratified, the Congress by Act of July 27, 1789 (ch. 4, § 1, 1 Stat. 28) created the Department of Foreign Affairs, with a secretary for the Department. The Act of September 15, 1789 changed the name of this Department to the Department of State and added to its duties, providing in part:

> [T]he said Secretary shall forthwith after his appointment be entitled to have the custody and charge of the said seal of the United States, and also of all books, records and papers, remaining in the office of the late Secretary of the United States in Congress assembled . . . .

Id. ch. 14, § 7, 1 Stat. 68, 69.

Section 203 of the Revised Statutes (2d ed. 1878) provides:

> The Secretary of State shall have the custody and charge of the seal of the United States, and of the seal of the Department of State, and of all the books, records, papers, furniture, fixtures, and other property now remaining in and appertaining to the Department, or hereafter acquired for it.

18 Stat. pt. 1, at 32 (repl. vol.).

Under the above statute the Constitution for many years remained in the custody of the Secretary of State. Charles Warren, in his work *The Making of the Constitution*, says:

> The original document remained in the possession of the Secretary of Congress, Charles Thomson, until the new Government was established. On July 24, 1789, President Washington directed Thomson to deliver the "books, records and papers of the late Congress" to Roger Alden, late Deputy Secretary of Congress, to take charge of them in New York. The First Congress, by Act of September 15, 1789, directed that "all books, records, and papers remaining in the Office of the late Secretary of the United States in Congress assembled" be placed in the charge and custody of the new State Department. Alden, however, remained in custody of all these papers until after Thomas Jefferson assumed the duties of the office of Secretary of State, which he accepted on February 14, 1790. When the Government moved from New York to Philadelphia, in 1791, the Constitution was taken back to its place of origin; and it followed the Government and the Secretary of State to Washington, in 1800. In 1814, when the British occupied Washington, the Declaration of Independence and other papers in the State Department were taken out to Leesburg, Virginia, and it is probable that the Constitution was one of these papers. They were returned when President Madison reoccupied Washington.

Id. at 784–85 (1828) (footnotes omitted).

The Act of February 25, 1903, entitled "An Act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June 30, 1904, and for other purposes," under the heading "Increase of Library of Congress," provides in part:

> The head of any Executive department or bureau or any commission of the Government is hereby authorized from time to time to turn over to the Librarian of Congress, for the use of the Library of Congress, any books, maps, or other material in the library of the department, bureau, or commission no longer needed for its use, and in the judgment of the Librarian of Congress appropriate to the uses of the Library of Congress.

Pub. L. No. 57-115, 32 Stat. 854, 865.

On September 29, 1921, President Harding issued Executive Order 3554, which reads:

> The original engrossed Declaration of Independence and the original engrossed Constitution of the United States, now in the Department of State, are, by authority provided by the Act of Congress entitled "An Act making appropriations for the legislative, executive and judicial expenses of the Government for the fiscal year ending

> June 30, 1904, and for other purposes," approved February 25, 1903, hereby ordered to be transferred from the Department of State to the custody of the Library of Congress, to be there preserved and exhibited under such rules and regulations as may from time to time be prescribed by the Librarian of Congress.
>
> This Order is issued at the request of the Secretary of State, who has no suitable place for the exhibition of these muniments and whose building is believed to be not as safe a depository as the Library of Congress, and for the additional reason that it is desired to satisfy the laudable wish of patriotic Americans to have an opportunity to see the original fundamental documents upon which rest their Independence and their Government.

It will be noted that the authority contained in the Act of February 25, 1903, to transfer documents to the Library of Congress, is vested in the heads of the departments and agencies and not in the President. Executive Order 3554, however, after citing that act, states that it is "issued at the request of the Secretary of State," and I am of the opinion that the transfer of the Constitution and the Declaration of Independence to the Library of Congress was, in fact, the act of the Secretary of State in the exercise of the authority conferred upon him by the statute, and that while Executive Order 3554 may have lent dignity, it added nothing to the legality of the transaction.

It thus appears that the custody of the Constitution is now vested by statute in the Library of Congress, and I find no statute which authorizes the President to interfere with that custody or to prescribe rules governing it. It is my opinion, therefore, than an executive order authorizing the removal of the Constitution from the Library of Congress could neither compel such removal nor make it legal.

GOLDEN W. BELL
Assistant Solicitor General

Presidential Control of Wireless and Cable Information Leaving the United States

The President has authority under the Communications Act of 1934 to control any radio station so as to prevent the transmission from the United States of any message, or part thereof, inimical to the national security and foreign policy of the nation. Specific emergency powers like those granted over radio are not contained in the Communications Act, or elsewhere, with respect to cables. But should the President as Commander in Chief and under his other constitutional powers deem such action essential to the protection of the armed forces or the national security, or the protection of shipping, in a time of unlimited national emergency, he could exercise similar control through the Army or Navy over the transmission by cable of messages from the United States.

A great deal can be done by the President with respect to censorship of second, third, and fourth class mail; but in view of the protection which the existing statutes afford to sealed first class mail, the problem there is a difficult one, and it is still being studied.

June 19, 1941

MEMORANDUM OPINION FOR THE DIRECTOR
OFFICE OF GOVERNMENT REPORTS

I. Wireless

Section 606(c) of the Communications Act of 1934[1] provides that, upon proclamation by the President that there exists a national emergency, the President may suspend or amend for such time as he sees fit the rules and regulations applicable to any and all radio stations within the jurisdiction of the United States, and may cause the closing of any station and the removal of its apparatus and equipment, or he may authorize the use or control of any such station and/or its apparatus and equipment by any department of the government under such regulations as he may prescribe, upon just compensation to the owners.

Under this power the President may under existing circumstances take over and control the radio stations of the country. If he does not desire to go that far, the President in my opinion may, through appropriate agents and regulations, control any radio station so as to prevent the transmission from the United States of any message, or part thereof, inimical to the national security and foreign policy of the nation.

Attention is called, however, to the provisions of section 605 of the Communications Act of 1934 that, "no person not being authorized by the sender shall intercept any communication [by wire or radio] and divulge or publish the . . . contents . . . of such intercepted communication to any person." 48 Stat. at 1104. The Supreme Court has held that this provision applies to wiretapping and interception of messages, even by the government, for the purpose of obtaining

[1] Act of June 19, 1934, ch. 652, 48 Stat. 1064, 1104–05, *codified at* 47 U.S.C. § 606.

evidence. *Weiss v. United States*, 308 U.S. 321 (1939); *Nardone v. United States*, 308 U.S. 338 (1937). Attention is also called to section 326 of said Communications Act, which prohibits the Commission from establishing any censorship over any radio communications or signals. Notwithstanding these provisions, I believe that under his emergency powers referred to above, the President may exercise the control above stated. Whether or not information obtained through the exercise of this control could be used as evidence presents a different question, and I express no opinion about that for the moment.

II. Cable

Specific emergency powers like those granted over radio are not contained in the Communications Act, or elsewhere, with respect to cables. But should the President as Commander in Chief and under his other constitutional powers deem such action essential to the protection of the armed forces or the national security, or the protection of shipping, etc., in a time of unlimited national emergency such as now exists, he could, I believe, exercise similar control through the Army or Navy over the transmission by cable of messages from the United States. On April 28, 1917, censorship of cable, telegraph, and telephone lines was established by Executive Order 2604, which recited the authority of the President under the Constitution and the Joint Resolution of April 6, 1917 declaring an existence of a state of war. Legislation was subsequently enacted specifically authorizing censorship (Trading with the Enemy Act[2]), but this legislation was only for the period of the war of 1917–18. Similar legislation is desirable to put the matter beyond doubt, although I believe the President may act without it.

III. Mail

During the last war there was no censorship of mail until October 12, 1917, when it was established under the authority contained in the Trading with the Enemy Act of October 6, 1917 (§ 3(d)). This statutory provision is no longer in existence. It is clear a great deal can be done with respect to second, third, and fourth class mail; but in view of the protection which the existing statutes afford to sealed first class mail, the problem there is a difficult one, and I am still studying it.

CHARLES FAHY
Assistant Solicitor General

[2] Act of Oct. 6, 1917, ch. 106, 40 Stat. 411.

Removal of Japanese Aliens and Citizens From Hawaii to the United States

Japanese who are aliens can be brought to the continental United States from Hawaii and interned under the provisions of 50 U.S.C. § 21. This statute, however, is probably not applicable to the Japanese who are American citizens.

Although not free from doubt, an argument can be made for removing Japanese who are American citizens from Hawaii to a restricted zone in the United States on grounds of military necessity.

In view of the changed conditions of modern warfare, the Supreme Court would likely follow the views of the dissenting justices in *Ex parte Milligan*, sustaining a declaration of martial law in places outside the zone of active military operations upon a showing of military necessity for such action. From the nature and purpose of martial law, it would seem to be properly applicable to particular areas rather than to particular persons.

May 16, 1942

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

1. Attached is a legal memorandum* on the subject.

2. As a practical matter, I understand that the Army feels the problem can be satisfactorily handled by removing the Japanese citizens from Hawaii and treating them the same way as those evacuated from the West Coast.

3. If this is so, it is not necessary to pass on the legal questions which you put. I should think therefore, that the War Department ought not now to be told the

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* Editor's Note: The referenced memorandum begins after the line of asterisks on the next page. It was issued three months after Executive Order 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942), which authorized the Secretary of War "to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion." It is not clear from our files what precipitated this opinion request from the Attorney General, or to whom the opinion may have been forwarded. The opinion does not appear to have been directed to a particular executive or military order, although it preceded by days a string of Civilian Restrictive Orders (8 Fed. Reg. 982–88), requiring the removal of "persons of Japanese ancestry" to various internment camps in the western United States. Another relocation/internment order—Civilian Exclusion Order No. 34, 7 Fed. Reg. 3967 (May 3, 1942), requiring the removal of persons of Japanese ancestry from Alameda County, California, and issued just two weeks prior—was upheld against constitutional challenge by the Supreme Court in *Korematsu v. United States*, 323 U.S. 214 (1944).

At the time of this opinion, military authorities had already set up internment camps on the Hawaiian Islands, including in particular Sand Island, through which internees were then transferred to internment camps on the continent. *See* Brian Niiya, *History of the Internment in Hawai'i* (June 4, 2010), http://www.hawaiiinternment.org/history-of-internment. In 1988, Congress formally recognized that "a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II," Pub. L. No. 100-383, § 2(a), 102 Stat. 903, 903 (codified at 50 U.S.C. App. § 1989a(a)), and ordered restitution for Japanese-American citizens and resident aliens who had been confined under one of the relocation/internment orders, *id.* § 105, 102 Stat. at 905-08 (codified at 50 U.S.C. App. § 1989b-4).

theory of removing and interning the Japanese. It is a conclusion not without doubt and it might be extended or abused. Like unto the Supreme Court, I think the decision ought to be saved for the specific case in which it is necessary.

* * * * *

You have asked me to consider whether (1) Japanese moved from Hawaii to the United States could be placed in a delimited zone in which martial law could be declared; (2) martial law could be declared with respect to a group of Japanese.

I.

Those Japanese who are aliens can be brought to the continental United States and interned under the provisions of 50 U.S.C. § 21 (1940). This statute, however, is probably not applicable to the Japanese who are citizens.

II.

Although not free from doubt, an argument can be made for removing Japanese who are American citizens from Hawaii to a restricted zone in the United States.

This is total war. It is quite unlike any prior war. Fifth column activities, espionage, and sabotage have been and are being employed on an unprecedented scale. What the Nazis did in Norway, Holland, Belgium, and France—to mention but a few places—through citizens of those places as well as through German nationals is now well known. The Japanese have used similar techniques. Axis agents—American citizens as well as non-citizens—participated in making the Japanese attack on Pearl Harbor so successful to the Japanese.

As a result of the Japanese attack, Hawaii has been put under martial law. Military necessity dictated that move—a move well justified under the legal authorities. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *United States v. Diekelman*, 92 U.S. 520, 526 (1875). Hawaii is still within the Pacific theatre of war and subject to attack again. Continuance of martial law in Hawaii is doubtless justified.

If military necessity dictates it—as it well may—those Japanese who were interned in Hawaii or those whose presence is dangerous can be removed. To hold otherwise would be deciding upon the impractical. Hawaii is virtually an armed fortress. All of the energies of the armed forces there should doubtless be concentrated on resisting or striking the enemy. If, because of the military needs, the forces cannot be spared to guard or watch the Japanese in Hawaii, they can be removed.

The strongest legal ground upon which to make the removal would be under an order of the military commander in Hawaii to a restricted area—a military area or military zone—designated by the Secretary of War under Public Law 77-503, 56 Stat. 173 (1942), *codified at* 18 U.S.C. § 97a (Supp. II 1942).

If this is done, it would not be necessary to declare martial law with respect to these Japanese as a group. A declaration of martial law as to a group is of doubtful legal validity except possibly under unusual circumstances. The circumstances here involved might be such. But I would be inclined not to rely on this method of handling the problem.

III.

The existing case law indicates some doubt on the power to remove and intern the Japanese citizens in the United States. But the conditions of modern warfare are different from those of prior wars. Because of this the courts might well follow a different course than that indicated by the earlier decisions. *Ex parte Ventura*, 44 F. Supp. 520 (W.D. Wash. 1942).

If the majority opinion in *Ex parte Milligan* should be followed today, a declaration of martial law outside the zone of active military operations at a place where the courts are functioning would probably not be approved by the Supreme Court. It is believed, however, that, in view of the changed conditions of warfare, the Supreme Court, in a proper case, would follow the views of the dissenting justices in the *Milligan* case sustaining a declaration of martial law in places outside the zone of active military operations upon a showing of military necessity for such action. Martial law, however, is ordinarily made applicable to districts or areas and when established applies to all persons within the district or area so long as they remain therein. There appear to be no precedents sustaining a declaration of martial law with respect only to a particular group of persons as suggested in your question numbered 2. From the nature and purpose of martial law, it would seem to be properly applicable to particular areas rather than to particular persons.

The establishment of martial law in a delimited zone for the sole purpose of confining therein a particular citizen or group of citizens would also raise questions of policy and public morals. If this can be done with respect to the Japanese here involved, it might be done at any time with respect to any citizen. Thus, it would approach the practices of the German and Italian governments, so bitterly denounced in this country, of establishing citizen concentration camps in which citizens may be confined without due process of law.

There is considerable authority for the position that military necessity for the establishment of martial law is a political question into which the courts will not inquire. There is, however, authority on the other side of this question, and in the comparatively recent case of *Sterling v. Constantin*, 287 U.S. 378 (1932), the Court inquired into this question and determined that military necessity did not exist. That case may be distinguishable since it involved a question of conflict between state and federal jurisdiction. There is sufficient language to indicate, however, that the Court would have the right to and would inquire into the necessity for declaring martial law if the occasion arose. A declaration of martial law in a delimited zone for the sole purpose of confining therein objectionable

citizens might not be a good case in which to have this question directly passed upon by the Court.

The desired result might be obtained by a suspension of the privilege of the writ of habeas corpus as to the Japanese citizens involved. There is precedent for the suspension of the privilege of the writ as to particular persons. *See* 6 *A Compilation of the Messages and Papers of the Presidents (1789–1908)* 19 (James D. Richardson ed., 1909). This, however, raises the same question of policy and public morals above discussed. If the privilege of the writ can be suspended as to Japanese citizens, it can likewise be suspended as to other citizens at any time. Also, if the suspension should be made by the President, it would reopen the age-old question of whether the President has the authority to suspend or whether that right lies in the Congress alone. I think the President has the power, but whether the controversy over this subject should be again precipitated at this time is a question which should be carefully considered.

IV.

1. If it is at all practical to do so, the safest legal procedure would be to hold the Japanese who are American citizens in Hawaii.

2. The next best legal procedure would be, under the martial law prevailing in Hawaii or under an order pursuant to Public Law 77-503, to intern them in Hawaii and then give them the option to come to the United States if they sign up as members of the work corps of the War Relocation Authority under an agreement to serve for the duration of the war.

3. It would also be proper to evacuate the Japanese citizens from Hawaii under Executive Order 9066 and Public Law 77-503 and then treat them the same as the Japanese evacuated from the West Coast.

4. If it is not necessary for these Japanese to be kept in strict confinement it may be that, in view of the large industrial plants along the East Coast and in many cities extending westward to the Mississippi, military areas might be declared along the entire East Coast and extending inward some distance, thus requiring the Japanese, under Public Law 77-503, to reside in the Middlewest, where they would probably have less opportunity to engage in activities dangerous to the national safety.

5. It is possible that the Japanese citizens legally could be removed from Hawaii and interned in the United States.

OSCAR C. COX
Assistant Solicitor General

Senatorial Courtesy

The custom known as "senatorial courtesy," whereby certain nominations to federal office have been objected to by an individual senator on the ground that the person nominated is not acceptable to him, appears recently to have been limited to local offices of the federal government.

May 29, 1942

MEMORANDUM OPINION FOR A UNITED STATES SENATOR*

The custom known as "senatorial courtesy" is not a formal rule of the Senate, and is not included in the published rules of that body. The term is used to refer to a practice of long standing whereby certain nominations to federal office have been objected to by an individual senator on the ground that the person nominated is not acceptable to him. The question of whether this practice is in any sense justifiable or desirable is one which the Senate itself must decide. In this memorandum I am merely calling attention to relevant authorities and precedents, without attempting to state my own personal views on the desirability of the practice or, of course, attempting to advise the Senate.

If it be conceded that the practice may in certain instances be justifiable and even desirable, in sound reason it would seem that the exercise of the practice should be limited to cases in which a senator makes objection to an individual who is a resident of the senator's own state, and has been nominated for local federal office in that state. The argument is advanced, perhaps not without some merit, that the senator is in a position to report to his colleagues the views of his constituents as to the qualifications of the individual in question—an individual whose duties will bring him in intimate contact with the daily lives of those constituents. This argument would not seem to be applicable to positions of national importance, the duties of which are not limited to any one state. As to such a position, an individual senator would seem to be acting in his capacity as a member of the council of elder statesmen of the nation, rather than as a representative primarily of his own constituents.

Expressions by distinguished members of the Senate in recent years have tended to be in accord with the view that senatorial courtesy should apply only to local offices, the duties of which are limited to the state of the objecting senator. For example, on March 23, 1932, Senator Watson said:

> Mr. WATSON. . . . [W]hen I came here I adopted the policy of voting against the confirmation of any man appointed to a Federal

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* Editor's Note: This memorandum was conveyed under cover of a letter from Assistant Solicitor General Cox to Senator George L. Radcliffe of Maryland, stating as follows: "The Attorney General has asked me to prepare and send to you a memorandum on the custom known as 'Senatorial Courtesy.' I am herewith transmitting a copy of such a memorandum."

> position if and when a Senator from the State in which he lived rose in his place on the floor of the Senate and stated that the appointment was personally obnoxious and personally offensive to him. Originally that rule was followed without regard to the field of activity of the appointee; that is to say, if a man were appointed to office anywhere and a Senator rose to say the appointment was personally offensive, it was regarded as sufficient to cause rejection. But about 10 years ago there was a modification of the rule here, and I was one of those who led the fight to bring about the modification.
>
> . . . .
>
> Mr. NORRIS. The Senator does not mean to say there is a rule on that subject in the Senate?
>
> Mr. WATSON. No; I do not mean to say there is a rule; but there is a practice; if the Senator please, an unwritten rule. . . .
>
> It is a practice or custom that has been followed; so that where a man is appointed to serve wholly within the State represented by the Senator who makes the objection, in such a case his objection on such grounds is sufficient reason for rejection.

75 Cong. Rec. 6729.

On March 23, 1934, the following colloquy between Senator Overton and Senator Barkley occurred:

> Mr. OVERTON. . . . Mr. President, let me make the additional statement that I understood that whenever a Senator from a State made an objection to the appointment of someone who was to discharge the duties of an office that was wholly intrastate, and based that objection upon the ground that the person named was personally obnoxious to him, the Senate respected that objection. . . .
>
> Mr. BARKLEY. . . . I realize that from time immemorial, where a Senator objects to a nomination or appointment of a citizen of his State to a local office, and states that the appointment is personally objectionable and obnoxious to him, the Senate heretofore, almost as a universal rule—which does not have the force of law, but is the result of courtesy—has respected that objection, and has refused to confirm the nominee. In recent years, I think it ought to be said, there has been some modification of that unwritten rule to the extent of asking or expecting the Senator who makes the objection on per-

> sonal grounds to present some reason for the objection. Otherwise its arbitrary exercise would make it impossible for an Executive to appoint anybody in the State who could be confirmed.

78 Cong. Rec. 5251.

Similarly, on June 29, 1939, Senator Wheeler said:

> In the 16 years I have been a Member of the Senate I have not known the Postmaster General of the United States to name appointees in a particular State over the objection of either one of the Senators. Perhaps it has been done; but, if so, it has never been called to my attention during my service in the Senate. . . .
>
> It has always been recognized that a different rule applies to appointments outside the State from that applying to appointments within the State.

84 Cong. Rec. 8225, 8226.

Leading text writers, apparently without exception, have indicated that senatorial courtesy should be confined to local offices. To quote:

> "[T]hrough the development of what is known as the 'courtesy of the Senate,' the Senators from each state when they belong to the same political party as the President generally control the nominations to local offices of the national government within their own state." John A. Fairlie, *The National Administration of the United States of America* 45–46 (1905).
>
> "The Constitution provides that appointments to federal office shall be made by the President with the advice and consent of the Senate. But in consequence of the custom known as 'senatorial courtesy,' when the President makes an appointment to a local federal office he is virtually obliged to obtain the consent of the senators from the particular state in which the office is located, if they belong to his party. Otherwise the Senate will not approve the appointment." James Wilford Garner & Louise Irving Capen, *Our Government: Its Nature, Structure, and Functions* 263 (1938).
>
> "In late years, however, there has come into existence the custom known as 'senatorial courtesy,' according to which the President must obtain in advance the approval of the senators from the particular state in which an office to be filled is located, provided they belong to his political party. If he refuses to do so and nominates a

> person who is objectionable to the senators from that state, the other senators as a matter of 'courtesy' to their offended colleagues will come to their rescue and refuse to approve the appointment. It has come to pass, therefore, that individual senators in many cases are virtually the choosers of federal officers in their states." *Id*. at 333.
>
> "A class of important federal offices scattered among the states, though nominally filled by the President with the advice and consent of the Senate, is subject largely to the control of the latter, as a result of a time-honored practice known as 'senatorial courtesy.' Under its power to advise and consent, the Senate does not officially suggest names to the President, but it will ratify nominations to many offices only under certain conditions. If either one or both of the Senators from the state in which the offices under consideration are located belong to the President's political party, then executive freedom of choice almost disappears." Charles A. Beard, *American Government and Politics* 151 (8th ed. 1939).

Haynes, in his *Senate of the United States*, has perhaps the most complete discussion of the subject. He cites a few instances in which attempts were made to apply the practice of senatorial courtesy to nominations to national offices, though it is clear that he does not approve of such application. He refers to the Rublee incident in 1916, and states that Senator La Follette, in challenging Senator Gallinger's request for application of the practice, declared that "this was the first time since he had been in the Senate that the 'personally obnoxious' rule had been applied to a national appointment." 2 George H. Haynes, *The Senate of the United States: Its History and Practice* 741 n.2 (1938).

As the Rublee incident shows, individual senators have not at all times agreed upon the extent to which the practice should be applied. Senatorial courtesy is, after all, simply based on custom, the boundaries of which may change from time to time, and which can never be said to be subject to exact definition. If a senator wishes to do so, he may object to any nomination on whatever ground he sees fit. His colleagues in the Senate will then judge whether these objections should be given weight. The purpose of this memorandum is to point out that the views expressed in recent years by some of the leading members of the Senate and by text writers have tended in the direction of limiting the practice to local offices.

Such examination of the actual precedents in the Senate as has been made in the limited time at my disposal appears to indicate that senators have from time to time attempted to invoke the practice of senatorial courtesy in respect of offices of national importance, and that in a few cases the Senate has in fact failed to confirm the nominee. In most, if not all, of these instances, however, it would appear that the Senate's action was based on considerations independent of the objection so raised. In no case which has come to my attention—not even the Rublee case—

does it appear that such a nomination was rejected solely on the ground of senatorial courtesy.

OSCAR S. COX
Assistant Solicitor General

Criminal Liability for Newspaper Publication of Naval Secrets

A reporter who kept or copied a Navy dispatch containing a list of Japanese ships expected to take part in an upcoming naval battle, and later submitted for publication a newspaper article with information from the dispatch, appears to have violated sections 1(b) and 1(d) of the Espionage Act, but it is doubtful he violated sections 1(a) and 2.

Whether the managing editor and publisher of the newspaper that published the article might also be criminally liable under the Espionage Act depends on their intent and knowledge of the facts.

June 16, 1942

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

You have inquired concerning the legal implications of a state of facts which may be summarized as follows:

A, a reporter permitted to travel with the Pacific fleet, picked up a dispatch on the desk of an officer on a battleship, and discovered that it contained a list of Japanese ships taking part in a certain naval engagement. He either kept the dispatch or copied it. Later, he returned to San Francisco by airplane. On landing, he wrote a story about the engagement, in which he used the information contained in the dispatch. This dispatch was wired to the ***B*** newspaper, in Chicago, and certain other newspapers in other cities, including the ***C*** paper in Washington, D.C.

The publication of the story in these papers, although not effected until several days after the naval battle, resulted in important advantages to the Japanese, who thus became aware of the efficiency of our naval intelligence. Certain additional facts appear in the course of the discussion.

Among the substantive questions presented are:

(1) Has ***A*** violated the Espionage Act of 1917[1]?

(2) Has the managing editor of ***B*** newspaper violated the Act?

(3) Has the corporation owning the ***B*** newspaper violated the Act?

(4) Has the person described as the "publisher" of the ***B*** newspaper violated the Act, assuming that he owns a large fraction of the corporation's stock and controls its general policies?

Questions of venue also arise. These will be treated in a separate memorandum.[*]

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[1] Act of June 15, 1917, ch. 30, 40 Stat. 217, *codified at* 50 U.S.C. §§ 31 *et seq.* (1940).

[*] Editor's Note: That memorandum opinion follows this one in this volume (*Trials of Newspaper Personnel Accused of Disclosing Naval Secrets*, 1 Op. O.L.C. Supp. 102 (June 16, 1942)).

The answers to these questions appear, in brief, to be as follows:

(1) ***A***, the reporter, appears to have violated the Espionage Act of 1917.

(2) Whether the managing editor of ***B*** newspaper has violated the Act depends on his intent and knowledge of the facts.

(3) If the managing editor has violated the Act, it would seem that the publishing corporation has also violated it.

(4) Whether the person described as the "publisher" of the ***B*** newspaper has violated the Act would seem to depend on his intent and knowledge of the facts.

I. The Reporter Appears to Have Violated the Espionage Act, in Wrongfully Taking or Copying the Dispatch

The Espionage Act of 1917, section 1, provides in part as follows:

(a) Whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base, coaling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, or other place connected with the national defense, owned or constructed, or in progress of construction by the United States or under the control of the United States, or of any of its officers or agents, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, repaired, or stored, under any contract or agreement with the United States, or with any person on behalf of the United States, or otherwise on behalf of the United States, or any prohibited place within the meaning of section 36 of this title; or

(b) whoever, for the purpose aforesaid, and with like intent or reason to believe, copies, takes, makes, or obtains, or attempts, or induces or aids another to copy, take, make, or obtain, any sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, ap-

> pliance, document, writing, or note of anything connected with the national defense . . .
>
> shall be punished by imprisonment for not more than ten years and may, in the discretion of the court, be fined not more than $10,000.

50 U.S.C. § 31.

In the instant case, there is doubt whether section 1(a) applies: the reporter has not attempted to obtain information about vessels of the United States, but only concerning vessels of the Japanese Navy.

Section 1(b) seems more directly applicable: there certainly has been a "taking or a copying" of a "writing" connected with the "national defense." Under this subsection, a writing which lists ships of an enemy nation does not by reason of that fact become unconnected with the national defense. The dispatch is intimately connected with defense, as is shown by the fact that if it had been lost or stolen before the beginning of the battle the consequences to the national defense might have been disastrous.

Was the reporter's act motivated by the requisite intent? Under section 1(b), as under section 1(a), an act is criminal only if the accused acted "for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation."

Thus, there must be a *purpose* to obtain information respecting the national defense. This purpose seems clearly present. While the information relates to the state of our Navy's knowledge of Japanese plans, rather than to our own vessels and strategy, it nevertheless is information "respecting the national defense." There must also be "intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation." That there was a specific intent of this nature is doubtful. That there was "reason to believe" seems fairly apparent, though the facts are not completely known to me. The reporter was skilled in naval matters, as shown by his ability to understand the dispatch, which was couched in technical terms. The information was obviously secret. He did not submit his story to the naval censors, but waited until he was on American soil before sending it in. He might have thought that the story of a battle which had been fought several days earlier would not be prejudicial to our defense; he may simply have kept silence in order to be sure of a "scoop." But a person in his position should have realized that the information contained in the dispatch had been obtained by the naval intelligence in some remarkably efficient manner: it should have been clear to him that revealing the text or substance of the dispatch would jeopardize the method by which this information had been gathered. It is true that some of this information might have been gathered by scouting planes, but it is understood that data of the degree of completeness here present could not have been so gathered. It is also true that a

complete story might have been sent out after the battle: but it is understood that this dispatch was sent prior to the battle, and revealed in advance the entire disposition of the Japanese forces.

The reporter's conduct in taking and copying a dispatch of immense importance—as this one seems obviously to have been—is characterized by real turpitude and disregard of his obligations as a citizen. It is hard to believe that any jury or judge would take a sympathetic view of his case, or seek to free him on any narrow view of the facts of the law. He thoroughly deserves punishment.

II. The Reporter Appears to Have Violated Section 1(d) of the Espionage Act in Transmitting the Information For Publication

Section 1(d) of the Espionage Act provides:

> [W]hoever, lawfully or unlawfully having possession of, access to, control over, or being intrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, willfully communicates or transmits or attempts to communicate or transmit the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it . . . shall be punished by imprisonment for not more than ten years and may, in the discretion of the court, be fined not more than $10,000.

50 U.S.C. § 31(d).

To bring the reporter within the compass of this statute, four things must be shown:

> (1) That the reporter had "possession of, access to, control over" or was entrusted with a document or similar item;
>
> (2) That he communicated the document (or perhaps information therein contained);
>
> (3) That the communication was to persons not entitled to receive it; and
>
> (4) That his communication was "willful."

The answers to these points appear to be as follows:

1. The reporter clearly had "access" to a document of the stated character.

2. The statute speaks in terms of communicating or transmitting a document. Does this extend to communicating the substance of a document, or information contained in it? The legislative history of section 1(d) is not particularly enlightening on this point. The section as originally drawn contained the words "or information" at the end of the list of items covered (document, writing, etc.). These words were stricken out, though the debate indicates no intention to weaken the section by so doing. *See* 55 Cong. Rec. 778 (1917). The section should be held to cover the communication of information in a case where such information closely parallels the contents of a document, and gives its gist or substance.

3. Section 1(d) does not define "persons not entitled to receive." In the original bill, this expression was implemented by a separate section, which gave the President power to define the classes of persons entitled to receive defense documents. This section was stricken by Congress, as being a grant of dictatorial power, and the meaning of "persons not entitled" was left in some doubt. Certain persons—such as representatives of enemy powers—are clearly "not entitled to receive." On the other hand, American citizens may be presumed to be entitled to information about their government and its acts; it is fairly arguable that limitations should be found in express legislation rather than in the court's ideas of desirable policy in the individual case. But in this case it seems clear that the general public was "not entitled to receive" the facts disclosed, and that the enormous circulation of the newspapers in question made it practically certain that the story would reach the enemy.

4. Was the reporter's communication "willful," within the meaning of section 1(d)? It certainly was, if the statute merely means "intentional." Yet it may mean more than that. Section 1(d) requires no specific intent. Further, it sets a rather vague standard: the document must relate "to the national defense"—a term which is not defined. A similar standard is set in section 1(b), which refers to copying plans "connected with the national defense." The Supreme Court, in interpreting section 1(b), has indicated that this standard is so vague as to be unenforceable, except in cases where the defendant's purpose is so clearly evil that he needs no warning. *Gorin v. United States*, 312 U.S. 19 (1941). In that case, the defendant knew that he was supplying valuable defense information to a foreign power, and the court held that this purpose was so evil as to preclude reliance on the vagueness of the statute. Similarly, in this case, the vast circulation of the newspapers involved puts the reporter in a position where he must pause and consider the consequences of his act. At best, his conduct was reckless and negligent, rather than specifically intended to do harm. Yet the negligence and recklessness were of such magnitude as to be fairly characterized as criminal and evil within the meaning of the *Gorin* rule.

III. Whether the Reporter Has Violated Section 2 of the Espionage Act Appears Doubtful

Section 2 of the Act provides:

> Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to, or aids or induces another to, communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by imprisonment for not more than twenty years: *Provided*, That whoever shall violate the provisions of subsection (a) of this section in time of war shall be punished by death or by imprisonment for not more than thirty years; and (b) whoever, in time of war, with intent that the same shall be communicated to the enemy, shall collect, record, publish, or communicate, or attempt to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the armed forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense, which might be useful to the enemy, shall be punished by death or by imprisonment for not more than thirty years.

50 U.S.C. § 32.

The reporter has violated section 2(a) if he intended his story to reach the enemy, and had reason to believe that the enemy would be aided or the United States injured. The heavy penalty imposed may indicate that the statute was not intended to apply unless the defendant's *mens rea* is clear.

Section 2(b) is unique, in that it is the only statute relating to espionage which uses the word "publish." The intent required is that the information "shall be communicated to the enemy." This subsection is also likely to receive a narrow construction, in view of the severe penalties provided.

IV. The Liability of the Managing Editor of *B* Newspaper

The editor of ***B*** newspaper may perhaps have directed the reporter to obtain information in every possible way—including the taking or copying of secret documents—without permission. If so, he might perhaps be indicted for conspiracy to violate section 1(a) or 1(b). It is not known whether such facts could be proved in the present case.

On the question of the editor's liability for his part in *communicating* the information to the public, we must look once more at section 1(d). Here, again, we have four inquiries:

(1) Did the editor have "possession of" or "access to" a document?

(2) Did he "communicate" or "transmit" the document?

(3) Did he communicate it to "persons not entitled to receive it"?

(4) Was his communication "willful"?

These questions can probably be answered in the affirmative if the editor can be shown to have realized that the story he received was the gist or substance of a document of the type described in the statute. If he realized this, then his passing the story to the public would seem to be the intentional transmittal of a document. Whether the transmittal can be classed as "willful" depends on the meaning to be attached to that word, as it is used in the statute. It may mean merely "not accidental," or may mean "with a sense of realization of wrongdoing." Under the *Gorin* case, discussed above, the courts will probably read the latter meaning into the statute. It would thus appear to be necessary to prove, in effect, a conspiracy between the reporter and the editor to violate section 1(d), by the intentional transmission of the contents of a secret document to persons not entitled to receive it, with full realization of the evil character of the act—or at least with such recklessness and wantonness as to indicate an equally criminal mentality.

Whether the editor can be convicted under section 2 of the Act would appear to rest on considerations similar to those discussed in Part III of this memorandum.

V. The Liability of the Corporation Publishing *B* Newspaper

The corporation's liability would seem to depend on the liability of the managing editor: if he can be convicted, so also can the company. His criminality, if proved, can be fastened on the corporation which hired him, which put his act into effect, and which made a profit from it.

It is true that section 1(d) speaks of "whoever . . . willfully communicates," thus using a personal term and imposing a requirement of intent. Yet this does not render a corporation incapable of committing the crime. Construing section 3 of

the same statute, which condemns "[w]hoever . . . shall willfully obstruct . . . recruiting," 50 U.S.C. § 33, Judge Mayer held that a corporation which published a seditious pamphlet could be convicted and fined. *United States v. Am. Socialist Soc.*, 260 F. 885 (S.D.N.Y. 1919), *aff'd*, *Am. Socialist Soc. v. United States*, 266 F. 212 (2d Cir. 1920), *cert. denied*, 254 U.S. 637 (1920).

VI. The Liability of the Person Described as "Publisher" of *B* Newspaper

It is assumed that the person described as "publisher" owns a substantial fraction of the stock of the corporation which publishes ***B*** newspaper, and that he controls its general policies.

The most obvious grounds for holding the publisher are similar to those discussed in connection with the petition of the managing editor, i.e.,

> (1) Possible liability for directing the illegal obtaining or copying of the document, under sections 1(a) and 1(b).
>
> (2) Possible liability for willfully transmitting the contents of the document to "persons not entitled to receive," under section 1(d).
>
> (3) Possible liability for communicating information to the enemy, under section 2.

As to these grounds, the position of the publisher is similar to that of the editor, and like problems of proving knowledge, intent and *mens rea* arise.

If it is not possible to prove that the publisher knew about the story in advance of its publication, and that he willfully communicated it in violation of one of the statutory sections above mentioned, can he be held on some other ground? Can he be held criminally liable on the ground, for example, that he was negligent in failing to supervise the paper, or in choosing reckless reporters and editors? Or on the ground that if the corporation is held criminally liable the person controlling it should also be held?

While limitations of time have not permitted a complete investigation of these problems, it would appear that liability of this vicarious nature has seldom been imposed on stockholders and directors of corporations. Where the stockholder or director has directly participated in the crime—knowingly using the company as his tool—there is no difficulty in holding him. Occasionally, too, a statute will penalize someone who "permits" a nuisance or other criminal condition to exist: in such case, an officer or stockholder may be directly held for his criminal act of permission. This is a matter of statutory interpretation. *See generally* Frederic P. Lee, *Corporate Criminal Liability*, 28 Colum. L. Rev. 1 (1928).

Fletcher states:

> At common law, the managing editor of a newspaper is criminally responsible for an unlawful publication made in the paper unless it was made under such circumstances as to negative any presumption of privity or connivance or want of ordinary precaution on his part to prevent it, and statutes sometimes provide that every editor or proprietor of a book, newspaper or serial, and every manager of a corporation by which any newspaper is issued is chargeable with the publication of any matter contained therein. But the business or circulation manager of a newspaper who has no editorial duties and no part in editing or producing it, but only circulates or distributes it, is not criminally liable at common law for the insertion of matter in the paper.

3 William Meade Fletcher, *Cyclopedia of the Law of Private Corporations* § 1350 (rev. & perm. ed. 1931).

This doctrine probably does not extend to a newspaper publisher whose proprietary interest is represented by stock ownership, and who leaves the active running of the paper to his managing editor. The Espionage Act is not written in terms to apply to publication or to newspapers, and no special terminology can be found in it to relieve the prosecution from the necessity of showing the required personal intent in the case of a newspaper publisher as with every other class of person. However, a further study will be made of this problem.

OSCAR S. COX
Assistant Solicitor General

Trials of Newspaper Personnel Accused of Disclosing Naval Secrets

It is probable that the newspaper personnel accused of violating the Espionage Act by disclosing naval secrets can each be tried in any district in which the newspaper containing the secrets was received by a subscriber or newsstand.

The newspaper personnel would be entitled to separate trials unless a conspiracy to violate the Espionage Act can be shown.

June 16, 1942

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

In an accompanying memorandum of today's date,* the substantive aspects of certain disclosures of naval information are discussed. A short statement of facts is there given.

This memorandum discusses the following questions:

> (1) Assuming a violation of law by the reporter, the managing editor of ***B*** newspaper, the company publishing it, and the publisher, can they be tried in any district in which the newspaper was received by a subscriber or newsstand?
>
> (2) Can these trials be combined?
>
> (3) Assuming a violation of the law by the managing editors of ***B*** and ***C*** newspapers, and a conspiracy between them and ***A***, the reporter, can all be tried jointly in a certain district in which subscribers to both ***B*** and ***C*** can be found? If no conspiracy exists?

The answers appear to be as follows:

> (1) Each defendant can probably be tried in any district in which the newspaper was received.
>
> (2) The trials will be separate, in the absence of proof of conspiracy.
>
> (3) Assuming a conspiracy, the trial of all can be held jointly in a common district.

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* Editor's Note: That memorandum opinion precedes this one (*Criminal Liability for Newspaper Publication of Naval Secrets*, 1 Op. O.L.C. Supp. 93 (June 16, 1942)).

I. Problems of Venue; Place of Trial

Assuming a violation of the law by the reporter and his superiors—managing editor, publisher, and newspaper company—it is probable that each defendant can be tried (whether separately or jointly will be discussed below) in any district in which a copy of the newspaper containing the criminal dispatch was received by a subscriber or newsstand.

The Constitution of the United States provides that

> "The trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed . . . ," Article III, Section 2,

and that

> "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ," Amendment VI.

These constitutional provisions do not give a defendant a constitutional right to be tried only in the district of his residence or principal place of business. *Haas v. Henkel*, 216 U.S. 462 (1909). His right is to a trial in the district where the crime was committed.

It seems to be reasonably well established by the Supreme Court that a "crime," which involves a sequence of acts crossing district boundaries, is committed in any district in which any substantial act in the sequence took place. *Hyde v. United States*, 225 U.S. 347 (1911); *United States v. Lombardo*, 241 U.S. 73 (1915). The discretion of the Attorney General and the constant supervision of the courts are regarded as sufficient safeguards against double jeopardy and unnecessary multiplicity of suits.

The most significant act in the crime of "communicating" or "transmitting" a document relating to national defense to "any person not entitled to receive it" under section 1(d) of the Espionage Act[1] must be the actual presentation of the contents of such a document to the person not entitled to receive it. When such communication or transmission is effected through the medium of a newspaper, that act occurs only when the recipient of the newspaper has it in his control. The *factual* chain of events which constitute the *legal* crime begins of course when the reporter first illegally scans the forbidden document, but it does not end until the whole institutional apparatus of newspaper publication has deposited the finished paper in the hands of the subscriber or purchaser. To seize upon any one factual event in the crime chain—such as the physical rolling of the papers off a press—and to say that such an event only is "the crime" and that the crime is "committed" only at the locus of that event would be as unrealistic as it would be subversive of

[1] Act of June 15, 1917, ch. 30, § 1(d), 40 Stat. 217, 218, *codified at* 50 U.S.C. § 31(d) (1940).

the policy of the statute. It is not some physical step in the publishing process which is prohibited but the *communication* of defense information to unauthorized recipients. The fact that there may be unauthorized recipients in many districts only aggravates the crime. It would put an insuperable burden upon the government to require it to show which unauthorized recipients actually passed the information on to the enemy and, hence, to fix its venue there.

Direct case authority to support this reasoning is scant. Helpful analogies can, however, be found in cases involving the unlawful transmission of goods and fraudulent mail practices. Charles C. Montgomery, *Manual of Federal Jurisdiction and Procedure* § 1150 (4th ed. 1942). The famous old case of *In re Palliser*, 136 U.S. 257 (1890), which held that the offense of tendering a contract for the payment of money in a letter mailed in one district and addressed to a public officer in another, to induce him to violate his official duty, could be tried in the district in which the letter was received by that officer, is squarely in point. The opinion contains excellent supporting language.

Opposing authority is equally scant. The federal criminal libel cases are old, by lower courts, not numerous, and poorly reasoned. They have been often criticised. Justin Miller, *Handbook of Criminal Law* 495 (1934); Recent Cases, *Criminal Law—Jurisdiction—Locality of Publication of Libel*, 23 Harv. L. Rev. 309 (1910); Comment, *Copies of a Printed Criminal Libel as Separate Offenses*, 26 Yale L.J. 308 (1916–17). Many state court decisions are to the contrary. Annotation, *Venue of Action for Libel in Newspaper*, 37 A.L.R. 914 (1925). The leading case, *United States v. Smith*, 173 F. 227 (D. Ind. 1909), could easily be distinguished or discredited.

One section of the judicial code, 28 U.S.C. § 103, could be construed as relevant. This provides that:

> When any offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein.

Rev. Stat. § 731 (2d ed. 1878), 18 Stat. pt. 1, at 139 (repl. vol.), *as amended by* Act of Mar. 3, 1911, ch. 231, § 42, 36 Stat. 1087, 1100. If the argument above that a significant act of the chain "crime" was "committed" in the district where the newspaper was received is accepted, an equally plausible argument could be made under this section that the offense was "completed" in such district. The argument from the facts and from policy would be substantially the same.

For determining the place of trial, and allocating power between courts, the concept of "venue" serves the same function for different federal districts that the concept of "jurisdiction" serves for the states. State courts are—it should be noted by way of analogy—rapidly getting away from the naive notion that a "crime,"

involving a sequence of acts crossing state boundaries, is physically "located" on some one spot. Thus Mr. Berge observes:

> [T]he conclusion is irresistible that if the constituent acts of a given crime occur in more than one state, each such state has an equally valid claim to jurisdiction over the whole crime. Such extra-territorial elements should be frankly recognized by courts and no attempt should be made to cover them with legal fictions.

Wendell Berge, *Criminal Jurisdiction and the Territorial Principle*, 30 Mich. L. Rev. 238, 269 (1931).

II. Separate Trials

Where two or more defendants are accused of the *same crime*, i.e., if they are conspirators, or principal and accessory, they may be tried together. Even here, however, the court may in its discretion order separate trials, upon proper motion. Where the crimes are different, though related in nature or linked by events, the defendants are entitled to separate trials, if the objection is seasonably raised. *See* Montgomery, *Federal Jurisdiction and Procedure* § 1238; William T. Hughes, *Federal Practice, Jurisdiction & Procedure* § 7084 (1931 & Supp. 1941).

In the instant case, unless the conspiracy theory is relied upon, the defendants would appear to be entitled to separate trials.

III. Conspiracy

If a conspiracy to violate the Espionage Act can be shown (which does not appear probable on the facts now known to me), the defendants can be tried together in any district in which the conspiracy was formed or in which an act was done to effectuate the object of the conspiracy. Hughes, *Federal Practice* § 6849.

IV. Questions of Policy

The newspapers usually stand together on questions affecting their common interest. The *locus* of a suit against reporters, editors and proprietors is a matter of major importance to the publishing trade. If it is established that suits based on libel or violations of the Espionage Act can be brought at any point at which even a single subscriber receives the publication, the trade would feel itself in grave jeopardy. Accordingly, an attempt to start a prosecution at a point remote from the place of publication might raise a nationwide outcry from the press, and prevent the public from reaching an understanding of the merits of the case.

OSCAR S. COX
Assistant Solicitor General

Implementation of International Civil Aviation Agreements

If a valid reciprocal arrangement has been entered into between the United States and a foreign country, the Civil Aeronautics Authority is authorized under existing law to grant to a foreign aircraft a permit to fly across the United States without landing or a permit to land for non-traffic purposes.

February 6, 1945

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL*

The State Department has requested the informal advice of the Attorney General on a question that has arisen in connection with the International Air Services Transit Agreement, commonly called the "Two Freedoms Agreement," and the International Air Transport Agreement, frequently referred to as the "Five Freedoms Agreement," drawn up at the International Civil Aviation Conference held in Chicago in the fall of 1944. These agreements grant to the signatory powers certain privileges with respect to "scheduled international air services." It is in connection with these privileges that the following question has risen: Assuming that reciprocal rights have been granted by some valid arrangement between the United States and a foreign country, is the Civil Aeronautics Authority authorized under existing law to grant to aircraft of the foreign country a license or certificate (1) to fly across United States territory without landing; and (2) to land in the United States for non-traffic purposes (e.g., refueling)?

The State Department has not asked this Department to examine the details of these agreements, or to comment on the Convention on Civil Aviation or the Interim Agreement on Civil Aviation drawn up at Chicago. The State Department has not asked us to consider whether the agreements require ratification by the Senate or may be executed as executive agreements. The only question that has been put to us relates to the construction of the statutes regulating civil aviation and we shall confine the discussion in this memorandum to that point. The question of statutory construction, however, does have a bearing on the question whether the agreements may properly be executed as executive agreements for the following reason: If the agreements required or contemplated action by the Civil Aeronautics Authority or any other agency of the government that was unauthor-

* Editor's Note: The cover memorandum attached to this memorandum opinion states that "Mr. Acheson [presumably Dean Acheson, then Assistant Secretary of State, later Secretary of State under President Truman] is very eager to get our views on this; he has called me twice in the past week. It may be that you will wish to submit a copy of my memorandum to Mr. Acheson for his comments before you decide whether you agree with the conclusion reached in the memorandum." The cover memorandum states further: "The State Department has not asked us for a formal opinion, and you will recall that in his conference with us Mr. Acheson said he was not sure that the State Department would make this request."

ized or forbidden by domestic law, a serious question might arise as to whether the agreements could be consummated as executive agreements. If it is concluded that the Civil Aeronautics Authority is authorized by existing law to grant to foreign aircraft a license or certificate to fly across United States territory without landing or to land in the United States for non-traffic purposes, the problem of the agreements contemplating action not authorized by existing law does not arise.

I. Statutes Involved

Section 6 of the Air Commerce Act of 1926, Pub. L. No. 69-254, 44 Stat. 568, 572, as amended by the Civil Aeronautics Act of 1938, Pub. L. No. 75-706, 52 Stat. 973,[1] provides in part as follows:

> (a) The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the air space above the United States . . . .
>
> (b) Foreign aircraft not a part of the armed forces of the foreign nation shall be navigated in the United States only if authorized as hereinafter in this section provided.
>
> (c) If a foreign nation grants a similar privilege in respect of aircraft of the United States, and/or airmen serving in connection therewith, the Civil Aeronautics Board may authorize aircraft registered under the law of the foreign nation and not a part of the armed forces thereof to be navigated in the United States. No foreign aircraft shall engage in air commerce otherwise than between any State, Territory,

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[1] Section 1107(i) of the Civil Aeronautics Act of 1938 amended section 6 of the Air Commerce Act of 1926. Among other things, section 1107(i) struck out the last part of section 6(a) and added the last sentence of section 6(c) as quoted in the text. In its original form, section 6(c) contained the following language limiting the authority to permit foreign aircraft to be navigated in the United States: "but no foreign aircraft shall engage in interstate or intrastate air commerce." Pub. L. No. 69-254, 44 Stat. at 572.

The Air Commerce Act of 1926 contains the following definitions:

> That as used in this Act, the term "air commerce" means transportation in whole or in part by aircraft of persons or property for hire, navigation of aircraft in furtherance of a business, or navigation of aircraft from one place to another for operation in the conduct of a business. As used in this Act, the term "interstate or foreign air commerce" means air commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through the airspace over any place outside thereof; or wholly within the airspace over any Territory or possession or the District of Columbia.

Pub. L. No. 69-254, § 1, 44 Stat. at 568, *codified at* 49 U.S.C. § 171 (1940).

As defined in the 1926 statute, the term "United States" includes the overlying airspace. *Id.* § 9(b), 44 Stat. at 573, *codified at* 49 U.S.C. § 179(b) (1940).

> or possession of the United States (including the Philippine Islands) or the District of Columbia, and a foreign country.

49 U.S.C. § 176 (1940).[2]

Section 1 of the Civil Aeronautics Act of 1938 contains the following definitions:

> (3) "Air commerce" means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any civil airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.
>
> . . . .
>
> (16) "Civil airway" means a path through the navigable air space of the United States, identified by an area on the surface of the earth, designated or approved by the Administrator as suitable for interstate, overseas, or foreign air commerce.
>
> . . . .
>
> (25) "Navigation of aircraft" or "navigate aircraft" includes the piloting of aircraft.
>
> . . . .
>
> (31) "United States" means the several States, the District of Columbia, and the several Territories and possessions of the United States, including the Territorial waters and the overlying air space thereof.

Pub. L. No. 75-706, 52 Stat. at 977–80, *codified at* 49 U.S.C. § 401 (1940).

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[2] The authority conferred by this section was originally vested in the Secretary of Commerce. Pub. L. No. 69-254, § 6(c), 44 Stat. at 572. As amended by the Civil Aeronautics Act of 1938, § 1107(i)(1), 52 Stat. at 1028, subsection (c) referred to the Civil Aeronautics Authority. Section 7(b) of Reorganization Plan 4 changed the title of the Civil Aeronautics Authority to "Civil Aeronautics Board" and made other changes not relevant here. 5 Fed. Reg. 2421, 2422 (June 29, 1940). The term "Civil Aeronautics Authority" is now used to refer to the Civil Aeronautics Board and the Administrator of Civil Aeronautics considered together. In this memorandum we shall use the title "Civil Aeronautics Authority" without discussing whether the authority given by section 6(c) of the Air Commerce Act may be exercised by the Civil Aeronautics Board or by the Administrator or by both. *See Permits for Flight of Foreign Aircraft into the United States*, 40 Op. Att'y Gen. 136 (Sept. 12, 1941).

II. Text

In section 6 of the Air Commerce Act, the Congress asserted sovereignty over the airspace above the territory of the United States and reserved to American aircraft all rights of "cabotage" (e.g, air traffic between points within a single state, between two states or between the United States and any of its possessions or territories). The section, however, authorizes the Civil Aeronautics Authority to grant certain flight privileges to foreign aircraft. The only question discussed in this memorandum is whether foreign aircraft may be authorized to make non-stop flights over the United States or to land for non-traffic purposes in the United States. In neither case would the foreign aircraft be authorized to pick up passengers or freight at any point in the United States, its territories or possessions destined for any other point in the United States, its territories or possessions.

The first sentence of section 6(c) authorizes the Civil Aeronautics Authority to permit foreign aircraft "to be navigated in the United States." In its ordinary meaning and as defined in the act, "navigation" includes any flight by aircraft whether or not a landing is made; both non-stop flight and transit flight with the privilege of landing for non-commercial purposes necessarily involve the navigation of aircraft in the airspace over the United States. Therefore, if the first sentence of section 6(c) stood alone, it would authorize the Civil Aeronautics Authority to grant a permit for the type of flight discussed in this memorandum. It is necessary, however, to consider the limitation placed on this sentence by the second sentence of section 6(c).

That sentence provides that foreign aircraft may not engage in "air commerce otherwise than between any State, Territory or possession of the United States (including the Philippine Islands) or the District of Columbia, and a foreign country." For the purpose of deciding how this sentence should be interpreted we shall first consider the meaning of the term "air commerce" and then discuss the requirement that air commerce must be between a state, territory or possession of the United States, or the District of Columbia, and a foreign country.

As defined in section 1(3) of the Civil Aeronautics Act, the term "air commerce" includes any navigation of aircraft within the limits of a civil airway or any navigation of aircraft which may endanger the safety of operations in air commerce. Under this definition any flight by aircraft into the airspace of the United States would appear to be "air commerce." Both non-stop flights and transit flights with non-traffic landing privileges are, therefore, "air commerce" within this definition.[3]

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[3] If section 6(c) is examined in the light of the definition of "air commerce" contained in the 1926 statute, it is none the less clear that under section 6(c) the Civil Aeronautics Authority may authorize non-stop flight by foreign aircraft as part of a scheduled international air service. As defined in the 1926 statute, "air commerce" includes the navigation of aircraft in the furtherance of a business. 49

If a foreign aircraft en route from one foreign point to another stops at some point in the United States or one of its possessions for a non-traffic purpose, it seems clear that the aircraft is engaged in air commerce between a "State, Territory or possession of the United States (including the Philippine Islands) or the District of Columbia, and a foreign country" within the meaning of the statute. There remains for consideration the question whether a non-stop flight by a foreign aircraft over American territory en route from a point in one foreign country to another foreign point also falls within the statutory language. When an aircraft enters the airspace over any part of the United States, including its territories and possessions, it has entered the United States as much as if it had landed within the territorial boundaries, since the United States has sovereignty over the overlying airspace. *Cf. United States v. One Pitcairn Bi-Plane*, 11 F. Supp. 24 (W.D.N.Y. 1935). For the purpose of subsection (c) it does not appear to make any difference whether the foreign aircraft returns by the same route it entered the United States. The section refers to "any" foreign country and does not require the aircraft to leave the United States by the same route it followed when entering.

Section 6(c) of the Air Commerce Act does not prohibit a foreign aircraft from entering the airspace over more than one state, territory or possession of the United States. The section refers to "any" state, territory, or possession and does not limit the application of the section to states which are on the boundary of the United States. In addition, subsection (c) refers to the District of Columbia. It would not be possible for a foreign aircraft to fly into the airspace over the District of Columbia without crossing the airspace of some other state. It is obvious, therefore, that the statute does not contemplate that the foreign aircraft is prohibited from entering any state other than a border state.

This construction of section 6(c) is reinforced by a consideration of the purposes of the Civil Aeronautics Act of 1938. Section 3 of that Act declares that the purpose of the statute is to promote the development of air transportation. If the statute were construed to prohibit the Civil Aeronautics Authority from granting a certificate to foreign aircraft for non-stop flight as part of a scheduled international air service, even though the foreign government was willing to grant reciprocal privileges, the foreign government would undoubtedly refuse such privileges to American air lines. As a result, the development of international air transport services by American carriers would be hampered rather than encouraged.

III. Administrative Construction

Administrative practice under both the Air Commerce Act of 1926 and the Civil Aeronautics Act of 1938 supports the construction of section 6(c) outlined in

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U.S.C. § 171. Non-stop flights or transit flights with the privileges of non-traffic landing carried on as a part of a regularly scheduled air service appear to be included within this definition of air commerce.

this memorandum. Under the 1926 statute, a number of bilateral agreements relating to air navigation were entered into between the United States and other countries granting, among other things, reciprocal privileges of non-stop flight, subject to various limitations not relevant here and to the rules and regulations of each country. *See Air Navigation Agreement*, U.S.-It., Oct. 31, 1931, E.A.S. No. 24; *Air Navigation Agreement*, U.S.-Swe., Oct. 9, 1933, E.A.S. No. 47; *Air Navigation Agreement*, U.S.-Nor., Nov. 15, 1933, E.A.S. No. 50; *Air Navigation Agreement*, U.S.-S. Afr., Sept. 20, 1933, E.A.S. No. 54; *Air Navigation Agreement*, U.S.-Den., Apr. 16, 1934, E.A.S. No. 58; *Air Navigation Agreement*, U.S.-Gr. Brit., May 5, 1935, E.A.S. No. 76; *Air Navigation Agreement*, U.S.-Ir., Dec. 4, 1937, E.A.S. No. 110.

Since 1938 bilateral agreements conferring similar privileges have been entered into. *See Air Navigation Agreement*, U.S.-Can., Aug. 1, 1938, E.A.S. No. 129; *Air Transport Services Agreement*, U.S.-Can., Aug. 18, 1939, E.A.S. No. 159; *Air Navigation Agreement*, U.S.-Fr., Aug. 15, 1939, E.A.S. No. 152; *Air Navigation Agreement*, U.S.-Liber., June 15, 1939, E.A.S. No. 166.

Since April 7, 1939 the Trans-Canada Air Lines has been operating under a permit granted by the Civil Aeronautics Authority authorizing non-stop flights by Canadian aircraft over the State of Maine en route between Toronto, Canada and Halifax, Nova Scotia. The Civil Aeronautics Authority has also issued a permit to the Canadian Colonial Airways, Inc., authorizing flights between Montreal, Canada, and Nassau in the Bahamas with a stopover for non-traffic purposes in Jacksonville, Florida.

IV. Legislative History

The legislative history does not offer positive assurance with respect to the construction of section 6(c) of the Air Commerce Act. Non-stop flights by foreign aircraft and transit flights with the privilege of landing for non-traffic purposes were not the subject of debate in Congress at the time of the passage of the Civil Aeronautics Act of 1938. However, the agreements executed under the Air Commerce Act were not criticized or repudiated by the Congress. The legislative history indicates in this respect that the Congress intended to make no substantial change in section 6(c) of that Act.

V. Conclusion

It is my view that the Department of State may be advised informally that if a valid reciprocal arrangement has been entered into between the United States and a foreign country, the Civil Aeronautics Authority is authorized under existing law to grant to a foreign aircraft a permit to fly across the territory of the United States without landing or a permit to land for non-traffic purposes in the United States, subject to compliance with the laws and regulations of the United States.

It is unnecessary to discuss in this memorandum whether a non-stop flight with or without the privilege of landing for technical reasons is the kind of air transportation for which a permit must be granted under section 401 or 402 of the Civil Aeronautics Act of 1938. *Cf. Canadian Colonial Airways, Inc.—Investigation*, 2 C.A.B. 752, Docket No. 601 (July 7, 1941). It is also unnecessary to discuss conditions that should be attached by the Civil Aeronautics Authority to any certificate issued to foreign aircraft.

I am attaching a memorandum prepared by Mr. Eberly discussing these questions in greater detail.

HUGH B. COX
Assistant Solicitor General

January 29, 1945

MEMORANDUM FOR THE ASSISTANT SOLICITOR GENERAL

This memorandum is in response to your request for my views on the questions presented in the memorandum from the Department of State for the Attorney General, dated January 8, 1945.

I.

At the International Civil Aviation Conference held at Chicago, there were drawn up on December 7, 1944, the following multilateral agreements:

(1) a Convention on International Civil Aviation;

(2) an Interim Agreement on International Civil Aviation;

(3) an International Air Services Transit Agreement; and

(4) an International Air Transport Agreement.

Members of the Civil Aeronautics Board attended the conference as delegates of the United States. It is understood that they have approved the agreements.

The Convention is to be submitted to the Senate for ratification. The Interim Agreement provides for the establishment of a provisional organization for collaboration in the field of international civil aviation. It is to last only until the Convention comes into operation, or at most for a period of three years.

We are concerned only with the third and the fourth of these four agreements, the International Air Services Transit Agreement and the International Air Transport Agreement. These agreements deal with "scheduled international air services."

The International Air Services Transit Agreement, commonly referred to as the Two Freedoms Agreement, provides in pertinent part:

ARTICLE I

Section 1

> Each contracting State grants to the other contracting States the following freedoms of the air in respect of scheduled international air services:
>
> (1) The privilege to fly across its territory without landing;
>
> (2) The privilege to land for non-traffic purposes. . . .

Section 4

> Each contracting State may, subject to the provisions of this Agreement,
>
> (1) Designate the route to be followed within its territory by any international air service and the airports which any such service may use . . . .

Section 5

> Each contracting State reserves the right to withhold or revoke a certificate or permit to an air transport enterprise of another State in any case where it is not satisfied that substantial ownership and effective control are vested in nationals of a contracting State, or in case of failure of such air transport enterprise to comply with the laws of the State over which it operates, or to perform its obligations under this Agreement.

The second agreement, document 4 above mentioned, is the International Air Transport Agreement, commonly referred to as the Five Freedoms Agreement. It contains the same provisions as those quoted above from the International Air Services Transit Agreement (article I, sections 1, 5 and 6) and, in addition, three other privileges, hence giving rise to the name Five Freedoms Agreement.

Each of these two agreements comes into force as between contracting States upon its acceptance by each of them. Each agreement may be denounced by any party thereto on one year's notice.

The Two Freedoms Agreement and the Five Freedoms Agreement contain provisions making the exercise of privileges granted in the respective agreements to the contracting States subject to certain provisions of the Interim Agreement and, when it comes into force, subject to certain provisions of the Convention.

In view of the uncertainty as to the scope of the questions raised in the State Department memorandum, Mr. Barnard and I attended a meeting with representatives of the State Department on January 22, 1945. It is my understanding that with respect to the present inquiry this department is not concerned with any question arising out of the relation of the provisions of the Two Freedoms Agreement and of the Five Freedoms Agreement to the provisions of the Interim Agreement and the Convention; or with any question of national defense or security; or with the fact that the two agreements are multilateral international agreements, and not bilateral agreements; or with any question as to whether the Two Freedoms Agreement and the Five Freedoms Agreement may be executed by the President as executive agreements without the necessity of submitting the agreements, or either of them, to the Senate for its advice and consent as to ratification.

The only question on which the Department of State desires the informal opinion of the Attorney General is the question whether the two privileges granted by the Two Freedoms Agreement and the Five Freedoms Agreement with respect to foreign scheduled air services, (1) to fly across the territory of the United States without landing, and (2) to land in the United States for non-traffic purposes, are authorized by, or conform with, existing law of the United States. This question will be considered on the basis that the agreements conferring these privileges are bilateral agreements.

II.

Both the Paris Convention of 1919 (Convention for the Regulation of Aerial Navigation, Oct. 13, 1919, 11 L.N.T.S. 173) and the Havana Convention of 1928 (Pan American Convention on Commercial Aviation, U.S.-Cuba, Feb. 20, 1928, 47 Stat. 1901) adopted the doctrine of complete and exclusive sovereignty over the air space above the territory of a state, but contained provisions extending certain reciprocal privileges to foreign aircraft within the territories of member states.

This principle of exclusive sovereignty over the air space, but with authorization for innocent passage of civil foreign aircraft under certain conditions, is written into the statutes of the United States to which reference will shortly be made.

The Paris Convention was signed by the United States, but it was not ratified. S. Doc. No. 67-348, at 3768 (1923). Ratification of the Havana Convention was advised by the Senate on February 20, 1931. 74 Cong. Rec. 5514. The Convention was ratified by the President on March 6, 1931, and proclaimed by the President on July 27, 1931. 47 Stat. 1901.

Incidentally, it may be noted that Article XV of the Paris Convention provides that every aircraft of a contracting State has the right to cross the air space of another State without landing, subject to following a designated route. S. Doc. No. 67-348, at 3775.

The Paris Convention and the Havana Convention have been interpreted to deny freedom of air navigation to the operators of air lines, except by special agreement. As a result, international services have been established pursuant to international bilateral agreements and, in some cases, by unilateral concession. The United States is a party to a number of bilateral agreements under which each party grants certain privileges to the civil aircraft of the other party.

Air navigation in the United States is regulated by the provisions of the Civil Aeronautics Act of 1938, and the Air Commerce Act of 1926 as amended by the Civil Aeronautics Act of 1938. I shall discuss first the Air Commerce Act of 1926 as originally enacted, and, secondly, the Civil Aeronautics Act of 1938.

Section 6 of the Air Commerce Act of 1926, as originally enacted, provides:

> (a) *The Congress hereby declares that the Government of the United States has, to the exclusion of all foreign nations, complete sovereignty of the airspace over the lands and waters of the United States, including the Canal Zone*. Aircraft a part of the armed forces of any foreign nation shall not be navigated in the United States, including the Canal Zone, except in accordance with an authorization granted by the Secretary of State.
>
> (b) Foreign aircraft not a part of the armed forces of the foreign nation shall be navigated in the United States only if authorized as hereinafter in this section provided; *and if so authorized, such aircraft and airmen serving in connection therewith, shall be subject to the requirements of section 3, unless exempt under subdivision (c) of this section*.
>
> (c) If a foreign nation grants a similar privilege in respect of aircraft of the United States, and/or airmen serving in connection therewith, the *Secretary of Commerce* may authorize aircraft registered under the law of the foreign nation and not a part of the armed forces thereof to be navigated in the United States, *and may by regulation exempt such aircraft, and/or airmen serving in connection therewith, from the requirements of section 3, other than the air traffic rules; but no foreign aircraft shall engage in interstate or intrastate commerce*.

Pub. L. No. 69-254, § 6, 44 Stat. 568, 572 (emphasis supplied).

The parts underscored in the above quotation were repealed or amended by the Civil Aeronautics Act of 1938, Pub. L. No. 75-706, 52 Stat. 973.

Section 9(b) of the Air Commerce Act of 1926 provides that the term "United States," when used in a geographical sense, means the territory comprising the several States, Territories, possessions, and the District of Columbia, and the overlying air space. 44 Stat. at 573.

The term "air commerce" is defined in section 1 of the statute as "transportation in whole or in part by aircraft of persons or property for hire, navigation of aircraft in furtherance of a business, or navigation of aircraft from one place to another for operation in the conduct of a business." 44 Stat. at 568.

The term "interstate or foreign air commerce" is defined in section 1 of the statute to mean "air commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through the airspace of any place outside thereof; or wholly within the airspace over any Territory or possession or the District of Columbia." 44 Stat. at 568.

It will be seen that section 6 of the statute permits foreign civil aircraft, not a part of the armed forces of a foreign nation, to be "navigated in the United States" under certain conditions. The conditions are:

> (1) Reciprocal rights must first be granted by the foreign nation with respect to aircraft of the United States.
>
> The foreign aircraft or carrier—
>
> (2) must receive authorization from the Secretary of Commerce to be "navigate[d] in the United States";
>
> (3) may be subject to regulation; and
>
> (4) may not engage in interstate or intrastate air commerce.

44 Stat. at 572.

Subject to the foregoing conditions, foreign civil aircraft may be "navigated in the United States." This term is not defined in the statute. Also, it is to be noted that the statute contains no express reference to non-stop flights or landing for non-traffic purposes. It seems clear that so long as a foreign aircraft does not engage in interstate or intrastate air commerce, both non-stop flights and landing for non-traffic purposes would fall within the terms "navigated in the United States" and "air commerce" as used in the Air Commerce Act of 1926.

The term "navigation in the United States" as used in the statute includes any navigation through the air space over the territory of the United States or any part thereof. *Id.* §§ 2(e), 5(e); 44 Stat. at 569, 571. This term would, therefore, include a non-stop flight across the territory of the United States and a stop or stops in the United States for non-traffic purposes.

The term "air commerce" is defined in the Act of 1926 to include "transportation in whole or in part by aircraft of persons or property for hire" and "navigation of aircraft in furtherance of a business." *Id.* § 1; 44 Stat. at 568. Navigation of a foreign aircraft on a non-stop flight across the United States or a part thereof would seem to fall within both of these definitions.

Likewise, the landing of a foreign aircraft in the United States for non-traffic purposes—refueling, for example—when done in connection with transportation by the aircraft of persons or property for hire, or in connection with navigation of the aircraft in furtherance of a business, seems clearly to fall within the meaning of the term "air commerce" as used in the statute.

I find no apparent intent either in the language of the original Air Commerce Act of 1926 or its history to limit foreign aircraft to engaging in "foreign air commerce" within any restricted definition of this term that would exclude non-stop flights. On the contrary, the foregoing analysis of the provisions of the statute shows that non-stop flights of foreign civil aircraft and landing of civil aircraft for

non-traffic purposes are within the terms of the authorization contained in the statute as originally enacted.

There seems, however, to have been some doubt as to the construction of the Air Commerce Act of 1926. Thus, in March 1938, Mr. Hester, Assistant General Counsel, Treasury Department, later Administrator of Civil Aeronautics, gave the following testimony before a subcommittee of the House Committee on Interstate and Foreign Commerce:

> While the authority of the Secretary of Commerce under that act [the Air Commerce Act of 1926] to permit the operation of foreign private aircraft in this country is clear, his authority to permit the operation of a foreign air carrier to this country is in doubt. Consequently, a provision has been inserted in the present bill providing that no foreign air carrier shall operate to the United States unless it secures from the Authority a permit to do so. The issuance of such permits would be subject to the approval of the President.

Hearings on H.R. 9738 Before the H. Comm. on Interstate and Foreign Commerce, 75th Cong., 3d Sess. at 41 (1938).

The Civil Aeronautics Act of 1938 created a Civil Aeronautics Authority and conferred certain powers and duties upon an Administrator. Pub. L. No. 75-706, § 201, 52 Stat. at 980-81. The title, Civil Aeronautics Authority, was changed to Civil Aeronautics Board by the provisions of the President's Reorganization Plan 4 of 1940, § 7, 5 Fed. Reg. 2421, 2421–22, and certain changes have been made in the respective duties of the Board and the Administrator. *See Permits for Flight of Foreign Aircraft into the United States*, 40 Op. Att'y Gen. 136 (1941). For present purposes it is unnecessary to distinguish whether duties are vested in the Board or in the Administrator.

Following are pertinent provisions of the Civil Aeronautics Act of 1938:

Section 2 of the statute states that in the exercise and performance of its duties the Authority shall consider the following as being in the public interest—

> (a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense; . . .
>
> (d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense; . . .
>
> (f) The encouragement and development of civil aeronautics.

52 Stat. at 980.

Section 201(b) of the statute provides that there shall be in the Authority an Administrator, 52 Stat. at 981, and section 301 empowers and directs the Administrator "to encourage and foster the development of civil aeronautics and air commerce in the United States, and abroad," 52 Stat. at 985.

Section 402 provides in part—

> (a) No foreign air carrier shall engage in foreign air transportation unless there is in force a permit issued by the Authority authorizing such carrier so to engage; . . .
>
> (b) The Authority is empowered to issue such a permit if it finds that such carrier is fit, willing, and able properly to perform such air transportation and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority hereunder, and that such transportation will be in the public interest.

52 Stat. at 991.

The Authority is authorized by paragraph (f) of section 402 to prescribe the duration of any permit and to attach to it such reasonable terms as, in its judgment, "the public interest may require." 52 Stat. at 992.

Paragraph (g) provides that any permit issued under section 402 may, after notice and hearing, be altered, modified, amended, suspended, canceled, or revoked by the Authority whenever it finds such action to be in the public interest. 52 Stat. at 992.

Section 801 provides that the issuance, denial, transfer, amendment, cancellation, suspension, or revocation of the terms of any foreign air carrier permit issuable under section 402 shall be subject to the approval of the President. 52 Stat. at 1014.

Section 802 provides that the Secretary of State "shall advise the Authority of, and consult with the Authority, concerning the negotiation of any agreements with foreign governments for the establishment or development of air navigation, including air routes and services." 52 Stat. at 1014.

Section 1102 provides that in exercising and performing its powers under the Act, "the Authority shall do so consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign countries." 52 Stat. at 1026.

The statute gives recognition to "agreements" entered into by the United States with foreign governments "for the establishment or development of air navigation, including air routes and services."

It will be noted that under the Civil Aeronautics Act of 1938 a foreign air carrier is required to obtain from the Civil Aeronautics Board a permit to engage in foreign air transportation. The issuance of any permit is subject to the approval of

the President. It is understood that if the Two Freedoms Agreement and the Five Freedoms Agreement are entered into by the United States, foreign air carriers who wish to make non-stop flights or who want permission to land in the United States for non-traffic purposes will be required to obtain permits from the Civil Aeronautics Board in the same manner as other foreign air carriers who make stops in the United States for traffic purposes.

The Civil Aeronautics Act of 1938 (section 1107(i)(1) and (5)) amended section 6(c) of the Air Commerce Act of 1926 to read in part as follows:

> If a foreign nation grants a similar privilege in respect of aircraft of the United States, and/or airmen serving in connection therewith, the *Civil Aeronautics Authority* may authorize aircraft registered under the law of the foreign nation and not a part of the armed forces thereof to be navigated in the United States. *No foreign aircraft shall engage in air commerce otherwise than between any State, Territory, or possession of the United States (including the Philippine Islands) or the District of Columbia, and a foreign country.*

52 Stat. at 1028 (underscored portions added by the 1938 amendment).

The Civil Aeronautics Act of 1938 substituted for the provision in section 6(c) of the Air Commerce Act of 1926 that "no foreign aircraft shall engage in interstate or intrastate air commerce" the requirement that "no foreign aircraft shall engage in air commerce otherwise than between any State, Territory, or possession of the United States (including the Philippine Islands) or the District of Columbia, and a foreign country."

There is a question whether the Congress intended by this change in the provisions of the Air Commerce Act of 1926, and by the other provisions of the 1938 statute that I have mentioned, to prohibit foreign aircraft from making non-stop flights across the United States in connection with scheduled international air services. I find no such intention either in the language of the statute or in its history. Reading the provisions of section 6(c) of the Air Commerce Act of 1926, together with the provisions of the Civil Aeronautics Act of 1938, it seems to me that all that was intended was to prohibit foreign aircraft or foreign air carriers from engaging in interstate air commerce or intrastate air commerce.

Section 1 of the Civil Aeronautics Act of 1938 contains the following definitions:

> (3) "Air Commerce" means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any civil airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.

. . . .

(20) "Interstate air commerce," "overseas air commerce", and "foreign air commerce," respectively, mean the carriage by aircraft of persons or property for compensation or hire, or the carriage of mail by aircraft, or the operation or navigation of aircraft in the conduct or furtherance of a business or vocation, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the air space over any place outside thereof; or between places in the same Territory or possession (except the Philippine Islands) of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

Under section 6 of the Air Commerce Act of 1926, as amended, foreign aircraft may be authorized "to be navigated in the United States." It has been shown that this term includes non-stop flights. Section 6 further provides that no foreign aircraft shall engage in "air commerce" otherwise than between any State, Territory or possession of the United States and a foreign country. The term "air commerce" as used in section 6 before it was amended by the Civil Aeronautics Act of 1938 also includes non-stop flights.

The term "air commerce" in the last sentence of section 6(c) of the 1926 Act, after the subsection was amended by the 1938 Act, is somewhat ambiguous for the reason that the definition of "air commerce" in the Act of 1938 differs from the definition of "air commerce" in the Act of 1926. The term "air commerce" as used in the 1938 Act includes any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce. This definition, therefore, as well as the definition of "air commerce" in the 1926 Act, seems to include non-stop flights.

The Civil Aeronautics Act of 1938 is derived from S. 3845, 75th Cong., 3d Sess., and H.R. 9738, 75th Cong., 3d Sess.

S. 3845, as reported to the Senate and agreed to by the Senate, provided in section 1103:

> (b) . . . If a foreign country grants a similar privilege in respect of aircraft of the United States the Authority may authorize such foreign aircraft registered under the laws of such country to enter and be navigated within the United States. . . .
>
> (d) No foreign aircraft shall engage in interstate or overseas air commerce, or in the transportation of persons or property for compensation or hire, or be operated or navigated in the conduct or furtherance of a business or vocation, in commerce wholly within a State.

83 Cong. Rec. 6765 (1938).

H.R. 9738, as reported to the House and agreed to by the House, contained the amendment to section 6(c) of the Air Commerce Act of 1926, which was finally adopted in the 1938 Act, providing that no foreign aircraft shall engage in air commerce otherwise than between any state and a foreign country. 83 Cong. Rec. 7100, 7104 (1938).

The Senate bill repealed all of the provisions of the Air Commerce Act of 1926, and rewrote in the text of the bill such of the provisions that the Senate thought necessary to preserve. The House bill, on the other hand, repealed most of the 1926 Act, but preserved in existence and amended in certain respects other provisions of the 1926 Act. The conferees adopted the House amendment, dealing with "admission of foreign aircraft into the United States," without, however, indicating that in their opinion there was any material difference between the Senate provision and the House provision. Where there was any substantial or material difference between a Senate provision and a House provision, the conference report called attention to the difference. *See* H.R. Rep. No. 75-2635, at 80–81 (1938).

It thus appears that the provisions of the House bill and the Senate bill were each designed to prohibit foreign aircraft from engaging in interstate air commerce or overseas air commerce or air commerce wholly within a State. The amendment to the 1926 Act made by the 1938 Act authorizing foreign aircraft to engage in air commerce between the United States and foreign countries discloses no purpose to prohibit foreign air carriers from engaging in air commerce to the extent of making non-stop flights across territory of the United States or of landing in the United States for non-traffic purposes.

The Civil Aeronautics Act of 1938 is intended to promote the development of civil aeronautics and air commerce in the United States and abroad. The statute should be construed consistently with this purpose and its provisions. In permitting foreign aircraft to engage in air commerce between the United States and a foreign

country the Congress has disclosed no purpose to prohibit foreign aircraft from making commercial non-stop flights over the territory of the United States. Fairly construed, such non-stop flights of foreign aircraft fall within the provisions of the Air Commerce Act of 1926, as amended, and the provisions of the Civil Aeronautics Act of 1938.

A construction that would prohibit foreign aircraft from engaging in commercial non-stop flights undoubtedly would preclude the Government of the United States from obtaining similar privileges from foreign governments for American air carriers. Such a construction would hamper and restrict the development of civil aeronautics and air commerce in the United States. It would be contrary to the provisions and purpose of the Air Commerce Act of 1926, as amended, and the Civil Aeronautics Act of 1938.

III.

The administrative practice supports the construction that I have suggested. Under the 1926 Act a number of bilateral agreements were entered into by the United States with foreign governments granting liberty of passage over our territory in time of peace, and providing for the establishment and operation of regular air routes by air transport companies "across the said territory, with or without intermediary landing, . . . subject to prior consent of the other party given on the principle of reciprocity." *Air Navigation Agreement*, U.S.-Swe., art. 4, Oct. 9, 1933, E.A.S. No. 47, at 1-2; *Air Navigation Agreement*, U.S.-Nor., art. 4, Nov. 15, 1933, E.A.S. No. 50, at 1; *Air Navigation Agreement*, U.S.-S. Afr., art. 4, Sept. 20, 1933, E.A.S. No. 54, at 1-2; *Air Navigation Agreement*, U.S.-Den., art. 4, Apr. 16, 1934, E.A.S. No. 58, at 2. *See also Air Navigation Agreement*, U.S.-It., Oct. 31, 1931, E.A.S. No. 24; *Air Navigation Agreement*, U.S.-Gr. Brit., May 5, 1935, E.A.S. No. 76; *Air Navigation Agreement*, U.S.-Ir., Dec. 4, 1937, E.A.S. No. 110.

Since 1938 additional agreements have been entered into.

An agreement between the United States and Canada grants, subject to compliance with local laws and regulations, liberty of passage in time of peace above the territories of each of the parties. It is further agreed "that the establishment and operation by an enterprise of one of the Parties of a regular air route or services to, over, or away from the territory of the other Party, with or without a stop, shall be subject to the consent of such other Party." *Air Navigation Agreement*, U.S.-Can., art. 3, Aug. 1, 1938, E.A.S. No. 129, at 1.

In a further exchange of notes, the Government of the United States and the Government of Canada agreed, subject to compliance with their laws and regulations,

> to grant to air carrier enterprises of the other Party permits for non-stop services through the air space over its territory between two

> points within the territory of the other Party; provided however that inland non-stop services between the United States and Alaska shall be the subject of a separate understanding.

Air Transport Services Agreement, U.S.-Can., art. 3, Aug. 18, 1939, E.A.S. No. 159, at 1.

On July 15, 1939, the United States entered into an agreement with France by which each contracting party granted, subject to its laws and regulations, in time of peace, "liberty of passage above its territory" to the registered civil aircraft of the other party, and agreed that the establishment and operation of a regular air route or air transport service to, over or away from the territory of the other, with or without stop, should be subject to the consent of the other party. *Air Navigation Agreement*, U.S.-Fr., art. 4, Aug. 15, 1939, E.A.S. No. 152, at 2.

On June 14, 1939, the United States and Liberia entered into an agreement, effective June 15, 1939, providing that, subject to compliance with local laws and regulations, civil aircraft, not engaged in regular scheduled services, "shall be accorded liberty of passage above and of landing upon the territory of the other Party." *Air Navigation Agreement*, U.S.-Liber., art. 1(b), June 15, 1939, E.A.S. No. 166, at 3.

IV.

Accordingly, confining the advice in the manner that I have mentioned in this memorandum, I believe that the Department of State can be advised informally that the statutes permit the Government of the United States to enter into an agreement with the government of a foreign country granting on the principle of reciprocity, in respect of scheduled international air services, the privilege to fly across the territory of the United States without landing, and the privilege to land in the United States for non-traffic purposes, subject to compliance with the laws and regulations of the United States.

W.H. EBERLY
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Office of the Assistant Solicitor General

Reinstatement of a Federal Judge Following His Service in the Army

The reemployment provisions of the Selective Training and Service Act of 1940 are likely inapplicable to a federal judge.

If the Selective Training and Service Act of 1940 does not run to the benefit of federal judges, Judge William Clark has vacated his judicial office, under the circumstances presented here.

If the Selective Training and Service Act of 1940 does apply, then Judge Clark's resignation may be immaterial, and the prohibition in the Act of July 31, 1894 against holding a second office probably does not apply.

If Judge Clark's further judicial services are desired, he should be given a new appointment, subject to Senate confirmation.

December 19, 1945

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This is in response to your request for my views concerning the alleged right of former Judge William Clark to continue as judge of the United States Circuit Court of Appeals for the Third Circuit.

I.

My conclusions are as follows:

1. I seriously doubt that the reemployment provisions of the Selective Training and Service Act are applicable to a federal judge.

2. If the Act does not run to the benefit of federal judges, Judge Clark has vacated his judicial office, under the circumstances presented here.

3. If the Selective Training and Service Act does apply, then

   (a) Judge Clark's resignation may be immaterial; and

   (b) the statutory prohibition against holding a second office (Act of July 31, 1894) probably does not apply.

4. In any event, if Judge Clark's further judicial services are desired, he should be given a new appointment, subject to Senate confirmation.

II.

There seems to be no doubt that Judge Clark tendered his resignation to the President and that the President accepted the resignation without any qualification.

(Attorney Stryker's memorandum entitled "Judge William Clark—Memorandum in the Matter of his Right to Continue as Judge of the Circuit Court of Appeals" will be referred to as the "Brief" or "Br.")

Judge William Clark was appointed judge of the Circuit Court of Appeals for the Third Circuit on June 25, 1938. On March 24, 1942, he was commissioned a Lieutenant Colonel in the Army of the United States (Br. 6b). Mr. Stryker states that, on that very day (March 24, 1942), Judge Clark called upon President Roosevelt and submitted a letter in which he pointed out that "he had entered the service of the armed forces" and, for that reason, he preferred to resign from the Third Circuit Court of Appeals. It is further stated that President Roosevelt declined to accept the resignation, threw it into the waste basket, and suggested that Judge Clark obtain a leave of absence while serving in the army (Br. 6b).

Judge Clark's letter to the President reads as follows:

> This letter submits my resignation as Circuit Judge of the United States Circuit Court of Appeals for the Third Circuit. I am doing this because I am today taking the oath of office as Lieutenant Colonel in the Army of the United States. I am reporting to the General Staff for duty and I hope will eventually be sent to some field or foreign post where I can be useful. I thought that my military experience might well justify more than a transfer from one desk to another. I have most enthusiastically followed your awareness of what we have been facing in the world and with you I agree that "business as usual" or "courts as usual" must not continue. As I have on occasion expressed myself to that effect, I have wanted to practice what I have been preaching.
>
> It would be hypocritical for me to pretend that I should not like to have you accede to the request of my colleagues that the Congressional precedent be followed and leave of absence be granted. I have been a judge now for eighteen years, most of my adult life. I love the work and to give it up even for a short time is a great sacrifice. Because of that, however, I feel I am too closely concerned to be able to say what should be done. For this reason, I feel I must leave the decision to you.
>
> God keep you in your task of leading us all to victory.
>
> Respectfully,
>
> /s/ William Clark

Two days later, according to the Brief (at 7), which would be March 26, 1942, President Roosevelt wrote the following letter to Judge Clerk:

> Since talking to your the other day, I have been advised that under the law your voluntary entry into the military service will not permit the retention of your commission as United States Circuit Judge.
>
> Under the circumstances, I must regretfully accept your resignation from the judicial post.
>
> With appreciation for your long and able service, and for the patriotism which has moved you to your present choice, I am
>
> Very sincerely yours,
>
> /s/ Franklin D. Roosevelt

(A copy of this letter appears in Department of Justice File 44-5-1-3 and bears a pencil notation reading "The President signed this 3-25 & said No Publicity.")

It is stated in the Brief that Judge Clark did not receive the President's letter until "some days later on the Pacific Coast" while waiting transportation to the South Pacific, but it appears that on April 2, 1942, Judge Clark wrote the following letter to President Roosevelt:

> In these times I hesitate to trouble you with anything personal. However, as we talked about the matter, I feel I should.
>
> Our friend Frances [Francis], seems to me to have unnecessarily complicated the matter of my resignation. As I said to you, I was unwilling to follow the selfish precedent of our Congressional friends and therefore feel I should submit my resignation as a judge. You very generously rejected it and I think I am safe in saying that action on your part met with universal approval.
>
> I try to be careful about the law, particularly when dealing with my President and Commander-in-Chief. I was quite familiar with the statute on which the Attorney General has advised you. It was intended to prevent the receipt of two salaries. Only by a strained construction can it be extending to what is known as "incompatible office holding." However, I was careful about even that strained construction and discovered that the Act (it is found, I believe, U.S.C.A., title 8, Section 65) is in process of amendment, the amending bill being H.R. 6676 introduced March 11th and made retroactive to December 7, 1941. It would, therefore, be rather foolish to

> have me declared ineligible pending the passage of the bill which would make me perfectly eligible.
>
> Due to your kindness I am going to a far distant post and imagine I will be there for such length of time that I should have to insist on resigning in any event. It is my suggestion, however, that your recent letter might well be withdrawn pending a clarification of the legal situation. As I say, I think I shall have to resign in any event but I should be very reluctant to be forced out, so to speak, on the doubtful interpretation of a statute.
>
> My address from Saturday until probably Wednesday will be the Fairmont Hotel, San Francisco, where I could be reached by telegraph from General Watson, or in any other way.
>
> In conclusion, again thanking you for all your kindness, and be sure that I follow you with my usual affection and admiration.
>
> Yours sincerely,
>
> /s/ William Clark

Thereafter, Judge Clark received a telegram from the President, which did not reach Judge Clark "until some months later, after he arrived in Australia" (Br. 8).

The telegram read (Br. 8):

> Your letter of April second received. In view of the doubt which HR 6766 is intended to remove I think the wisest thing to do is to let your resignation stand.

III.

A.

It is very doubtful that the reemployment provisions of the Selective Training and Service Act of 1940, as amended, and related statutes, are applicable to a person holding the office of United States judge.

Judge Clark's claim of right to "reemployment" as a judge rests almost wholly upon the Selective Training and Service Act of 1940 and related statutes. Section 8 of the Selective Training and Service Act of 1940 provides in pertinent part:

> (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—
>
> > (A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay. . . .

Pub. L. No. 76-783, 54 Stat. 885, 890, *as amended by* Pub. L. No. 78-473, 58 Stat. 798 (1944).

The above reemployment benefits have been extended to all persons who voluntarily enter active service in the land or naval forces subsequent to May 1, 1940. Service Extension Act of 1941, Pub. L. No. 77-213, § 7, 55 Stat. 626, 627 (codified as amended at 50 U.S.C. app. § 357 (1940 Supp. IV)). Judge Clark entered the army voluntarily. The date of his discharge is not given, but it is stated that he received a certificate of satisfactory completion of training and service and that on or about August 13, 1945, he applied to the Attorney General for "reemployment" as a judge of the Circuit Court of Appeals. It is further stated that this application was made within ninety days after Judge Clark was released from training and service in the army (Br. 1–2).

It is extremely doubtful, in my opinion, that the reemployment provisions of the Selective Training and Service Act do, or can be properly held to, apply to the office of federal judge.

The reemployment provisions apply "if such *position* was in the *employ* of the United States Government" (emphasis supplied). Certainly, this phrase does not unambiguously include the office of federal judge. For some purposes, at least, a constitutional office holder may not be deemed an employee or his office a position. That the Act itself in various provisions distinguishes between "office," "position," and "employee" is not without significance in this connection. Thus, section 5(c)(1) of the Act provides for the deferment of persons holding certain offices. Section 5(c)(2) authorizes the President to provide for the deferment of any person holding an "office" under the United States or a state, territory, or the District of Columbia. Section 5(e) authorizes the President to provide for the deferment of persons in "employment in industry, agriculture, or other occupations or employment." *See also id.* §§ 10(a)(2) (disallowing deferment of an "officer, member, agent, or employee of the Selective Service System" by reason of that

status), 10(a)(3) (authorizing appointment by the Director of the Selective Service System of "officers, agents, and employees"; authorizing "any officer or employee of any department or agency of the United States"—or any person "assigned or detailed to any office or position," except on local boards—to carry out the provisions of the Act).

Moreover, the policy of the Act does not require an interpretation that the statutory phrase be held to cover the office of federal judge. Clearly, there was no intention to encourage federal judges to enter military service. On the contrary, it was probably contemplated that they should not join the armed forces, since section 5(c)(1) of the Act provided that they "*shall*, while holding such offices, be deferred" (emphasis supplied).

The policy considerations which led to the exemption of federal judges from training and service under the Act also lead to the conclusion that they are not covered by its reemployment provisions. In time of war, it is even more important than in time of peace that the normal functions of government be discharged efficiently. If judges were permitted to enter into active service in the armed forces without permanently vacating their offices, the normal functions of government would suffer. There is no authority for the appointment of an "acting" judge to substitute for another judge during the period of his military service. It must be assumed that the number of judges authorized for the Circuit Court of Appeals for the Third Circuit is necessary to carry on the duties of the court. There being no authority to appoint a temporary substitute, the work of the court would undoubtedly fall in arrears and be impeded by the extended absence of Judge Clark for more than three years. It is hardly to be supposed that the Selective Training and Service Act was intended to bring about such a result.

It is necessary to exclude the office of federal judge from the reemployment provisions of the Act, also, in order to avoid a serious constitutional question. It has been concluded that Judge Clark vacated his judicial office when he entered the army. Where an office has been vacated, the former incumbent can be restored to it only by a new appointment. Federal judges can be appointed only by the President with the advice and consent of the Senate (U.S. Const. art. II, § 2, cl. 2). Congress itself not only lacks power to appoint such officers of the United States, it also lacks power to prescribe qualifications for office which "so limit selection and so trench upon executive choice as to be in effect legislative designation." *Myers v. United States*, 272 U.S. 52, 128 (1926). Hence, when an office has been vacated, Congress lacks power to restore to office the former incumbent.

It may be noted that the President, with the advice and consent of the Senate, appointed another judge *vice* Judge Clark. The President and Senate appear to have assumed that Judge Clark would not be automatically restored to judicial office upon completion of his military service, since it is hardly likely that they would have assumed that there would necessarily be another vacancy which Clark could fill upon returning to civilian life. The action of the President and Senate

constitutes a practical construction which should be given considerable weight in this connection. The practice of the Department is also pertinent. This Office has heretofore concluded that the reemployment provisions of the Act do not apply to United States Attorneys who are commissioned by the President for a term of four years. (Dep't of Justice File No. 44-5-1-3, § 2.) The reasons underlying the decision with respect to United States Attorneys apply *a fortiori* to federal judges.

Considering all the provisions of the Selective Training and Service Act, in the light of the foregoing considerations, it seems extremely doubtful that the reemployment provisions are applicable to the office of federal judge.

B.

If the Selective Training and Service Act does not run to the benefit of Federal judges, Judge Clark has vacated his judicial office, under the circumstances presented here.

1.

The evidence shows that Judge Clark's resignation was validly accepted. The acceptance of the resignation vacated the judicial office.

When, on March 24, 1942, the subject was first brought to the attention of the President, it is said that he declined to accept Judge Clark's proffered resignation and insisted that Judge Clark should obtain a leave of absence. This situation was radically changed when the President did in fact, two days later, accept Judge Clark's resignation. The evidence from here on is all in writing, which is plain and unambiguous. The President's letter of March 26, 1942, to Judge Clark states unequivocally, "I must regretfully accept your resignation from your judicial post." There can be no doubt as to the President's intention to accept the resignation. This intention is emphasized by the concluding paragraph of the letter, which expresses appreciation of the Judge's long and able service.

It does not seem to be material whether or not the President acted "under a mistaken notion," as contended by Mr. Stryker, that Judge Clark's "voluntary entry into the military service" would not permit the retention of his commission as United States Circuit Judge. Even if it be presumed, solely for purposes of argument, that the President misapprehended the law or that that he was incorrectly advised, the resignation became effective when it was accepted, unless the acceptance was later retracted or withdrawn by the President.

There is no evidence that the President subsequently took any action to change the legal effect of his acceptance of Judge Clark resignation. On the contrary, the President's telegram to Judge Clark shows clearly that he did not intend to set aside the resignation or to change the situation created by the resignation and its

acceptance. The telegram to Judge Clark stated in part: "I think the wisest thing to do is to let your resignation stand."

Although the President's telegram is cast in language which might suggest that Judge Clark had the power to take some action with respect to his resignation which had already been accepted, there is no doubt that, in the absence of a court decision on the issue, only the President could set aside his own action in accepting the resignation. Since the President did not take any action to change, or suggest any change in, the legal status created by his acceptance of the resignation, it was not necessary, as suggested (Br. 8), that there should be any "concurrence or acquiescence" by Judge Clark in the President's telegram. It is contended that the President, on March 24, rejected the offer to resign, that this revoked the offer, and that thereafter when the President purported to accept, there was no offer pending (Br. 9). However, even if it be assumed that the President declined the offer at first, the evidence set forth above indicates that the parties deemed Judge Clark's resignation to be still pending, when it was accepted.

It seems clear that Judge Clark resigned and that the resignation was accepted by the President. The acceptance of the resignation vacated the judicial office.

2.

Under the Act of July 31, 1894 (5 U.S.C. § 62), there is a real question whether Judge Clark did not, by acceptance of a commission in the army, vacate his judicial office. The cases of Mr. Justice Murphy, Judge Marvin Jones and Judge Collett are distinguishable.

Mr. Stryker argues that no federal statute works a forfeiture of a judicial office by reason of a judge's acceptance of a commission in the armed forces; and that the provisions in 5 U.S.C. § 62 (1940) are limited to the executive department, and hence are not applicable to federal judges.

I think there is a real question whether, by virtue of 5 U.S.C. § 62, Judge Clark did not, by accepting the commission in the army, vacate his judicial office. In any event, double office-holding of the present type is in my opinion made unlawful by the statute.

The provisions of 5 U.S.C. § 62 are derived from section 2 of the Act of July 31, 1894, which provides in pertinent part:

> No person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to or hold any other office to which compensation is attached unless . . . specially authorized thereto by law . . . .

Id. ch. 174, § 2, 28 Stat. 162, 205.

It will be noted that there is nothing in the provisions of section 2 of the Act of July 31, 1894 (5 U.S.C. § 62) that would limit its application to the executive department or to any one of the three branches of the federal government. In fact, the Act of July 31, 1894 was a legislative, executive, and judicial appropriation act, and the history of section 2 of that act suggests no intention to limit its application to particular officers. S. Rep. No. 53-506 (1894); 26 Cong. Rec. 7423, 7844, 7855 (1894).

The Revised Statutes of 1878 (2d ed.), which antedated the Act of July 31, 1894, were divided into titles, arranged according to the subjects treated, in the same general manner in which the United States Code is divided. Title IV of the Revised Statutes was entitled "Provisions Applicable to All the Executive Departments." 18 Stat. pt. 1, at 26 (repl. vol.). Title XIX of the Revised Statutes was entitled "Provisions Applicable to Several Classes of Officer." *Id.* at 312. Since the Act of July 31, 1894 came after the promulgation of the Revised Statutes, it could not be allocated to its proper place in the Revised Statutes. It is significant, however, that Gould and Tucker, in their Notes on the Revised Statutes of the United States, which are arranged according to the subdivisions of the Revised Statutes, place section 2 of the Act of July 31, 1894 in title XIX, "Provisions Applicable to Several Classes of Officers." John M. Gould & George F. Tucker, *Supplement to Notes on the Revised Statutes of the United States* 160 (1898).

Section 158 of the Revised Statutes (title IV, 2d ed. 1878) provides that "[t]he provisions of this Title shall apply to the following Executive Departments," naming the departments then in existence. 18 Stat. pt. 1, at 26 (repl. vol.). This section, with amendments bringing within its terms executive departments later established, is now 5 U.S.C. § 1 (1940). Section 2 of the Act of July 31, 1894 is now 5 U.S.C. § 62. In view of the history of the Act of July 31, 1894, to which I have referred, its inclusion by the codifiers in title V of the United States Code is by no means conclusive or even persuasive of the fact that the statute was intended to apply only to the executive departments.

Further support for this view is found in the actions of the Attorney General and the courts. Thus, Attorney General Griggs, in an opinion dated August 18, 1898, discussed at length the application of the Act of July 31, 1894 to Circuit Judge William L. Putnam, in connection with the latter's appointment as commissioner under a convention with Great Britain relating to the seizure of vessels in the Bering Sea. *Office—Compensation*, 22 Op. Att'y. Gen. 184 (1898). The Attorney General held that the position of commissioner was not an office within the contemplation of the Act of July 31, 1894, but the whole discussion clearly shows that the Attorney General considered the statute to be applicable to judges. *United States v. Harsha*, 172 U.S. 567 (1899), involved one person holding two positions as clerk or other officer of the courts. The opinion of the Supreme Court shows that while under the facts in the case the Act of July 31, 1894 was not

applicable, the Court, nevertheless, considered the statute to be applicable to court officials.

I come now to consider the application of section 2 of the Act of July 31, 1894, to Judge Clark. As a judge of the Circuit Court of Appeals he held an office to which was attached a salary or annual compensation amounting to $2500. No citation is needed to support the statement that the office of Lieutenant Colonel in the Army of the United States is an "office" within the meaning of the 1894 statute. Statutory compensation is attached to the office of Lieutenant Colonel. Assuming that the Selective Training and Service Act is not applicable, no other statute authorizes a federal judge to be "appointed to or hold" the office of Lieutenant Colonel. Thus, on its face, the Act of July 31, 1894, seems to apply in Judge Clark's case.

It must be admitted, however, that the statute has not been authoritatively construed, and, in view of the tenure federal judges have under the Constitution (art. III, § 1), there is a question whether, by virtue of section 2 of the Act of July 31, 1894, a judge can be held to have vacated his judicial office by accepting a military commission, where his ascertained intent is to continue holding his judicial office.

It has been generally held, and I think rightly, that the statute does not apply in cases where no statutory compensation is attached to the second office. Thus, the statute is not applicable to Judge Marvin Jones and Judge Collett (Br. 6a). Judge Jones served as Food Administrator and Judge Collett is now serving as Economic Stabilizer. Both of these positions were created by executive order. Even if they were "offices" within the meaning of the Act of July 31, 1894, no statutory compensation is attached to either office and, therefore, the statute did not bar the holding by Judge Jones and by Judge Collett of the respective offices mentioned. There are precedents to support the action of judges serving on or in connection with international tribunals. Two recent examples are Mr. Justice Jackson and Judge Parker. Even if the international positions which they hold should be "offices," no statutory compensation has been attached by Congress to these "offices."

Mr. Stryker states that Mr. Justice Frank Murphy of the United States Supreme Court "served in the army" for three months during the summer of 1942. This statement is believed to be in error. It was first reported by the press about June 11, 1942, that Mr. Justice Murphy would accept a commission in the army. This report was later denied and it was subsequently reported that Mr. Justice Murphy was not commissioned in the army and did not serve in the army in any capacity, but that during the 1942 summer recess of the Supreme Court he spent some time as an observer or in some unofficial capacity with the army in the United States.

It will be recalled that, when it was desired to appoint as Secretary of Commerce Mr. Jesse Jones, who then held the office of Federal Loan Administrator,

the Congress passed a special statute authorizing Mr. Jones to hold both offices, his compensation being limited to that provided by law for the Secretary of Commerce. Act of Sept. 13, 1940, ch. 719, 54 Stat. 885.

Attorney General Sargent construed the Act of July 31, 1894 as being *in pari materia* with other statutes designed to prevent double salaries and as not prohibiting performance without additional compensation of the duties of two offices, one of which does not carry a statutory salary. *Holding Two Offices—Chief of Bureau of Efficiency*, 34 Op. Att'y Gen. 490 (1925).

On the other hand, the Supreme Court in *Harsha* (a case involving a person who at the time of the passage of the Act of July 31, 1894, was holding two offices) observed with respect to this statute that "[i]f the appointment to the other office were made after the passage of the act, it might well be held to be void, leaving the person in possession of the first office." 172 U.S. at 572. In *Pack v. United States*, 41 Ct. Cl. 414, 429 (1906), the court in a dictum indicated that "acceptance of" the second office might "of itself operate" to vacate the first office. In *Double Compensation*, 24 Comp. Dec. 604 (1918), it was held that acceptance of a second office incompatible with the first one vacated the first office. *Accord Civilian Employees Ordered to Active Military Duty—Leaves Of Absence*, 20 Comp. Gen. 158 (1940).

Since statutory compensation or salary is attached to the office of Lieutenant Colonel in the Army of the United States, Judge Clark could not waive or decline to accept such military compensation or salary and at the same time hold the military office. *Glavey v. United States*, 182 U.S. 595 (1901). *See also United States v. Andrews*, 240 U.S. 90 (1916); *MacMath v. United States*, 248 U.S. 151 (1918); *Bancroft v. United States*, 56 Ct. Cl. 218 (1921), *aff'd*, 260 U.S. 706 (1922) (per curiam). Attorney General Wickersham, after advising the Secretary of the Interior that a retired army officer might be appointed superintendent of an Indian school without additional compensation, the salary of which position had not been fixed by the Congress, said:

> Of course, I do not mean by anything I have said herein to intimate that persons may be appointed without compensation to any position to which Congress has by law attached compensation. [*Glavey v. United States*, 182 U.S. 595 (1901); *Miller v. United States*, 103 F. 413 (1900).] The position of superintendent of Indian schools, however, is one of those appropriated for in general lump sums [Pub. L. No. 62-335, 37 Stat. 518 (1912); Pub. L. No. 60-104, 35 Stat. 70, 73 (1908); Pub. L. No. 59-154, 34 Stat. 1015, 1020 (1907)] and to which, therefore, persons may be appointed either without compensation or with any compensation short of the maximum.

Employment of Retired Army Officer as Superintendent of Indian School, 30 Op. Att'y Gen. 51, 56 (1913).

I do not discuss the Act of May 10, 1916 (Pub. L. No. 64-73, § 6, 39 Stat. 66, 120 (codified as amended at 5 U.S.C. § 58 (1940))), since this statute is aimed only at receipt of double salaries or compensation, and since that question is not material to a question whether one person may hold two separate offices, to each of which statutory compensation is attached.

There appears, therefore, to be a real question whether under the Act of July 31, 1894, the acceptance by Judge Clark of the military commission and acceptance of compensation or salary attached to the military office, together with the performance of active military duties for an extended period, did not vacate his office of judge of the Circuit Court of Appeals.

3.

Under common law a public officer may not hold two incompatible offices, and acceptance of the second office vacates the first.

This rule, which is discussed at length in a note appearing in 1917A L.R.A. 216 (1917) ("Incompatibility of offices at common law"), may provide a useful guide to the construction of the statutes here involved. The question is further discussed in a note in 26 A.L.R. 142 (1923), entitled "Incompatibility of offices or positions in the military, and in the civil service," with citations of court decisions and authorities.

Attention is invited to *Lopez v. Martorell*, 59 F.2d 176 (1st Cir. 1932); *Montes v. Sancho*, 82 F.2d 25 (1st Cir. 1936); *Howard v. Harrington*, 96 A. 769 (Me. 1916); *Crosthwaite v. United States*, 30 Ct. Cl. 300 (1895), *rev'd*, *United States v. Crosthwaite*, 168 U.S. 375 (1897). *See also* Floyd Russell Mechem, *A Treatise on the Law of Public Offices and Officers* bk. II, §§ 419–431, at 267–75 (1890).

Rulings of the Attorney General holding that certain offices named are not incompatible are found in *District of Columbia—Naval Militia—Office*, 22 Op. Att'y Gen. 237 (1898), and *Holding Two Offices—Chief of Bureau of Efficiency*, 34 Op. Att'y Gen. 490 (1925).

It seems to be the general rule at common law that two offices are incompatible when their functions or duties are inconsistent or when they conflict with one another. Almost all state constitutions have provisions prohibiting state officials from holding an office of trust or profit under the United States. Prior to World War II, these provisions seem to have been strictly construed by the state courts. The reverse seems to be true with respect to decisions of the state courts involving state officers who have entered the armed forces of the United States. As stated in the note in the George Washington Law Review,

> Prior to the present war, there were many decisions—indeed, the weight of authority—finding forfeiture of state office, based upon a strict interpretation of the state constitutional provision. . . . However, since the beginning of the present war, the majority of opinions have held against forfeiture of state office even though the incumbent has become an officer of the United States.

The Serviceman's Right to Retain His State Office, 13 Geo. Wash. L. Rev. 453, 463 (1944–45) (footnotes omitted).

Most of the state court cases are collected in the above note in the George Washington Law Review and in a note in the Virginia Law Review, *Constitutional Law—Incompatibility of Offices—State Judge Called into Federal Service with National Guard Does Not Thereby Vacate His Judgeship*, 29 Va. L. Rev. 501 (1943). With respect to the state court cases, the writer of the latter note observes: "It would seem, therefore, that the courts prefer to do violence to the letter of a constitution rather than to penalize a person for his patriotism." *Id.* at 502.

In some states there are statutes authorizing the duties of an absent office holder to be performed by a substitute. This was true in two of the four cases cited in Mr. Stryker's brief (at 12–14). In *State ex rel McGaughey v. Grayston*, 163 S.W.2d 335 (Mo. 1942), a circuit judge was called into active service as a colonel in the National Guard. In discussing questions of incompatibility between the two offices, the court observed: "If the law did not permit a substitute to carry on the duties of the [judicial] office in his absence[,] a different question might be presented." *Id.* at 341. Likewise, in *Caudel v. Prewitt*, 178 S.W.2d 22 (Ky. 1944), the views of the court on the question whether the duties of the Commonwealth's attorney and those of an officer in the Officers' Reserve Corps on active duty are incompatible seem to have been considerably influenced by the fact that there was authority to appoint a substitute to perform the duties of the office of the Commonwealth's attorney during his absence in military service.

The question of incompatibility, alone, does not appear to be the basis for many state court decisions involving military personnel in World War II. Most of the cases seem to turn on constitutional and statutory provisions. However, in *Perkins v. Manning*, 122 P.2d 857 (Ariz. 1942), there was no disability under the Arizona constitution, but nevertheless, the court held that the office of Major in the National Guard on active duty with the army was incompatible with that of Superintendent of Health.

Under the circumstances of Judge Clark's absence from the bench for more than three years, part of the time outside of the United States, with no authority for the President or anyone to designate a substitute judge, it could be argued that his judicial and military positions were incompatible. However, in the light of the above discussion the contrary could also be argued. In this connection, the cases of Judge Collett, et al., should be borne in mind.

C.

1.

If the Selective Training and Service Act does apply, then Judge Clark's resignation may be immaterial.

The evidence shows that before Judge Clark tendered his resignation to the President, he had already entered the armed forces and been commissioned a Lieutenant Colonel in the Army of the United States (Br. 6b). Thus, it appears that Judge Clark left his position or office to perform training and service in the armed forces. Vacating his judicial office seems to bear more on the question of whether by so doing he intended to waive reemployment rights rather than on the question of whether or not he left his civil position to enter the armed forces. Assuming the Selective Training and Service Act to be applicable, I am inclined to believe that under the circumstances of this case, the court would be loathe to hold that the resignation in itself is a bar to reemployment under the statute. Where the statute applies it provides that a person who has been restored to his position "shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces" (*id.* § 8(c)). The regulations of the Selective Service System also take this view of the statute, it being stated that "the fact that a veteran signed a 'quit slip' or 'resignation' at the time of leaving his employment for entrance into the armed forces does not operate to defeat the legal right of reinstatement" (Br. 9).

2.

The statutory prohibition against holding a second office (Act of July 31, 1894) probably does not apply.

The Act of July 31, 1894, quoted in the preceding section, is designed to prevent one person from holding two lucrative offices. Even if it be assumed that the statute is applicable, it would not bar granting a furlough or military leave from a civil office to enable the incumbent of the office to perform training and service, as required under the Selective Training and Service Act. This requirement is expressly stated in the Selective Training and Service Act. I conclude, therefore, that if the Selective Training and Service Act does apply to Judge Clark, the Act of July 31, 1894, probably would not prohibit him from holding the military office and the judicial office at the same time.

D.

If Judge Clark's further judicial services are desired, he should be given a new appointment subject to Senate confirmation.

The evidence shows that President Roosevelt accepted unconditionally Judge Clark's resignation from his judicial office. If the Selective Training and Service Act is not applicable to Judge Clark, President Truman would not have power to restore Judge Clark to the judicial office, except by making a new appointment, subject to Senate confirmation. In view of the grave doubt as to the application of the Selective Training and Service Act, and the serious consequences as to other constitutional officers that would follow if Judge Clark should be restored to office under authority of the Selective Training and Service Act, the safest course seems to be for the President to make a new nomination and appointment subject to confirmation by the Senate, if it should be decided that Judge Clark's further service on the bench is wanted.[*]

HAROLD W. JUDSON
Assistant Solicitor General

[*] Editor's Note: Judge Clark was not nominated again to the Third Circuit. In 1949, he was appointed Chief Justice of the Allied High Commission Court of Appeals in Nuremberg, Germany, and served in that capacity until 1954.

Presidential Authority to Call a Special Session of Congress

The President has the power, under Article II, Section 3 of the Constitution, to call a special session of the Congress during the current adjournment, in which the Congress now stands adjourned until January 2, 1948, unless in the meantime the President pro tempore of the Senate, the Speaker, and the majority leaders of both Houses jointly notify the members of both houses to reassemble.

October 17, 1947

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL[*]

The question has been raised as to whether the President has authority to call a special session of the Congress in view of Senate Concurrent Resolution 33, pursuant to which the Congress now stands adjourned. That resolution provides that the Congress stands adjourned until January 2, 1948, unless in the meantime the President pro tempore of the Senate, the Speaker, and the majority leaders of both Houses jointly notify the members of both houses to reassemble.

Article II, Section 3 of the Constitution provides that the President

> may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper.

The following provisions of the Constitution are also pertinent:

> Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days . . . (art. I, § 5, cl. 4).

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[*] Editor's Note: In the Unpublished Opinions of the Assistant Solicitor General, this memorandum is accompanied by another memorandum from Attorney General Tom Clark to Clark Clifford, dated October 20, 1947, stating as follows: "I attach a memorandum, with which I concur, regarding the present authority of the President to call a special session of the Congress." It appears that Mr. Clifford was serving as Special Counsel to President Truman at the time, a position that later became known as White House Counsel. *See* Jeremy Rabkin, *At the President's Side: The Role of the White House Counsel in Constitutional Policy*, 56 Law & Contemp. Probs. 63, 66 (1993).

The OLC daybook additionally contains a cover memorandum from Assistant Solicitor General Washington to the Attorney General, dated October 17, 1947, stating as follows:

> Clark Clifford called to say that Taft had been quoted as saying that the President had no power to call a special session but that under the resolution of adjournment that power was vested in the majority leaders.
>
> Under the Constitution I think there is no doubt that the President has the power to call a special session, and the attached memorandum states that conclusion.

The "Taft" to whom the memorandum refers is likely Senator Robert A. Taft of Ohio.

> [T]he Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall be law appoint a different day (amend. XX, § 2).

The foregoing provisions appear to contemplate the existence of situations, comparable to the present, in which one or both houses of the Congress may stand adjourned or at recess until a future date other than that appointed by the Constitution or by a duly enacted statute. There is nothing in the Constitution to indicate, nor is there any other basis for believing, that the President's power to convene the Congress on extraordinary occasions depends upon the precise nature of the recess or the adjournment, that is, whether the adjournment is *sine die*, until a day certain, or until the majority leaders of the Congress find it in the public interest to reassemble the two houses.

The important factor would appear to be not the nature of the recess or adjournment but, rather, that the Congress is not in session and that an extraordinary occasion has arisen which requires that it be in session and that it convene, therefore, at a date earlier than it otherwise would. It is beyond question that the two houses of the Congress do not have the power, even by statute, to defeat the constitutional power of the President, under Article II, Section 3, to convene the Congress on such an occasion.

While the motives of the Congress in passing Senate Concurrent Resolution 33 may not be entirely clear, I may say that neither the resolution on its face nor its legislative history indicates a congressional intention to deny this power of the President.

I conclude, therefore, that the President has the power, under Article II, Section 3 of the Constitution, to call a special session of the Congress during the current adjournment.

GEORGE T. WASHINGTON
Assistant Solicitor General

Presidential Authority to Direct the Chairman of the Council of Economic Advisers Not to Comply With a Congressional Subpoena Seeking Testimony About Private Activities

Although there has been a practical construction, extending back to the earliest days of this Republic, of the respective powers of the Congress and the Executive, under which the President may order his subordinates in the Executive Branch to withhold information from the Congress when he deems such action to be in the public interest, it is difficult to justify application of this principle with respect to a congressional subpoena seeking an official's testimony regarding his private activities prior to the time of his close official connection with the President.

February 19, 1952

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

The question has been raised as to whether Mr. Leon R. Keyserling, Chairman of the Council of Economic Advisers, could be directed by the President not to appear and testify, in response to a subpoena issued by a subcommittee of a committee of the Senate, with respect to his political views and his expressions of these views, through a period of time beginning several years before he was made a member of the President's immediate official family after the enactment of the Employment Act of 1946, Pub. L. No. 79-304, § 4, 60 Stat. 23, 24, *codified at* 15 U.S.C. § 1023, which established the Council in the Executive Office of the President.

There are in general two theories on which such a refusal might be justified. Most frequently, support is found in the power of the President to hold information confidential in the public interest. Another theory that has been suggested is that the official subpoenaed cannot be spared from his conduct of the public business.

The latter ground would seem to be the most difficult to justify in the present case. The only cited instance of its recognition that has been found occurred in 1806, in a case where the Secretary of State, the Secretary of War, and the Secretary of the Navy had been summoned to appear in the United States Circuit Court in New York. Declining to honor the subpoena, they wrote to the judges presiding at the trial that, in view of the state of public affairs, the President was unable to dispense with their services at that moment, and that it was uncertain whether they would at any subsequent time be able to absent themselves from their official duties. In order not to prejudice the court in the exercise of its functions, however, they signified their willingness to give testimony by deposition. *United States v. Smith*, 27 F. Cas. 1192, 1194 (C.C.D.N.Y. 1806) (No. 16,342). Conceivably, the assertion could be made that the President is unable to spare Mr. Keyserling at any time, now or in the indefinite future, to appear before a congressional subcommittee, but it is questionable whether such a statement

would be accepted without serious reservations, either by the public or by a court sitting in judgment on a possible prosecution for contempt of Congress.

A more frequently used basis for the refusal of an official close to the President to obey a congressional subpoena exists in the well-established practice of the Presidents in their discretion to hold information of various types to be confidential in the public interest, and to decline to permit its divulgence outside of the Executive Branch of the government.

Instances of the practice may be adduced as far back as the administration of George Washington. In 1796, for example, President Washington declined to comply with a request of the House of Representatives to furnish it with a copy of the instructions to ministers of the United States who had initiated a treaty with Great Britain.

In 1803, in his famous opinion in *Marbury v. Madison*, Chief Justice Marshall recognized the right of Attorney General Levi Lincoln, who had been Secretary of State as of the time of the transactions in question, to refrain from disclosing to the court information which had been communicated to him in confidence. 5 U.S. (1 Cranch) 137, 143–44 (1803). In so doing, the Chief Justice recognized that "[t]he intimate political relation, subsisting between the president of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation." *Id.* at 169; *see also Appeal of Hartranft*, 85 Pa. 433, 443–50 (1877).

There are more recent instances as well of the refusal of an official of the Executive Branch to appear and testify before courts or congressional committees in response to direction or subpoena.

In 1905, Attorney General Moody advised the Secretary of Commerce and Labor, who had been subpoenaed by a state court to appear and testify before it, that he was not legally bound to obey the subpoena. *Executive Departments—Official Records—Testimony*, 25 Op. Att'y Gen. 326 (1905).

In 1909, President Theodore Roosevelt instructed his Attorney General not to respond to that portion of a Senate resolution which directed the latter to inform the Senate as to why legal proceedings had not been instituted against the United States Steel Corporation. In a strongly worded message to the Senate, the President declared that "I have instructed the Attorney-General not to respond to that portion of the resolution which calls for a statement of his reasons for nonaction. I have done so because I do not conceive it to be within the authority of the Senate to give directions of this character to the head of an executive department, or to demand from him reasons for his action. Heads of the executive departments are subject to the Constitution, and to the laws passed by the Congress in pursuance of the Constitution, and to the directions of the President of the United States, but to no other direction whatever." 43 Cong. Rec. 528 (1909).

In 1944, the Director of the Federal Bureau of Investigation refused to answer certain questions put to him by a congressional committee, and further declined to show the committee a copy of the President's directive to him on which his refusal was based. *Study and Investigation of the Federal Communications Commission: Hearings Before the Select Committee to Investigate the Federal Communications Commission*, 70th Cong. pt. 2, at 2334, 2337 (1944). In the same investigation, a congressional request for the appearance of several Army and Navy officers was refused. *Id.* pt. 1, at 14, 21, 67–68 (1943).

In 1948, the Secretary of Commerce refused to obey a House Resolution directing him to supply certain information relating to the loyalty of the head of a Bureau in that Department. H.R. Doc. No. 80-625 (1948).

These instances, and many others, are evidence of a practical construction, extending back to the earliest days of this Republic, of the respective powers in this field of the Congress and the Executive, under which the President may order his subordinates in the Executive Branch to withhold information from the Congress when he deems such action to be in the public interest.

It is difficult, however, to justify the application of the principle with respect to information relating, as I understand it, mainly to Mr. Keyserling's *private* activities *prior to* the time of his close official connection with the President.

In order to support application of the principle in this instance, it might be asserted that, because of Mr. Keyserling's current close official association with the President, the risk of his disclosing confidential official information would be present even though the questions themselves were directed to Mr. Keyserling's activities before the time of his intimate association with the President. Alternatively, it might be urged that if the President feels, on whatever grounds seem to him to be persuasive, that revelation of the information sought by the committee would be prejudicial to the public interest even though the information itself is not in the category of public documents or "official" information, he would be justified in directing Mr. Keyserling not to appear before a congressional subcommittee for the purpose of supplying such information while Mr. Keyserling is in his immediate official service. Such a position would represent an extension of the presidential prerogative beyond any precedent with which I am acquainted, and I am unable to predict whether or not it would command sufficient support to be sustained if the question were forced to litigation in a contempt prosecution.

It should be pointed out that, if the President should decide to direct Mr. Keyserling not to obey the subpoena, the refusal itself need not necessarily state the theory of justification on which the President is relying. In 1948, for example, in reply to subpoenas served personally upon John R. Steelman, one of the assistants to the President, directing him on two separate occasions to appear before a House subcommittee, Mr. Steelman did not appear but returned the subpoenas to the chairman of the subcommittee with a letter stating, among other things, that "in each instance the President directed me, in view of my duties as his assistant, not

to appear before your subcommittee." H.R. Rep. No. 80-1595, at 3 (1948). The theory underlying a refusal, however, would seem to be largely determinative of the degree to which public opinion receives the refusal with favor, and must of course be depended upon for a successful defense against a prosecution for contempt of Congress.

Even if the course of refusal to appear is decided upon, it is suggested that it might be wise for the President to demonstrate his desire to cooperate with the subcommittee in any appropriate inquiry which it might make, by authorizing Mr. Keyserling to submit to the subcommittee for its use a statement of affirmance or denial of specific allegations that have been made, together with such additional remarks as might be considered appropriate. It would appear that such a statement should meet the needs of the subcommittee. Nevertheless, the President might also make it known that he has further authorized Mr. Keyserling to transmit to the subcommittee, if that body after receiving and considering his statement should wish to ask him additional specific questions, such additional relevant information in his possession as may properly be disclosed. Such a course should succeed in preserving the confidential nature of information that ought not to be disclosed in the public interest, while at the same time lending every assistance to the committee in its work. For use in drafting such a letter to the subcommittee, if it is the decision of the President to follow that course, a suggested form which such a letter might take is attached.

In addition to the question of Mr. Keyserling's position in this matter, there has also been raised the question of the status of his wife, as to her obligation to obey a similar senatorial subpoena to appear and testify on the same alleged activities of Mr. Keyserling, and possibly of herself. I understand that Mrs. Keyserling is employed as an economist at the Department of Commerce.

As an employee of the federal government, it would appear that in general Mrs. Keyserling is equally subject with any other federal employee to a congressional subpoena. To justify her refusal to appear, it would seem necessary flatly to assert that her husband's position is such that the President cannot permit any federal employee to disclose the information requested. I know of no precedent for such action. On the other hand, there has been no previous instance, as far as I am aware, where the question has been raised.

JOSEPH C. DUGGAN
Assistant Attorney General
Executive Adjudicative Division

ATTACHMENT

My dear Mr. Chairman:

I am returning herewith the subpoena issued under date of _____, 1952, by the Subcommittee on Internal Security of the Senate Committee on the Judiciary, and signed by you as Chairman of that Subcommittee, directing me to appear before it on _____, 1952, to testify concerning certain alleged associations or conversations attributed to me. The President has directed me, in view of my duties as Chairman of the Council of Economic Advisers, not to appear before the Subcommittee for that purpose.

However, in view of the President's desire not to interfere with or impede appropriate inquiries of the Subcommittee, he has permitted me to transmit for the use of the Subcommittee the accompanying statement relating to certain specific allegations which have been reported in the newspapers. In my opinion, the statement speaks for itself and is complete. Should the Subcommittee, however, after receiving and considering this statement, desire any further specific information from me, I shall be glad to transmit to it in response to specific questions such additional relevant information as I may have which may appropriately be disclosed.

Sincerely,

_____

Constitutionality of an Appropriations Bill Denying Funds for Certain Civil Litigation

Legislation directing that no funds be expended in the preparation or prosecution of a civil lawsuit by the United States against a state public utility district regarding riparian rights in a river owned by the federal government is not subject to serious constitutional objection.

July 30, 1952

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

A question has arisen concerning the validity of section 208(d) of the act making appropriations for the Departments of State, Justice, Commerce, and the Judiciary for the fiscal year ending June 30, 1953, approved by the President on July 10, 1952. Pub. L. No. 82-495, 66 Stat. 549, 560.

Section 208(d) provides:

> None of the funds appropriated by this title may be used in the preparation or prosecution of the suit in the United States District Court for the Southern District of California, Southern Division, by the United States of America against Fallbrook Public Utility District, a public service corporation of the State of California, and others.

The case referred to in the subsection is a pending civil suit instituted by the government on January 25, 1951, in the United States District Court for the Southern District of California, Southern Division. The suit, which is in a pre-trial stage, seeks a judicial determination of the government's valuable riparian rights in the Santa Margarita River in California, which runs for approximately twenty-one miles through a 135,000 acre tract of land acquired by the government by purchase during the war and presently used as a naval establishment.

The question would seem to turn on whether or not section 208(d) represents a constitutional exercise of the legislative power of the Congress or constitutes an unwarranted encroachment on powers committed to the Judicial and Executive Branches of the government by the Constitution.

In *United States v. California*, the Supreme Court succinctly stated that the prosecution of claims on behalf of the United States is within the area of legislative control:

> An Act passed by Congress and signed by the President could, of course, limit the power previously granted the Attorney General to prosecute claims for the Government. For Article IV, § 3, Cl. 2 of the Constitution vests in Congress "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ." We have said that the

> constitutional power of Congress in this respect is without limitation. *United States v. San Francisco*, 310 U.S. 16, 29–30 (1940). Thus neither the courts nor the executive agencies could proceed contrary to an Act of Congress in this congressional area of national power.

332 U.S. 19, 27 (1947). A similar view was expressed by the district court in the pending litigation. *United States v. Fallbrook Pub. Util. Dist.*, 101 F. Supp. 298, 301, 307 (S.D. Cal. 1951).

It might be urged, however, that, granting the Congress's plenary power to dispose of federal property, it has not clearly and unequivocally done so here. Rather, it might be said that the Congress has merely rendered the rights of the United States temporarily unenforceable in the courts by denying to the Executive the funds necessary to the discharge of its constitutional functions in the protection and vindication of such rights in the courts of the United States. In this view it might be argued that the Congress's action ignores the constitutional separation of powers and vitiates by indirection the proper discharge of the constitutional duties of the Judiciary and the Executive. However, the force of this argument would seem dissipated by the Congress's admitted legislative control over the property involved. If the Congress had sought to do in an appropriation measure what it would have had no constitutional power to do directly, a wholly different situation would be presented. *Cf. Constitutionality of Proposed Legislation Affecting Tax Refunds*, 37 Op. Att'y Gen. 56 (1933) (Mitchell, A.G.); *Constitutionality of Resolution Establishing United States New York World's Fair Commission*, 39 Op. Att'y Gen. 61 (1937) (Cummings, A.G.).

However, in denying the use of the appropriated funds for the preparation or prosecution of the *Fallbrook* suit, it cannot be doubted that the Congress intended to waive, for the time being at least, the rights asserted by the government in that suit. Since it seems clear, as the Supreme Court has stated in the *California* case, that the Congress could do that by direct legislation, there would scarcely appear to be a constitutional bar to doing it through a prohibition contained in an appropriation act. *Cf. United States v. Dickerson*, 310 U.S. 554 (1940).

It would seem, therefore, that section 208(d) is not subject to serious constitutional objection.

JOSEPH C. DUGGAN
Assistant Attorney General
Executive Adjudications Division

Authority of Florida Police Officers to Make Arrests on the Basis of FBI Pick-Up Notices

The authority of a Florida police officer to make a warrantless arrest for an alleged violation of federal law depends on state law and cannot be based merely on the existence of an FBI pick-up notice.

January 28, 1953

MEMORANDUM OPINION FOR THE DIRECTOR
FEDERAL BUREAU OF INVESTIGATION

With your memorandum of October 9, 1952, addressed to the Deputy Attorney General and referred to this office for reply, you sent a copy of an opinion given by Attorney General Richard W. Ervin of Florida to the Florida Peace Officers' Association (dated September 15, 1952) containing answers to several questions regarding the authority to make arrests by municipal police officers of Florida. The portion concerning the federal government and this Department came under the heading of question 4. The question read:

> 4. What authority, if any, does a municipal police officer have to make arrests upon the basis of pick-up notices sent out by other officers?

The answer took the view that under the Florida statutes a municipal police officer (regarded as a peace officer, see page 2 of the opinion), who receives a pick-up notice from another peace officer of Florida showing that a named person is wanted for a felony under the laws of Florida, may accept the notice as reasonable ground to believe that a felony has been committed and reasonable ground to believe that the wanted person committed it, and has authority to arrest the wanted person. On the other hand, without assigning any reason the answer assumed a distinction in the case of pick-up notices received from federal officers and further assumed that a municipal police officer has only the common law right of a private citizen to arrest for a federal felony. If he should make an arrest, it was stated the municipal police officer acts at his peril (subject to liabilities indicated in the answer to question 5) when he arrests for a federal felony on the strength of the federal pick-up notice, even if it is sufficient to give him reasonable ground to believe that a federal felony has been committed and that the person to be arrested has committed it, because, as in the case of arrest by a private citizen, reasonable ground to believe that a federal felony has been committed will not suffice; a federal felony must actually have been committed and the municipal police officer must have reasonable ground to believe that the person to be arrested committed it. The answer further stated that a municipal police officer acting as a private citizen had no authority to arrest for a federal misdemeanor upon the basis of a pick-up notice.

You have pointed out that substantially all of the requests for pick-ups made by the FBI are in cases where federal warrants are outstanding and that the opinion does not distinguish between the situation where a warrant is outstanding and the situation where one has not been issued.

We think that the Florida opinion on this subject is unfortunate in this and several other respects. In testing the lawfulness of arrest, if we were to assume that an arrest by a state or municipal police officer pursuant to an FBI pick-up notice is an arrest without a warrant, there is no basis in federal or state law at the present time for distinguishing between the conduct of a state or local police officer when he arrests without a warrant for a state felony or a federal felony. The United States Supreme Court dealt squarely with the issue in *United States v. Di Re*, 332 U.S. 581 (1948). Speaking through Mr. Justice Jackson, the Court said:

> We believe, however, that in absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity. By one of the earliest acts of Congress, the principle of which is still retained, the arrest by judicial process for a federal offense must be "agreeably to the usual mode of process against offenders in such state."[8] There is no reason to believe that state law is not an equally appropriate standard by which to test arrests without warrant, except in those cases where Congress has enacted a federal rule. Indeed the enactment of a federal rule in some specific cases seems to imply the absence of any general federal law of arrest.
>
> . . . No act of Congress lays down a general federal rule for arrest without warrant for federal offenses. None purports to supersede state law. And none applies to this arrest which, while for a federal offense, was made by a state officer accompanied by federal officers who had no power of arrest. Therefore the New York statute provides the standard by which this arrest must stand or fall.

Id. at 589–90, 591 (footnote 8 below is from page 589 of the reported opinion).

The test which the Court applied (in this arrest by a state police officer for a federal war rationing violation) was section 177 of the New York Code of Criminal Procedure, which is a statute cast in general terms providing the

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[8] The Act of September 24, 1789 (Ch. 20, § 33, 1 Stat. 91), concerning arrest with warrant, provided: "That for any crime or offence against the United States, the offender may, by any justice or judge of the United States, or by any justice of the peace, or other magistrate of any of the United States where he may be found agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested, and imprisoned or bailed, as the case may be, for trial before such court of the United States as by this act has cognizance of the offense." This provision has remained substantially similar to this day. 18 U.S.C. § 591. *See also* 1 Op. Att'y. Gen. 85, 86.

authority of a peace officer to arrest without warrant in three types of cases. The statute resembles section 901.15, Florida Statutes, 1951 (which is quoted at length at a later point in this memorandum), except that the Florida statute is somewhat broader in its coverage. It is important for our purposes to observe that, although the arrest and subsequent search in *Di Re* failed because the arresting officer had no information which would lead him to believe that either a felony or misdemeanor had been committed by Di Re, the action of the arresting officer was tested by New York's statutes on arrest applicable to peace officers and not on any theory that the state peace officer was acting as a private citizen or that there was any special or different rule when he acted to arrest for a federal offense.

Di Re was followed shortly by *Johnson v. United States*, 333 U.S. 10 (1948), in which an arrest on a federal narcotics violation, effected without a warrant by federal narcotics agents and a city police officer, was tested by the law of the State of Washington applicable to state officers, the Court holding again that state law determines the validity of arrest without warrant.

Still later, the contemporaneous state of the law of arrest, as it was confirmed in *Di Re*, was described by Judge Learned Hand in *United States v. Coplon* as follows:

> In the absence of some controlling federal law the validity of an arrest for a federal crime depends upon whether an arrest for a state crime would have been valid under the state law, if made in the same circumstances. Whatever the doubts which might have existed as to this before 1948, they were laid in that year. At common law a private person, as distinct from a peace officer, had the power to arrest without warrant for a felony, committed in his presence, and for one, actually committed in the past, if he had reasonable ground to suppose that it had been committed by the person whom he arrested. A "constable" or other "conservator of the peace" had all the powers of arrest without warrant of a private person, and in addition the power to arrest for felony, although no felony had actually been committed, if he had reasonable ground to suppose that the person arrested had committed the felony. That was the only distinction between their powers and those of a private person. The law of New York is nearly, if not quite, in accord with this.

185 F.2d 629, 633–34 (2d Cir. 1951) (footnotes omitted).

It might be observed that the law of Florida as codified in section 901.15, Florida Statutes, 1951, is even more nearly in accord with the common law, as noted in *Dorsey v. United States*, 174 F.2d 899 (5th Cir. 1949). In this case, cited by the Florida Attorney General's opinion, the Court acknowledged the rule of *Di Re*; but the point of *Dorsey* is that investigators of the federal Office of Price Administration who the court said were not arresting officers, but who nevertheless made an

arrest without a warrant for a federal offense, had no greater rights than private persons in effecting the arrest. In Florida, though the statutes make no provision for arrest by a private person, the Court held he may nevertheless act under the common law rule to arrest for a felony committed in his presence. This was the situation in the case and the arrest was sustained. The opinion is entirely in accord with the views laid down by the Supreme Court and applied in the other circuits, as hereinafter noted. But the holding of the *Dorsey* case does not deal with the powers of arresting officers, and in our view is misapplied if it is used, as it appears to be used in the Florida Attorney General's opinion, to correlate the powers of arresting officers, state or federal, to that of private citizens in making arrests without warrants for federal felonies.

Illustrating that the Supreme Court opinions in *Di Re* and *Johnson* did not establish "new" law, but confirmed a long-accepted practice, is *Cline v. United States*, in which the court held that "[t]he procedure for making arrests which obtains under the state practice is applicable to arrests made for crimes against the United States," 9 F.2d 621, 621 (9th Cir. 1925) (citing *Prize Ship and Crew—How To Be Disposed Of*, 1 Op. Att'y. Gen. 85, 86 (1798)), and a group of early federal cases. Other cases in other circuits or districts which have followed and applied the *Di Re* case are *Pon v. United States*, 168 F.2d 373 (1st Cir. 1948), a narcotics case, holding the validity of arrest to be determined by the law of Massachusetts under which an arrest by an officer without a warrant is authorized if the officer has reasonable grounds to believe that a felony was committed by the defendant; *Brubaker v. United States*, 183 F.2d 894 (6th Cir. 1950), a Dyer Act violation, holding the legality of the arrest to be governed by the law of Tennessee, which provides that an officer may without a warrant arrest a person when a felony has in fact been committed and the officer has reasonable cause for believing the person arrested committed the felony; *United States v. Horton*, 86 F. Supp. 92 (W.D. Mich. 1949), upholding an arrest without a warrant by city police for a federal narcotics violation as tested by the law of Michigan, the pertinent of which are practically identical with subsection (2) and (3) of section 901.15, Florida Statutes, 1951; and *United States v. Guller*, 101 F. Supp. 176 (E.D. Pa. 1951), testing an arrest in a narcotics case by the Pennsylvania law which accords with the common law rules.

In the *Di Re* and subsequent cases involving arrests for federal offenses by state officers, apparently it was accepted without argument, so far as the opinions show, that a state officer may arrest for federal offenses. The issue was the standard to be applied. But the matter assumed had not gone without argument, earlier, and the leading case is probably *Marsh v. United States*, 29 F.2d 172 (2d Cir. 1928). In an opinion by Judge Learned Hand, the court held that a state police officer had authority to arrest for violation of federal law. The court pointed out that the state statute (section 177 of the New York Code of Criminal Procedure, the same statute later applied in *Di Re*, which provides that a peace officer may without a warrant arrest a person for a crime committed or attempted in his presence) had been

universally used by New York police officers in arresting for federal crimes regardless of whether they were felonies or misdemeanors. But the court went on to say:

> Moreover, we should be disposed a priori so to understand it. Section 2 of article 6 of the Constitution makes all laws of the United States the supreme law of the land, and the National Prohibition Law is as valid a command within the borders of New York as one of its own statutes. True, the state may not have, and has not, passed any legislation in aid of the Eighteenth Amendment, but from that we do not infer that general words used in her statutes must be interpreted as excepting crimes which are equally crimes, though not forbidden by her express will. We are to assume that she is concerned with the apprehension of offenders against laws of the United States, valid within her border, though they cannot be prosecuted in her own courts.

Marsh, 29 F.2d at 174.

The court went on further to reject the argument that Congress in enacting section 33 of the Judiciary Act of 1789, providing for arrest and commitment or bail of offenders against federal law by state officials "agreeably to the usual mode of process against offenders in such state," had by implication forbidden any state arrests for federal offenses without warrant. Act of Sept. 24, 1789, ch. 20, § 33, 1 Stat. 73, 91, *later codified as amended at* Rev. Stat. § 1014 (2d ed. 1878), 18 Stat. pt. 1, at 189 (repl. vol.), *and at* 18 U.S.C. § 591 (1925–26), *now* 18 U.S.C. § 3041 (1952). On the contrary, said the court anticipating what was later held in *Di Re*, it would be unreasonable to suppose that it had been the purpose of the Congress to deny to the United States any help that the states may allow. *Marsh* was followed in *United States v. One Packard Truck*, 55 F.2d 882 (2d Cir. 1932).

In the light of the well-established body of law and practice reviewed here, it would seem to us that there is no justification, and it is contrary to the precedents, to read section 901.15, Florida Statutes, 1951, particularly subsections (3) and (4), as purporting to exclude arrests for federal offenses. The Florida statute is cast in general terms like the New York, Michigan, Tennessee, Massachusetts, and other statutes construed by the courts, and its language and derivation afford no basis for the artificial distinction. Unfortunately in this regard the opinion of the Florida Attorney General in dealing with question 4 paraphrases rather than quotes the Florida statute, and in so doing inserts the word "Florida" in several places where it does not appear in the statute, thereby creating an erroneous impression. For your benefit there is set out verbatim the provisions of section 901.15:

> *When arrest by officer without warrant is lawful.*—A peace officer may without warrant arrest a person:

> (1) When the person to be arrested has committed a felony or misdemeanor or violation of a municipal ordinance in his presence. In the case of such arrest for a misdemeanor or violation of a municipal ordinance, the arrest shall be made immediately or on fresh pursuit.
>
> (2) When a felony has in fact been committed, and he has reasonable ground to believe that the person to be arrested has committed it.
>
> (3) When he has reasonable ground to believe that a felony has been or is being committed and reasonable ground to believe that the person to be arrested has committed or is committing it.
>
> (4) When a warrant has been issued charging any criminal offense and has been placed in the hands of any peace officer for execution.

These are, as said of the comparable New York statute by Judge Learned Hand, "general words used in her statutes," *Marsh*, 29 F.2d at 174, from which it is not to be inferred that there are excepted crimes which are equally crimes by the supreme law of the land though not forbidden expressly by Florida law. The notion that federal criminal law may be "foreign" to the states was laid to rest by the Supreme Court in *Testa v. Katt*, 330 U.S. 386 (1947), where the Court said:

> It cannot be assumed, the supremacy clause considered, that the responsibilities of a state to enforce the laws of a sister state are identical with its responsibilities to enforce federal laws. Such an assumption represents an erroneous evaluation of the statutes of Congress and the prior decisions of this Court in their historic setting. Those decisions establish that state courts do not bear the same relation to the United States that they do to foreign countries. The first Congress that convened after the Constitution was adopted conferred jurisdiction upon the state courts to enforce important federal civil laws, and succeeding Congresses conferred on the states jurisdiction over federal crimes and actions for penalties and forfeitures.
>
> Enforcement of federal laws by state courts did not go unchallenged. Violent public controversies existed throughout the first part of the Nineteenth Century until the 1860's concerning the extent of the constitutional supremacy of the Federal Government. During that period there were instances in which this Court and state courts broadly questioned the power and duty of state courts to exercise their jurisdiction to enforce United States civil and penal statutes or

> the power of the Federal Government to require them to do so. But after the fundamental issues over the extent of federal supremacy had been resolved by war, this Court took occasion in 1876 to review the phase of the controversy concerning the relationship of state courts to the Federal Government. *Claflin v. Houseman*, 93 U.S. 130. The opinion of a unanimous court in that case was strongly buttressed by historic references and persuasive reasoning. It repudiated the assumption that federal laws can be considered by the states as though they were laws emanating from a foreign sovereign. Its teaching is that the Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." It asserted that the obligation of states to enforce these federal laws is not lessened by reason of the form in which they are cast or the remedy which they provide.

Id. at 389–91 (footnotes omitted).

It would therefore seem to us that the Attorney General of Florida should have no difficulty in regarding subsection (3) of section 901.15 as ample authority for a municipal police officer to arrest without a warrant for a federal felony on a pick-up notice emanating from a federal officer. As the Attorney General of Florida has already indicated to be the case for state pick-up notices in state felonies, so the federal pick-up notice can equally afford the arresting officer reasonable ground to believe that a federal felony has been committed and that the wanted person has committed it. Reliance on hearsay, and on reasonableness of belief or reasonable or probable cause, in making arrests is supported in the cases, such as *United States v. Bianco*, 189 F.2d 716 (3d Cir. 1951); *United States v. Heitner*, 149 F.2d 105 (2d Cir. 1945), *cert. denied sub nom. Cryne v. United States*, 326 U.S. 727, *reh'g denied*, 326 U.S. 809; *Brinegar v. United States*, 338 U.S. 160 (1949).

To the extent that the FBI pick-up notice advises with particularity that a warrant of arrest has been placed in the hands of a federal marshal or deputy (who, it will be remembered, enjoys the corresponding powers of a state sheriff, 28 U.S.C. § 549, and is regarded as a peace officer, *In re Neagle*, 135 U.S. 1, 68–69 (1890)), or any other peace officer, it would also seem that the Attorney General of Florida could with propriety advise that subsection (4) of section 901.15, Florida Statutes, 1951, might also provide the basis for a Florida peace officer arresting the wanted person in reliance on the pick-up notice, whether the offense charged is a felony or misdemeanor (since the express wording of subsection (4) covers "any criminal offense"), without the Florida peace officer having the warrant in his possession. Rule 4(c)(1) of the Federal Rules of Criminal Procedure (1952) permits the federal criminal warrant to be executed "by a marshal or by some other officer authorized by law"; under Rule 4(c)(3), the officer need not have a warrant in his possession at the time of the arrest; and, under Rule 4(c)(2) and Rule 9(c)(1), the warrant may

be executed anywhere in the United States regardless of the district in which it issued. *See, e.g.*, *United States v. Donnelly*, 179 F. 2d 227 (7th Cir. 1950) (sustaining an arrest in Missouri made by FBI agents and Missouri police as the result of a teletype message from Chicago after issuance of a commissioner's warrant for the defendant's arrest in Chicago), *overruled on other grounds*, *United States v. Burke*, 781 F.3d 1234 (7th Cir. 1985).

In view of the doubt that may have been created by the portion of the Florida Attorney General's opinion we have discussed, it would be helpful if reconsideration of that portion of the opinion could be had.

While the problem, as it affects arrests for federal offenses, is one of interpretation and application of state law, it has nevertheless been made so by the action of Congress and the judicial extension of section 33 of the Judiciary Act of 1789 (18 U.S.C. § 3041). The correct application of the appropriate state law in the federal cases is therefore not only a matter of federal interest but may involve, in the legal sense, a federal question, *cf. Dice v. Akron, Canton and Youngstown R.R. Co.*, 342 U.S. 359 (1952); *Davis v. Wechsler*, 263 U.S. 22 (1923).

Since the oversight in interpretation ought to be susceptible of clarification by a further interpretation, it would be most unfortunate if, as is intimated in your memorandum, the matter would have to be rectified by state legislation. A request for, or enactment of, legislation on this point in one state might unnecessarily give rise to confusion and doubts in the other judicial districts of the United States where, so far as we know, no similar difficulty has been encountered under comparable state law.

No doubt you have available suitable means of raising the question with Attorney General Ervin, in order to bring about the desired correction. We might add that this office has in the past enjoyed good relationships with his office on a number of matters, and we would be quite willing to do whatever we can to assist.

J. LEE RANKIN
Assistant Attorney General
Executive Adjudications Division

Authority of the Department of Justice to Represent Members of Congress in a Civil Suit

The Attorney General has authority to represent members of the House of Representatives in a state court civil lawsuit if he determines that it would be in the interest of the United States to do so.

The question whether the congressmen should be represented by the Department is wholly discretionary and should be determined as a matter of policy.

March 26, 1953

MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL

A number of members of the House Committee on Un-American Activities, including the chairman, have been named as defendants in a suit in the California state courts by certain writers, actors, directors and other persons formerly employed in the motion picture industry. Although the complaint has not been examined in detail, it appears that the basic allegation is that certain producers and motion picture production companies conspired with the named members of the House Committee to deprive the plaintiffs of employment in the motion picture industry. The members of the House who are named in the suit are alleged to have acted both in their official and unofficial capacity in furtherance of the alleged conspiracy.

This memorandum is addressed to the question whether the Department may represent the congressmen in the defense of the suit.[1] It is concluded that authority to do so exists if it is determined that such action is appropriate as a matter of policy.

The statutes provide authority for the Attorney General and any other officer of the Department of Justice to appear in "any case in any court of the United States in which the United States is interested." 5 U.S.C. § 309. In addition, authority is conferred upon any officer of the Department directed by the Attorney General to do so "to attend to the interests of the United States in any suit pending in any of the courts of the United States, or in the courts of any States." 5 U.S.C. § 316. These statutes have been interpreted as granting to "the Attorney General broad

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[1] This also involved the question whether the Department must represent the congressman pursuant to the provisions of 2 U.S.C. § 118, which provides:

> In any action brought against any person for or on account of anything done by him while an officer of either House of Congress in the discharge of his official duty, in executing any order of such House, the district attorney for the district within which the action is brought, on being thereto requested by the officer sued, shall enter an appearance in behalf of such officer; . . . and the defense of such action shall thenceforth be conducted under the supervision and direction of the Attorney General.

The question of the applicability of this provision is being considered by the Claims Division and it is assumed that that Division will advise you separately of its conclusion.

powers to institute and maintain court proceedings in order to safeguard national interests." *United States v. California*, 332 U.S. 19, 27 (1947).

No cases have been found in which the Department has undertaken to represent congressmen pursuant to this broad general grant of authority. However, an analogy is presented in the case of *Booth v. Fletcher*, 101 F.2d 676 (D.C. Ct. App. 1938). In that case an action was instituted against a large number of persons, including justices of the Court of Claims, and of the District Court of the United States for the District of Columbia, by a disbarred attorney, alleging his disbarment had been pursuant to conspiracy to injure him. The Department of Justice appeared for the justices, and the plaintiff contended that the action was against the defendants in their individual capacity and that the Attorney General was not authorized to represent them. The court, recognizing the right of the Attorney General to represent the justices, stated:

> The law provides that the Attorney General, whenever he deems it for the interest of the United States, may, in person, conduct and argue any case in any court of the United States in which the United States is interested, or may direct the Solicitor General or any officer of the Department of Justice to do so. It does not limit his participation or the participation of his representatives to cases in which the United States is a party; it does not direct how he shall participate in such cases; it gives him broad, general powers intended to safeguard the interests of the United States in any case, and in any court of the United States, whenever in his opinion those interests may be jeopardized. The Attorney General occupies no subordinate position when he elects to enter such a proceeding, whether in person or by his representatives. On the contrary, the law contemplates that—consistent with the proper interests of private litigants and, so far as concerns the interests of the United States—he shall have full control of the prosecution or defense of the case.
>
> Moreover, it is not the function of the trial court to supervise the Attorney General in the exercise of the discretion thus vested in him. In such cases he appears as an officer of the court it is true, but he appears also, and primarily, as the head of one of the great executive departments to protect the interests of the United States, under a special and extraordinary statutory authorization. As appellants in their brief well say:
>
> > Again, if the right of the Attorney General to act rests upon a judicial determination of the Court where the suit is pending that the asserted unlawful, illegal, or unauthorized acts were lawful and within the authority and in the discharge of official duty, then

> the discretion of the Attorney General could be exercised only at a time when the occasion for its exercise had passed.
>
> Throughout the years since the first Judiciary Act the Attorney General and his representatives have appeared on many occasions, in actions between private persons where the interests of the United States were involved, and in behalf of officers of the United States who were sued by others. Under the well recognized rule this uniform practice may properly be regarded as having been approved by Congress through the adoption of later statutes, and particularly by the sweeping provisions of Section 359 [of the Revised Statutes].

Id. at 681–82 (footnotes omitted).

The reasoning in *Booth v. Fletcher* was followed in *People ex rel. Woll v. Graler*, 68 N.E.2d 750 (Ill. 1946). In that case a former government employee was sued, allegedly in his individual capacity, for having conspired, while a contracting officer for the Navy Department, with a competitor of the plaintiff to procure the cancellation of certain contracts the plaintiff had with the Navy Department. The trial judge in the state court entered an order directing the United States Attorney to withdraw his appearance on behalf of the defendant. The Supreme Court of Illinois issued a writ of mandamus requiring the judge to expunge the order from the records as void. It did so on the theory that the Attorney General has authority to appear in any suit in which the interests of the United States are involved and the courts will not interfere with his determination that such interests are involved even though the suit is between private persons.

The *Fletcher* and the *Graber* cases appear to supply clear authority for the Department to represent the congressmen if it determines that to do so would be in the interests of the United States. Those cases indicate that, if that determination is made, it is irrelevant that the United States is not a defendant, that the defendants are officials of a branch of the government other than the Executive Branch, that defendants are being sued as individuals, and that the suit is in a state court.

It is true that the Attorney General is not authorized to represent the defendants solely to vindicate their private rights. However, the issue in the instant case appears to be whether their acts were lawful and authorized or whether they were illegal and outside the scope of their authorization. This was the issue in both the *Fletcher* case and the *Graber* case and in each case the court deferred to the preliminary determination of the Attorney General, made for the purpose of his decision to represent the defendants, that the alleged acts were authorized. In doing so they pointed out that any other course would prevent the Attorney General from exercising his discretion until it was too late.

The foregoing merely establishes that the Attorney General has authority to represent the congressmen if he determines that it would be in the interest of the United States to do so. It in no way requires him to. Unless 2 U.S.C. § 118

imposes such a requirement, the question whether the congressmen should be represented by the Department is wholly discretionary and should be determined as a matter of policy.

J. LEE RANKIN
Assistant Attorney General
Executive Adjudications Division

Constitutionality of a Joint Resolution Requiring the President to Propose a Balanced Budget Every Year

A proposed joint resolution requiring the President annually to propose a budget in which estimated expenditures do not exceed estimated receipts, if made effective, would be invalid.

August 16, 1955

MEMORANDUM OPINION FOR THE ACTING DEPUTY ATTORNEY GENERAL

The proposed resolution, introduced on June 20, 1955, by Representative Cannon, provides, in its entirety:

> That hereafter, except in time of war or national emergency, the estimated expenditures contained in the Budget for the fiscal year for which presented shall not exceed the estimated receipts during such fiscal year: *Provided*, That if, in accomplishing such requirement it should become necessary to reduce or eliminate objects or projects which the President should deem it would not be in the public interest to do, such reductions or eliminations shall be enumerated in the message transmitting the Budget along with definite recommendations for financing their cost.

H.R.J. Res. 346, 84th Cong. The resolution, if made effective, would operate as a limitation on the Act of June 10, 1921, ch. 18, § 201(a), 42 Stat. 20, *codified as amended at* 31 U.S.C. §§ 11 *et seq.*, which provides that the President shall transmit to the Congress the budget, containing, among other matters, "estimated expenditures and proposed appropriations necessary in his judgment for the support of the Government for the ensuing fiscal year." 31 U.S.C. § 11(d) (1950).

Article II, Section 3 of the Constitution provides that "[h]e [the President] shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; . . . he shall take Care that the Laws be faithfully executed . . . ."

The proposed resolution would impinge upon the affirmative duties thus imposed upon the President in at least two significant respects. First, in order to fulfill his obligation to transmit information to the Congress, together with such measures "as he shall judge necessary and expedient," the President is given absolute discretion as to the character of information and recommendations he may choose to transmit. The proposed resolution plainly would frustrate the President's responsibility of advising the Congress of the needs of the nation, the measures for fulfilling those needs, as his judgment dictates, and the required appropriations therefor. It appears too clear for serious question that a legislative fiat which seeks to remove the President's unlimited judgment in communicating with the Congress is in violation of the cited provisions of the Constitution.

Second, the President's responsibility for the faithful execution of the laws requires that he be given sufficient funds to discharge his constitutional duty. The proposed resolution would have the obvious effect of preventing the proper performance of executive functions through the arbitrary compression of need up to but not exceeding estimated receipts. Consequently, through legislative processes unrelated to appropriations, the Congress will continue to enact legislation requiring administration and enforcement by the Executive Branch. However, since for many years past the nation has lived under an unbalanced-budget economy (apart from war and national emergency periods), the execution of the laws has required expenditures in excess of receipts. It is thus obvious that the President would be given laws to execute for which an appropriation request could not be made. The inevitable consequence of any such posture would be an inability to carry out the constitutional mandate of faithfully executing the laws.

It may also be observed that the achievement of a balanced budget, if that should be the will of the Congress, is primarily a legislative matter. Clearly, in largest part, it is the congressional enactments which require expenditures in excess of receipts. The resolution, therefore, attempts to shift non-delegable legislative functions to the Executive Branch, in violation of the principle of separation of powers.

The exception provided for times of war or national emergency do not relieve the resolution of its aspects of invalidity. The legal defects discussed would cause forbidden interference with the executive process during unexceptional periods.

It may be argued that the proviso for "public interest" objects or projects would permit the President to accomplish all necessary purposes since, presumably, all requests for appropriations would be for objects or projects in the public interest. If this were so, however, the resolution would need to be viewed as being wholly without purpose. Since, by plain intention, it attempts to place a limitation upon the President, we should not read it as being self-defeating.

For the foregoing reasons, we are of the view that Resolution 346, if made effective, would be invalid.

FREDERICK W. FORD
Acting Assistant Attorney General
Office of Legal Counsel

Constitutionality of Pending Bills Restricting the Withdrawal of Public Land for National Defense

Pursuant to his constitutional powers as Commander in Chief, the President, particularly in time of war or national emergency, may have authority without the authorization of Congress to reserve and use public lands for the training and deployment of the armed forces of the United States for national defense purposes.

If the above is true, any attempted restriction of this authority by Congress would be an unconstitutional invasion of the President's authority as Commander in Chief.

July 12, 1956

MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL

This is in reply to your memorandum dated April 18, 1956, requesting my comments on H.R. 10,362, H.R. 10,366, H.R. 10,367, H.R. 10,371, H.R. 10,372, H.R. 10,377, H.R. 10,380, H.R. 10,384, H.R. 10,394, and H.R. 10,396 (all pending in the 84th Congress). The stated purpose of the bills is "[t]o provide that withdrawals or reservations of more than five thousand acres of public lands of the United States for certain [defense purposes] shall not become effective until approved by Act of Congress."

Sections 1 and 2 of H.R. 10,366, 10,367, 10,372, 10,377, 10,394 and 10,396 provide that on and after the enactment of the bill, notwithstanding any other provisions of law, no public land, water, or land and water area of the United States, including public lands in the Territory of Alaska, shall be (1) withdrawn from settlement, location, sale, or entry, in order that it may be used for defense purposes, or (2) reserved for such purposes, except by Act of Congress. Sections 1 and 2 of H.R. 10,362, 10,371, 10,380 and 10,384 differ from the aforementioned bills in that these latter bills provide that the provisions of the Act will not apply in time of war or in a national emergency declared by the President or by act of Congress.

Article IV, Section 3, Clause 2 of the United States Constitution provides that "[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." However, from an early period in the history of the federal government, the President, without special authorization from Congress, has withdrawn public lands from private settlement and acquisition even though Congress had opened them to such occupancy. In the case of *Grisar v. McDowell*, 73 U.S. (6 Wall.) 363, 381 (1867), which involved the reservation of public lands for military purposes, the Supreme Court of the United States noted that the authority of the President to reserve public lands from sale and set them apart for public uses had been recognized in numerous acts of Congress.

The effect of H.R. 10,362 and the other captioned bills would be to restrict the President's authority to withdraw, for defense purposes, public lands or waters, in

excess of five thousand acres, from private settlement, location, sale or entry. A question is presented whether such a restriction can be placed on the President by act of Congress.

In the case of *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915), the Supreme Court passed on the question whether the President could constitutionally exercise regulatory power over the public domain. In the *Midwest Oil* case the Congress had opened the public lands containing petroleum to occupation, exploration and purchase by citizens of the United States. *Id.* at 465. In 1909 it was discovered that large areas of that public lands in California contained oil, and extensive exploitation was undertaken by private parties. This exploitation was so rapid that the Secretary of the Interior advised the President that unless public lands containing petroleum were withdrawn from entry, settlement, and exploitation, the United States Navy would be forced to buy its oil from private parties exploiting former federal public lands. In the light of these facts, the President, without the express authorization of Congress, withdrew "in aid of proposed legislation" large areas of the public domain in California and Wyoming. *Id.* at 467. This authority was properly challenged in the courts.

In passing on the matter, the Supreme Court noted that, though the Constitution gave Congress the power to dispose of and make all needful rules and regulations respecting the public lands, nevertheless, former presidents, without special authorization from Congress, had in a large number of cases, for a public use or purpose, withdrawn public lands from occupation and settlement by private parties. The Court further noted that this long-continued practice had never been repudiated by Congress; rather Congress had apparently recognized that the Executive was in an advantageous position to protect the public domain for public purposes and uses. The Court held that, while the Executive cannot by a course of action create a power, Congress by its long and continuous acquiescence in the exercise by the President of management over the public domain had given the President the implied power as Chief Executive to exercise administrative power over the public domain. Therefore, the Court held that, for a public use or purpose, the President had the power to withdraw the public lands in question from private settlement or occupation even though Congress may have previously opened the lands for such use. *Cf. Sioux Tribe v. United States*, 316 U.S. 317 (1942).

The Supreme Court has also indicated in both the *Midwest Oil* case and *Sioux Tribe* case that, since Congress had the constitutional power to regulate the use of public lands, it could by express action limit or revoke this implied delegation of power to the President. And in fact, in the situation involved in the *Midwest Oil* case, Congress subsequently did curtail somewhat the President's administrative powers over the public lands in question. *See* Pub. L. No. 61-303, 36 Stat. 847 (1910); *Withdrawal of Public Lands*, 40 Op. Att'y Gen. 73 (1941).

In arguing the *Midwest Oil* case, one of the contentions of the government was that the President, as Commander in Chief, had the power to issue the order in question for the purpose of retaining and preserving a source of supply of fuel for

the Navy. The Supreme Court, however, decided the case in favor of the federal government on different grounds.

As pointed out above, H.R. 10,362 and the other captioned bills would restrict the President's authority to use public lands for defense purposes. It is my opinion that the bills, especially those that do not contain a national emergency or war exception, present a serious constitutional question which the courts have never passed on in regard to the President's powers as Commander in Chief.

It is clear that the President's powers as Commander in Chief cannot be intruded upon by Congress, just as the war powers of Congress cannot be intruded upon by the President. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866). However, the nature and extent of the President's constitutional war powers are not clearly defined or specified in the Constitution. Article II, Section 2, Clause 1 of the Constitution simply provides:

> The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual service of the United States . . . .

Clearly, the President is Commander in Chief both in time of peace and war.

In reply to a request from the Senate for an opinion as to the powers of the President during a national emergency or state of war, Attorney General Murphy stated:

> You are aware, of course, that the Executive has powers not enumerated in the statutes—powers derived not from statutory grants but from the Constitution. It is universally recognized that the constitutional duties of the Executive carry with them the constitutional powers necessary for their proper performance. These constitutional powers have never been specifically defined, and in fact cannot be, since their extent and limitations are largely dependent upon conditions and circumstances. In a measure this is true with respect to most of the powers of the Executive, both constitutional and statutory. The right to take specific action might not exist under one state of facts, while under another it might be the absolute duty of the Executive to take such action.

Request of the Senate for an Opinion as to the Powers of the President "In Emergency or State of War," 39 Op. Att'y Gen. 343, 347–48 (1939).

The courts have several times dealt with the President's constitutional powers as Commander in Chief, but it is clear that in doing so they have not made a clear demarcation of the boundaries of said power. *See Fleming v. Page*, 50 U.S. (9 How.) 603, 614–15 (1850); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1867);

Prize Cases, 67 U.S. (2 Black) 635, 668, 670 (1863); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

In the case of the bills in question, the issue is whether the Congress can restrict the President, as Commander in Chief, in the use of public lands of the United States for national defense purposes. As pointed out above, the courts have never passed on this precise question. In this regard it should be noted that no private rights are involved, since a person has no private rights in the public lands until he has made a legal entry upon the lands, and they cease to become part of the public domain. *Reservation of Land for Public Uses*, 17 Op. Att'y Gen. 160 (1881).

The classic statement of the powers of the Commander in Chief is set forth in the case of *Fleming v. Page*, where it was said by Mr. Chief Justice Taney:

> As commander-in-chief, he [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy.

50 U.S. at 615.

As Commander in Chief it has been held that the President, during time of war, has powers of his own concerning the use of private property for national defense purposes. In the case of *United States v. McFarland*, 15 F.2d 823, 826 (4th Cir. 1926), it was stated that the President, as Commander in Chief, has the constitutional power in war time, in cases of immediate and pressing exigency, to appropriate private property to public uses in order to insure the success of a military operation, the government being bound to make just compensation thereafter. *See also Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851); *United States v. Russell*, 80 U.S. (13 Wall.) 623 (1871); *Roxford Knitting Co. v. Moore & Tierney, Inc.*, 265 F. 177, 179 (2d Cir. 1920). However, the Supreme Court has also held that the President, as Commander in Chief, cannot seize the property of private citizens in time of emergency, contrary to an act of Congress, to prevent interruption of the production of supplies for the armed forces. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

The Attorney General has indicated that the President, as Commander in Chief, has broad constitutional powers to obtain military bases for the national defense. In *Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers*, 39 Op. Att'y Gen. 484 (1940), Attorney General Jackson dealt with the question whether the President, pursuant to his powers to administer foreign relations and as Commander in Chief, could acquire by executive agreement, and without action by Congress, the right to obtain foreign naval and military bases for the armed forces of the United States. It was stated:

> One of these is the power of the Commander in Chief of the Army and Navy of the United States, which is conferred upon the Pres-

> ident by the Constitution but is not defined or limited. Happily, there has been little occasion in our history for the interpretation of the powers of the President as Commander in Chief of the Army and Navy. I do not find it necessary to rest upon that power alone to sustain the present proposal. But it will hardly be open to controversy that the vesting of such a function in the President also places upon him a responsibility to use all constitutional authority which he may possess to provide adequate bases and stations for the utilization of the naval and air weapons of the United States at their highest efficiency in our defense. It seems equally beyond doubt that present world conditions forbid him to risk any delay that is constitutionally avoidable.

Id. at 486.

In regard to the command, training, and deployment of the armed forces, the Attorney General has stated:

> Thus the President's responsibility as Commander in Chief embraces the authority to command and direct the armed forces in their immediate movements and operations designed to protect the security and effectuate the defense of the United States. As pointed out by the texts just cited, this authority undoubtedly includes the power to dispose of troops and equipment in such manner and on such duties as best to promote the safety of the country. Likewise of course the President may order the carrying out of maneuvers or training, or the preparation of fortifications, or the instruction of others in matters of defense, to accomplish the same objective of safety of the country. Indeed the President's authority has long been recognized as extending to the dispatch of armed forces outside of the United States, either on missions of good will or rescue, or for the purpose of protecting American lives or property or American interests.

Training of British Flying Students in the United States, 40 Op. Att'y Gen. 58, 61–62 (1941).

In *Fort Missoula Military Reservation*, 19 Op. Att'y Gen. 370 (1889), the Attorney General was called on to construe an act of Congress which applied to the Territory of Oregon and provided that all reservations and withdrawals of public land for the purpose of establishing forts should be limited to 640 acres. The Attorney General did not pass on any constitutional problems that might have been involved since he found that the fort in question was located in Montana which, although once a part of the Oregon Territory, was not in his opinion covered by the Act.

In the light of the analysis set forth above, it appears that, pursuant to the constitutional powers as Commander in Chief, the President, particularly in time of war or national emergency, may have authority without the authorization of Congress to reserve and use the public domain for the training and deployment of the armed forces of the United States for national defense purposes. If the above is true, any attempted restriction of this authority by Congress would be an unconstitutional invasion of the President's authority as Commander in Chief. I, therefore, recommend that the Department report that it is opposed to sections 1 and 2 of he captioned bills since the sections would impose an unwarranted restriction upon the President's powers to use the public domain for national defense purposes, and for the additional reason that the bills, particularly H.R. 10,366 and similar bills, present a serious question regarding an unconstitutional restriction of the President's powers as Commander in Chief.[*]

Section 3, which in identical language is a part of all the captioned bills, prescribes the information which is to be contained in an application by an agency of the Department of Defense for a withdrawal or reservation of any public land, water, or land and water exceeding in the aggregate five thousand acres. Section 4 of the bills would provide that the head of each military department or agency owning or controlling any military installation or facility, whether created in whole or in part through withdrawal or reservation of the public lands, must require that all hunting, trapping, and fishing on said military installation or facility be in accordance with the laws of the state or territory where the installations or facility is located and be licensed by the state or territory. The section further provides for cooperation between the federal and state officials to carry out the above measures. Section 5 of the bills provides for certain amendments to the Federal Property and Administrative Service Act of 1949, Pub. L. No. 81-152, 63 Stat. 377.

Section 6 of H.R. 10,362 and some of the other captioned bills provide as follows:

> All withdrawals and reservations of public land for the use of any agency of the Department of Defense, heretofore or hereafter made by the United States, shall be deemed made without prejudice to val-

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[*] Editor's Note: Two years later, in the 85th Congress, a bill similar to these became enrolled. In a subsequent opinion for the Deputy Attorney General on the constitutionality of the enrolled bill, also collected in this volume (*Constitutionality of Enrolled Bill Restricting the Withdrawal of Public Land for National Defense*, 1 Op. O.L.C. Supp. 192 (Feb. 24, 1958)), the Office took a narrower view of the President's preclusive authority as Commander in Chief. The Office observed that this 1956 opinion had failed to "refer to the majority per curiam opinion, in which Justice Reed concurred, that under Article IV, Section 3, Clause 2 of the Constitution the power of Congress over the public lands is 'without limitation,' *Alabama v. Texas*, 347 U.S. 272, 274 (1954) (per curiam), and the earlier decisions cited therein, including *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915)." 1 Op. O.L.C. Supp. at 194.

> id rights to the beneficial use of water originating in or flowing across such lands, theretofore or thereafter initiated under the laws of the States in which such lands are situated.

This section has been omitted from H.R. 10,367 and H.R. 10,380.

In language, the section is substantially identical to section 9 of S. 863, 84th Cong., 2d Sess., as amended, except that, in keeping with the more limited purpose of those bills, the words "for the use of any agency of the Department of Defense" have been added. It is believed that, if enacted, the section could completely destroy the value of any reservation for military purposes. The language employed is extremely broad and is capable of no other interpretation than that the water supply of any military installation, whenever established, can be appropriated completely by others at any future time. As it is not readily conceivable that any military installation can endure without some assured water supply, enactment of the section could preclude any further withdrawals or reservations of public lands for military purposes. It could also force the United States to purchase by way of eminent domain, in cases where reservations are presently being used for military purposes, rights which were not in existence when the lands were withdrawn or reserved for such purposes. Such grave objections can be eliminated, in the view of this Office, only by striking the words "heretofore or" and "or thereafter" from H.R. 10,362, and by striking the same words from the other bills of which section 6 is a part.

For the foregoing reasons, it is recommended by this Office that the Department report that it is opposed to the enactment of sections 1, 2, and 6 of the captioned bills. This Office wishes to defer to any comments the Lands Division may make regarding sections 3, 4, and 5 of the bills.

J. LEE RANKIN
Assistant Attorney General
Office of Legal Counsel

Applicability of Executive Privilege to Independent Regulatory Agencies

A case cannot be made for absolute exclusion of the so-called independent regulatory agencies from the doctrine of executive privilege.

Although free from executive control in the exercise of quasi-legislative and quasi-judicial functions, independent regulatory agencies frequently exercise important functions executive in nature.

As to the latter functions, the doctrine of executive privilege is as much applicable to regulatory commissions as to the executive departments and officers of the government.

November 5, 1957

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This is with reference to your memorandum of June 29, 1957, concerning the question raised by Senator Saltonstall in connection with the recent hearings on the nomination of J. Sinclair Armstrong as Assistant Secretary of the Navy as to the applicability of the doctrine of executive privilege to members of "independent" regulatory agencies, such as the Securities and Exchange Commission ("SEC"). In this regard you have asked us to review Mr. Armstrong's testimony and the earlier memorandum* originating from this Office which deals with the question. We have proceeded on the assumption, which you have asked us to make, that the President has authorized assertion of the privilege with respect to a demand for disclosure by a committee of Congress.

I. Summary

Because the subject is not only important and controversial but also obscure it has been necessary to canvass and discuss a considerable amount of material. This discussion is set out in detail below. Because of its length we have deemed it helpful to precede the discussion with the following summary:

The issue in the hearing on Mr. Armstrong's nomination was whether Mr. Armstrong as chairman of the SEC had properly asserted in 1955 the right to withhold from an investigating committee of the Senate communications between himself and the Assistant to the President, Governor Adams, concerning a proceeding before the SEC for the approval of the financing of the Dixon-Yates contract. Mr. Armstrong took that position upon the basis of the President's letter of May 17, 1954, to the Secretary of Defense advising him that the public interest required that, in testifying before congressional committees, employees of the

* Editor's Note: The referenced memorandum is understood to be *Assertion of Executive Privilege by the Chairman of the Atomic Energy Commission*, 1 Op. O.L.C. Supp. 468 (Jan. 5, 1956), included later in this volume and discussed in the body of this memorandum opinion at page 180.

Executive Branch must not disclose their internal communications. Finally, upon written advice from the Attorney General, Mr. Armstrong disclosed the substance of the communications. The Attorney General stated that the directive of the President was inapplicable to a quasi-judicial proceeding such as was involved before the SEC. He assumed, however, that the President's directive extended to the internal affairs of the SEC and to communications between the SEC and the Executive Branch regarding administrative matters.

At the hearing on Mr. Armstrong's nomination one Senator (Senator Russell) went so far as to question whether the SEC as an independent agency had any right even to consult the Attorney General on such matters. Senator Saltonstall said he would not attempt to pass on the question.

In our earlier memorandum, which dealt with the assertion of privilege by Admiral Strauss as chairman of the Atomic Energy Commission ("AEC") with respect to conversations with the White House concerning the repudiation of the Dixon-Yates contract, the position was taken that the President's letter was applicable, whether or not the AEC as a technical matter was part of the executive branch, since in the Dixon-Yates matter the AEC was exercising an executive function.

Some of the so-called independent regulatory commissions appear to take the view that whether or not the doctrine of executive privilege applies in their case depends upon the nature of the function involved. They assert that they are entitled to invoke the privilege where the communication relates to their executive or administrative functions but not if it involves their quasi-legislative or quasi-judicial functions. Other agencies, such as the Federal Trade Commission and the Interstate Commerce Commission, take the position, without attempting to differentiate between their functions, that as "arms of Congress" they are not bound by any doctrine of executive privilege.

Some legislative analysts of the problem, denying that the Executive Branch can itself properly assert the privilege, state that *a fortiori* an independent regulatory body cannot assert it. But apart from this broad proposition, they argue more narrowly that such bodies, in the information phases of their activities, are wholly independent from direction by the Executive Branch, and apparently they make no differentiation on the basis of whether the information relates to executive, quasi-legislative, or quasi-judicial functions.

No federal court has passed upon the precise question here involved. The decision which most nearly bears on the question is *Humphrey's Executor v. United States*, 295 U.S. 602, decided in 1935. Those who deny the applicability of the doctrine of executive privilege to the so-called independent regulatory agencies place great reliance on *Humphrey's Executor*. In that case the Supreme Court held that the independent status of the Federal Trade Commission prevented the President from removing its members within his uncontrolled discretion. But we think the case cannot be invoked as a complete charter of independence of the

regulatory commissions from executive control. The Court itself noted one exception, namely, that the President was vested with the power to select its members. Accordingly, even under *Humphrey's Executor* we believe that the doctrine of executive privilege could be properly asserted, for example, as to conversations between the President and members of an independent regulatory agency concerning the appointment of members. Moreover, where the agency has important executive functions it is our view that *Humphrey's Executor* cannot be cited to deny the existence of executive privilege at least where it relates to the exercise of such functions. In some areas Congress has itself subjected the independent regulatory commissions to executive control. For example, the President has been authorized to apply the federal employee's security program to all departments and agencies of the government. This includes the regulatory commissions. Hence, it is our opinion that they are also subject to the requirements of secrecy governing employee security matters. The President's power to remove commission members for inefficiency, neglect of duty, or malfeasance (Federal Trade Commission, Interstate Commerce Commission, Atomic Energy Commission, Civil Aeronautics Board) implies that he may exercise a certain amount of managerial authority over the commission. It would seem to follow that in this area the commission would be obligated to respect the President's wishes as to the release of communications between the commission and the President of his staff. That the independent regulatory commissions are not entirely divorced from the Executive Branch is further supported by the established practice which regards them as entitled to obtain formal legal advice from the Attorney General.

While the question of executive privilege has been the subject of considerable professional comment, no one has centered upon application of the privilege to the independent regulatory commission. The most comprehensive study and analysis of the relationship between the independent regulatory agencies and the President is that made by Professor Robert E. Cushman in *The Independent Regulatory Commissions*, published in 1941. The conclusions reached by Professor Cushman support those reached by us above.

We conclude in short that no valid case can be stated for excluding absolutely the so-called independent regulatory agencies from the doctrine of executive privilege. In many respects their functions and operations are subject to executive control. In such cases the doctrine of executive privilege should apply to the independent regulatory commissions to the same extent that it applies to the executive departments and officers of the federal government.

II. The Armstrong Testimony

On May 14, 1957, a hearing was held before the Senate Committee on Armed Services on the nomination of J. Sinclair Armstrong to be an Assistant Secretary of the Navy. Mr. Armstrong was interrogated by Senator Kefauver concerning his testimony in 1955 before the Subcommittee of the Senate Judiciary Committee on

Antitrust and Monopoly regarding certain aspects of the Dixon-Yates contract. *Nomination of J. Sinclair Armstrong to Be Assistant Secretary of the Navy: Hearing Before the S. Comm. on Armed Services*, 85th Cong. 6–36 (1957) ("1957 Hearing"). Senator Kefauver stated that on the basis of Mr. Armstrong's conduct at that time he would have to oppose Mr. Armstrong's nomination:

> The grounds on which I oppose Mr. Armstrong's confirmation arise out of his handling of certain important aspects of the Dixon-Yates case, in his role as Chairman of the Securities and Exchange Commission.

Id. at 6–7.

A. Armstrong's Testimony Before the Senate Subcommittee on Antitrust and Monopoly

In 1955 the Subcommittee on Antitrust and Monopoly initiated an investigation of the role of the First Boston Corporation, through one of its officers, Adolphe H. Wenzell, in the negotiations leading up to the Dixon-Yates contract. Mr. Wenzell had been retained by the Bureau of the Budget as a consultant in connection with certain features of the contract; it was claimed that there might be a possible conflict of interest arising from Wenzell's position with the First Boston Corporation.

At this time Armstrong was Chairman of the Securities and Exchange Commission, before which were pending applications of the Dixon-Yates companies for approval of their proposed financing of the contract project. On June 27, 1955, Senator Kefauver, who was a member of the subcommittee, wrote Mr. Armstrong inquiring as to the reasons for postponement of the hearings on the applications:

> On Monday, June 13, representatives of the First Boston Corp. and Adolphe H. Wenzell, formerly a vice president of the corporation, were scheduled to testify before the SEC in connection with the financing plans of the Mississippi Valley Generating Co., better known as the Dixon-Yates contract.
>
> Without notice or explanation the Commission directed the trial examiner to suspend the taking of testimony. The hearings were later resumed on Thursday, June 16, still with no explanation as to the reason for the cancellation.
>
> I should like to inquire from you whether any request or representation was made to the Commission with respect to the suspension of the hearings. I should also like to inquire whether any representation was made to the Commission by any official or representative of the

> Government asking that the hearing scheduled for June 13 can be canceled, or whether such cancellation was discussed by the Commission with any officials or representatives of any other branch of the Government.

Quoted in Power Policy—Dixon-Yates Contract: Hearings Before the Subcomm. on Antitrust and Monopoly of the S. Comm. on the Judiciary, 84th Cong., pt. 1, at 326 (1956) ("1955 Hearing"). On July 11, 1955, Mr. Armstrong advised Senator Kefauver that the SEC could not supply such information because, the application still being before the Commission, "we do not believe that it would be consistent with the orderly conduct of the administrative processes of this agency to subject to concurrent congressional review the manner in which this Commission is discharging its quasi-judicial functions in this proceeding"; and "this Commission is bound to respect the privileged and confidential nature of communications within the executive branch of the Government on the principles as set forth in the President's letter of May 17, 1954, to the Secretary of Defense." *Quoted in id.* at 327.[1]

Following the cancellation of the Dixon-Yates contract by the President, the proceedings before the SEC lapsed. Mr. Armstrong appeared before the subcommittee on July 12, 1955. He declined, however, to disclose any conversations he might have had with other officials in the executive branch concerning the postponement, stating that he was forbidden by the President's letter of May 17, 1954, to make such disclosure. *Id.* at 330–34.[2] When Senator Kefauver pointed out

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[1] The President in this letter, referring to an attached memorandum of the Attorney General, stated that "throughout our history the President has withheld information whenever he found that what was sought was confidential or its disclosure would be incompatible with the public interest or jeopardize the safety of the Nation." 100 Cong. Rec. 6621 (1954); Letter to the Secretary of Defense Directing Him to Withhold Certain Information from the Senate Committee on Government Operations, *Pub. Papers of Pres. Dwight D. Eisenhower* 483, 483 (May 17, 1954). And, the President continued,

> Because it is essential to efficient and effective administration that employees of the Executive Branch be in a position to be completely candid in advising with each other on official matters, and because it is not in the public interest that any of their conversations or communications, or any documents or reproductions, concerning such advice be disclosed, you will instruct employees of your Department that in all of their appearances before the Subcommittee of the Senate Committee on Government Operations regarding the inquiry now before it they are not to testify to any such conversations or communications or to produce any such documents or reproductions. This principle must be maintained regardless of who would be benefited by such disclosures.
>
> I direct this action so as to maintain the proper separation of powers between the Executive and Legislative Branches of the Government in accordance with my responsibilities and duties under the Constitution. This separation is vital to preclude the exercise of arbitrary power by any branch of the Government.

Id. [Editor's Note: *See also* 100 Cong. Rec. 6621–23 (memorandum of Attorney General).]

[2] Mr. Armstrong declined to answer, among others, the following question put by Senator Kefauver:

that the President's letter was directed to the Secretary of Defense, the head of an executive department, whereas the SEC was "a quasi-judicial agency" and "we are inquiring about . . . alleged interference, with the judicial work of the Securities and Exchange Commission," Mr. Armstrong responded that the President's letter applied to administrative functions of the Commission, which included the scheduling of hearings. *Id*. at 342.

Thereafter, the Attorney General advised Mr. Armstrong in response to the latter's request as follows:

> With regard to your statement that the Commission is bound to respect the privileged and confidential nature of communications within the executive branch of the Government on the principles as set forth in the President's letter of May 17, 1954, to the Secretary of Defense, I concur. Any communication within the Securities and Exchange Commission among Commissioners or the Commissioners and employees is privileged and need not be disclosed outside of the agency. Likewise, any communication from others in the executive branch to members of the Commission or its employees with respect to administrative matters comes within the purview of the President's letter of May 17, 1954.
>
> You inquired specifically whether when a proceeding is pending before the Commission a request to the Commission for an adjournment by someone in the executive branch outside the Commission is likewise covered. Because such a proceeding is quasi-judicial in nature, it is my opinion that such a request would not be covered by the President's letter of May 17, 1954, and once the proceeding is no longer pending before the Commission such information should, upon request, be made available by the Commission to an appropriate congressional committee.

Id. at 379 (quoting letter of Attorney General dated July 12, 1955). Thereupon Mr. Armstrong revealed that the request for adjournment came from Governor Adams,

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> [D]id you receive any communication or did you talk with anyone in the White House, Mr. Hughes, Mr. Dodge, Mr. Sherman Adams, or Mr. Bernard Shanley, Mr. Brownell, or anyone else, first advising you that a vote was coming up in the House, a big administration matter in a close vote, that this testimony might affect what was going to go on the Hill?
>
> That is all I am asking, just whether there was any interference with the hearing or not.

Id. at 336. There was pending before the House a bill providing for a $6,500,000 appropriation to construct a transmission line between the proposed Dixon-Yates plant and the existing TVA power lines. *Id.* at 417–22.

Assistant to the President, in the form of a telephone call on Saturday, June 11. *Id.* Mr. Adams stated that the reason for the request was to permit "certain Government attorneys" who were out of the city to determine whether they should object to the testimony of Mr. Wenzell. *Id.* at 380. Armstrong testified that upon informing the Commission of Governor Adams' request the Commission voted to continue the hearings. *Id.* He further testified that on June 15, 1955, Governor Adams advised him that "the Government attorneys" had decided not to participate, and that upon so informing the Commission it directed the hearings to resume. *Id*.

In the interrogation of Mr. Armstrong concerning the meaning of the Attorney General's letter, both Senators Kefauver and O'Mahoney agreed that a privilege existed as to communications within a Commission by members of the Commission with the employees. *Id.* at 383–84, 387–88. However, Mr. Armstrong, on the basis of the President's letter of May 17, 1954, refused to state whether or not his conversation with Governor Adams covered the bill pending before the House:

> [T]he question that you ask . . . has to do with a legislative matter in Congress and nothing to do with the pending proceeding before the Securities and Exchange Commission. . . . I am relying on the opinion of the Attorney General.

Id. at 419–20. The subcommittee (Senators Kefauver, O'Mahoney, and Langer) then asked Mr. Armstrong to obtain an opinion from the Attorney General as to whether the SEC would be permitted to make

> a full, detailed, and complete disclosure of all meetings, all conferences, all conversations, no matter where or when they took place, so long as they relate to the Dixon-Yates deal, and are outside of the purely administrative or housekeeping duties of the Commission as defined, and in purview of the Reorganization Act.
>
> This is the information we want and this is the clearance we hope Mr. Armstrong will obtain from the Attorney General.
>
> The investigation being conducted by this committee goes to the question of outside influence or alleged corruption in the Dixon-Yates deal. This committee wants to find out how far this outside influence or corruption went, what agencies of the Government were involved, and what influence or pressure, if any, was brought to bear on a quasi-judicial agency with statutory responsibilities under the Public Utility Holding Company Act.
>
> In these circumstances, there can be no privilege in the judicial proceedings. . . .

Id. at 429.[3]

At this point the hearing was adjourned to permit Mr. Armstrong to consult the Attorney General. He did so[4] and, upon resumption of the hearing on July 20, 1955, he testified that he was prepared to testify concerning the above matters: "Everything that I know about, I am prepared to testify to in that regard." *Id*. at 624. He then revealed that Governor Adams in connection with the request for a continuance of the SEC hearing had mentioned the pending appropriation bill, to which he replied: "Well, I don't know anything about that. It doesn't concern the Commission." *Id.* at 625. Governor Adams said: "That's right," and, according to Mr. Armstrong, "[t]hat is all there was to it," except that "[i]t is my best recollection today that the Government lawyers that Governor Adams was referring to in the part of the conversation I testified to the other day were the Attorney General, Mr. Brownell, and the special counsel for the President, Mr. Morgan." *Id*. Governor Adams said "he wanted these lawyers to consider the problem [of Wenzell's testimony], and they were away, and he couldn't get hold of them." *Id*. at 628.[5]

Mr. Armstrong refused, however, to state whether or not he had talked to Governor Adams about the matter since he had been summoned to testify at the hearing; he asserted that any such conversation was privileged under the President's letter to the Secretary of Defense. *Id*. at 634–35. On July 21, 1955, Governor Adams declined the subcommittee's invitation to testify, stating:

> Since every fact as to which I might give testimony either has been or could be testified to fully by other responsible Government offi-

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[3] The Reorganization Act of 1949, Pub. L. No. 81-109, 63 Stat. 203, directs the President to examine the organization "of all agencies of the Government" to determine the changes necessary to accomplish more effective management, *id.* § 2(a)(1) (codified at 5 U.S.C. § 133z(a)(1) (1952)), and for that purpose to prepare and submit plans of reorganization of any agency to the Congress, *id.* § 3 (5 U.S.C. § 133z-1). Section 7 of the Act defines the term "agency" to mean "any executive department, commission, council, independent establishment, Government corporation, board, bureau, division, service, office, officer, authority, administration, or other establishment, in the executive branch of the Government." 5 U.S.C. § 133z-5. Reorganization Plan 10 of 1950 transferred the executive and administrative functions of the SEC from the Commission to its Chairman. 15 Fed. Reg. 3175.

[4] Our files contain a copy of a letter from the Attorney General to Mr. Armstrong dated July 19, 1955, stating:

> As I view the matter, there is no bar by reason of the President's letter to the Secretary of Defense, or the principles involved, to disclosure of the entire conversation with Governor Adams, part of which related to his request for a short postponement of the Commission hearing in the Dixon-Yates proceedings.

[5] The Department's files (No. 115-016, § 3) disclose a letter from Senator O'Mahoney to the Attorney General dated February 20, 1956, asking whether Governor Adams had discussed the matter with the Attorney General. The letter replied under date of February 27, 1956, that the Attorney General had not had any such conversation.

> cials, and because of my official and confidential relationship to the President, I respectfully decline the subcommittee's invitation.

Id., pt. 2, at 676 (quoting letter). Thereafter, Mr. Armstrong testified that Mr. Morgan had informed him that the Attorney General had advised Mr. Morgan that while Mr. Armstrong was free to state that he had talked to Governor Adams since being summoned as a witness,[6] the conversation itself was privileged under the President's letter of May 17, 1954. *Id*. at 751.

B. Armstrong's Testimony at the Hearing on His Nomination

Senator Kefauver, reviewing Mr. Armstrong's testimony before the Antitrust and Monopoly Subcommittee, summarized his objection to Mr. Armstrong's confirmation as follows:

> [M]y point is that Mr. Armstrong did not live up to his trust in allowing Sherman Adams or somebody else to have him postpone a hearing without notice, without giving reasons; and he did not live up to his trust in allowing the SEC to be used, keeping information from getting to the House of Representatives which would affect legislation there, which they had a right to know.
>
> And, after having told our committee on three occasions that he had told the whole story, he came back and told more and more of it and then finally, in the end, pleaded executive privilege all over again. That is the story.
>
> I think it should be borne in mind that the Securities and Exchange Commission is a creature of Congress, it is a quasi-judicial agency. And my feeling is that anyone who would allow this procedure, and then refused to testify and pleaded executive privilege, and not telling about it, to say that he told the story, and then every time it develops that he had not told the full facts, simply is not worthy to be confirmed to this high office.

1957 Hearing at 13.

Mr. Armstrong defended his presentation of Governor Adams' request for a postponement of the SEC hearings to the Commission, and stated that he had withheld no information from the Antitrust and Monopoly Subcommittee with the exception of the single conversation with Governor Adams occurring after the subcommittee's hearing had begun. *Id*. at 18. He also defended the Commission's failure to advise the parties to the SEC proceeding of the reason for the postpone-

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[6] It appears that Governor Adams had telephoned Armstrong. *Id*. at 756.

ment, "[b]ecause the request had come from a person with respect to whom the executive privilege pertained." *Id*. at 22.

Senator Russell, chairman of the committee considering the nomination, stated that he had some question "as to whether an independent agency of the Government ought to consult with the Attorney General as to what is and what is not a proper matter of Executive privilege," *id.* at 34, and "I can conceive of cases where requests which are highly improper might be made from within the personnel of the White House to one in charge of an executive agency of Government, and I do not think that the opinion of the Attorney General in a case of that kind ought to bind one who has the responsibilities in connection with an independent agency which would preclude him from divulging those facts, either to a congressional committee or to a grand jury," *id*. at 35.

Subsequently, on May 16, 1957, in executive session, the committee reported the nomination favorably, by a vote of 9 to 1. The nomination was debated on the floor of the Senate on May 23, 1957; the SEC incident was again reviewed. 103 Cong. Rec. 7511–25 (1957). The gist of the criticisms was that it was improper for the executive branch to interfere with the quasi-judicial functions of a regulatory agency, and consequently that Mr. Armstrong as chairman of the SEC acted improperly in consenting to such interference. Senator Saltonstall, in supporting confirmation, stated as follows:

> Another instance in which Mr. Armstrong's actions have been assailed is his request of the advice of the Attorney General respecting the application of the doctrine of executive privilege and the extent to which Mr. Armstrong might testify about his conversation with Governor Adams. The Securities and Exchange Commission exercises quasi-judicial powers, in addition to administrative ones. For many purposes this status has served as the basis for differentiating the SEC and similar regulatory agencies from purely executive agencies of the Government. Without attempting to pass judgment on whether the Chairman of an Agency such as the SEC should seek his legal opinions from the Attorney General, the record will show that Mr. Armstrong sought this counsel in compliance with suggestions and recommendations of the members of the subcommittee before which he was testifying.

Id. at 7518. The debate terminated with confirmation, without a record vote having been taken. *Id*. at 7525.

III. The Office of Legal Counsel Memorandum

Apparently the memorandum which you have asked us to review is that prepared by a member of our staff under date of January 5, 1956.[*]

This memorandum was prepared as a result of Admiral Strauss's request for the Attorney General's opinion as to whether he was justified in asserting privilege in testifying on the repudiation of the Dixon-Yates contract before the Antitrust and Monopoly Subcommittee in December 1955. At that time he refused to disclose any conversations he may have had with the President or Governor Adams on the subject. We did not give him an opinion as he requested; instead a copy of the memorandum was exhibited to him. It concluded that the restrictions of the President's letter of May 17, 1954, applied to the subject of his interrogation.[7]

The memorandum reviews in considerable detail the constitutional and historical basis for the assertion of privilege by officials in the executive branch with respect to their internal communications. It then makes the following points concerning the applicability of that privilege to communications between Admiral Strauss, as Chairman of the Atomic Energy Commission, and the President or Governor Adams, concerning the Dixon-Yates matter:

> 1. "An examination of the historical precedents and the President's letter concerning the exercise of the executive privilege clearly indicate that the precedents and letter apply to the entire executive branch and function of the Government, and not alone to the ten executive departments."
>
> 2. The Atomic Energy Commission, the principal functions of which are executive in nature, is for the purpose of the privilege to be deemed a part of the Executive Branch.
>
> 3. Whether or not the Atomic Energy Commission is technically a part of the executive branch, it is, in the exercise of executive functions, subject to the requirements of non-disclosure imposed by the President's letter. In the Dixon-Yates matter it was exercising an executive function.

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[*] Editor's Note: As noted above, this memorandum is collected later in this volume (*Assertion of Executive Privilege by the Chairman of the Atomic Energy Commission*, 1 Op. O.L.C. Supp. 468 (Jan. 5, 1956)).

[7] In March 1957, Admiral Strauss renewed his request for an opinion. By memorandum dated April 11, 1957, this Office recommended that no opinion be given.

IV. Recent Views of the Executive and Legislative Branches and of the Regulatory Agencies Themselves

In this part of the memorandum we shall summarize views which have been recently expressed by the executive and legislative branches and by the regulatory agencies themselves as to the applicability of the doctrine of executive privilege to the regulatory agencies.

A. Views Expressed by the Executive Branch

The President's letter, it should be noted, says nothing about regulatory agencies as such. However, we do find an expression of the views of the Executive Branch in the Attorney General's letter to Mr. Armstrong of July 12, 1955. *Quoted in* 1955 Hearing, pt. 1 at 378–79. According to that letter, the nondisclosure principles set forth in the President's letter are applicable to administrative agencies, such as the Securities and Exchange Commission, with regard to (1) internal communications of the agency and (2) communications between the agency and others in the executive branch "with respect to administrative matters, but not as to such communications involving an exercise of the agencies' quasi-judicial functions." *Id.* at 379.

B. Views Expressed by the Regulatory Agencies

There is considerable material emanating from the agencies themselves, which is found in their replies to question 15 of the questionnaire submitted to them by the Special Subcommittee on Government Information of the House Committee on Government Operations, established in 1955 by the 84th Congress. These replies are contained in Staff of H. Comm. on Government Operations, 84th Cong., *Replies from Federal Agencies to Questionnaire Submitted by the Special Subcommittee on Government Information of the Committee on Government Operations* (Comm. Print Nov. 1, 1955).

Question 15 (to be answered only by "Independent Agencies") reads as follows:

> Please indicate your understanding of the application of the doctrine of executive communications (as grounds for withholding information) to:
>
> (a) Communications within the agency and other internal data.
>
> (b) Communications with other agencies.
>
> (c) Communications with the Executive Office of the President.

Id. at 3.

The views of the different agencies show some doubt and difference of opinion. Thus, the Federal Communications Commission ("FCC") stated that whether or not the doctrine of "executive communications" applied depended upon the nature of the agency function involved. It said that, while it was difficult to draw "precise lines between the Commission's quasi-judicial, quasi-legislative, and executive and administrative functions," it considered the following functions executive and administrative in nature: "(a) [p]ersonnel, (b) budgetary, (c) matters relating to the negotiating of treaties and negotiations with foreign governments." *Id.* at 167. It pointed out that it cooperated with the Executive Office of the President and the State Department with respect to negotiation and administration of treaties dealing with communications matters. *Id*.

As to quasi-judicial or adjudicatory functions the FCC stated that the doctrine of executive communications had no application and that any such communication was made a part of the public record. *Id.* at 168. But with respect to its administrative or executive functions, it was of the opinion that

> communications with other Government agencies and with the Executive Offices of the President may be withheld under the doctrine of executive communications. In this connection there is enclosed a copy of the President's letter of May 17, 1954, to the Secretary of Defense to which is attached a copy of a memorandum from the Attorney General to the President.

Id. at 168.

The Federal Trade Commission on the other hand stated that, since it was not "strictly" an executive agency (citing *Humphrey's Executor*), the doctrine of executive communications presented no serious problem and that "[t]he present Commission has not withheld any of its own information from Congress on that basis and does not intend to do so," including communications with the Executive Office of the President. *Id.* at 216. But as to earlier policy of the Commission it referred to a 1938 letter from the Commission to the Secretary of the President advising him that it respected the desire of the President against publication of any correspondence referred to "departments and establishments . . . from the White House." *Id.* The Interstate Commerce Commission stated categorically that "[a]s the ICC is an arm of Congress rather than part of the executive establishment, there has been no occasion for the doctrine of executive communications to arise." *Id*. at 303.

The National Labor Relations Board, after noting that it was uncertain as to the meaning of the doctrine of "executive communication," stated that it

> certainly would respect the wishes of another agency or the Executive Office of the President to maintain a confidence when requested or implied. In sum we assume that an "executive communication" in

> terms in which that phrase appears to be used, means a "communication" that is not for release generally.

Id. at 351. The Securities and Exchange Commission, apparently reluctant to express itself in detail, merely cited the Attorney General's letter of July 12, 1955, the President's letter of May 17, 1954, and other authorities. *Id*. at 433.[8]

C. Views Expressed by the Legislative Branch

1. Study by the Staff of the Committee on Government Operations

In May 1956, the House Committee on Government Operations (84th Congress) published a study by its staff entitled *The Right of Congress to Obtain Information from the Executive and from other Agencies of the Federal Government* (Comm. Print May 3, 1956). After suggesting the confusion as to the President's control over the independent regulatory commissions, the authors of the study seem to be of the view that with respect to withholding information from the Congress it is not necessary to resolve the question of amenability to presidential direction since a commission can be in no better position than executive agencies which have no such right: "In this regard they are both in the same legal status." *Id.* at 6.[9]

2. Report of the House Committee on Government Operations

This report states that

> In the information phases of their activities, the independent agencies must be truly independent from executive pressure.
>
> This independence is implicit in the legislation establishing the agencies and is spelled out in court cases. . . . In their quasi-legislative and quasi-judicial functions, the regulatory agencies need accept no interference from the executive bureaus. Specifically, the Budget Bureau has no authority to veto information or comments on

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[8] For the replies of the Civil Aeronautics Board, the Federal Power Commission and the Federal Reserve Board, *see id.* at 71, 190–91, 201–02. These agencies expressed no view, stating that the doctrine had never been invoked by them.

[9] As we understand them, the authors assert that under *Humphrey's Executor* it is clear that in discharging quasi-judicial and quasi-legislative functions the regulatory commissions act independently of executive control. While recognizing that in some instances there may be executive control as to administrative functions, this, they say, can be derived only from specific legislative grant. There is no separate discussion of the precise question which is the subject of this paper. However, we would assume that the position of the authors is that the regulatory commissions, no more than an executive department, are entitled to claim a right, even as to conceded executive functions, to withhold communications with the President or his staff.

> legislation transmitted from the independent agencies to Congress, nor does the Bureau have any final control, under the Federal Reports Act, over statistical information the independent agencies might request from private organizations and individuals.

H.R. Rep. No. 84-2947, at 87 (1956). Here the committee seems to follow substantially the views of the staff study, and, like that study, it appears to hold to the position that even as to what might normally be considered purely executive functions the independent regulatory commission cannot deny to Congress disclosure of communications with the President or his staff.

3. Study by the Staff of the Special Subcommittee on Legislative Oversight

On October 17, 1957, the Special Subcommittee on Legislative Oversight (of the House Committee on Interstate and Foreign Commerce, 85th Congress) released its staff study on the question of the subcommittee's right of access to the files and records of the Civil Aeronautics Board. *Memorandum of Law: Right of Access by Special Subcommittee on Legislative Oversight to Civil Aeronautics Board Files and Records* (Comm. Print Oct. 17, 1957).[10] Included in the 18 conclusions reached in this study is the conclusion that

> "Executive privilege" is not available to an independent agency like the Civil Aeronautics Board as a possible basis for the withholding of information from the Congress. The Civil Aeronautics Board, as the Supreme Court has recognized, is an independent agency whose members are not subject to the removal power of the President. Such a body cannot in any proper sense be characterized as an arm or eye of the Executive. It is instead an arm of the Congress, wholly responsible to that body.

Id. at vi. In the discussion of this conclusion, after denying that there is such a doctrine as "executive privilege," it is asserted principally on the basis of *Humphrey's Executor*, which we discuss in detail below, that in any event, administrative bodies like the Civil Aeronautics Board cannot withhold information from Congress under the claim of executive privilege. *Id.* at 4–8.

The Civil Aeronautics Board has filed with the Subcommittee a memorandum of its General Counsel dated October 16, 1957, in which it is argued, *inter alia*, that the Board "validly may, on behalf of the President and subject to his desires, withhold disclosure as to those matters which fall within the category of executive

[10] The memorandum was prepared by the Subcommittee's Chief Counsel and Staff Director, Bernard Schwartz. It is under current analysis and study by this Office.

functions until such time as a determination has been made and communicated to the Board by the executive branch with respect to disclosure" (p. 8).

4. Views Expressed at the Hearings Before the Senate Subcommittee on Antitrust and Monopoly and on the Armstrong Nomination

The Subcommittee on Antitrust and Monopoly (consisting of Senators Kefauver, O'Mahoney, and Langer) took the position that except for "purely administrative or housekeeping duties" the SEC was not subject to executive control. Senator Russell, speaking at the hearing on Mr. Armstrong's nomination, seemed to think that the independent status of regulatory agencies made it questionable whether they were even entitled to consult the Attorney General as to applicability of the doctrine of executive privilege. Senator Saltonstall, speaking in support of the nomination, stated that he would not attempt to pass judgment on that question.

V. Judicial Authorities and Professional Comment

No federal court has passed upon the precise question here involved. The decision most nearly bearing on the question is *Humphrey's Executor*, decided in 1935. *Humphrey's Executor* is usually cited by those who maintain that whatever may be the doctrine of executive privilege it has no application to the independent regulatory agencies of the federal government.

Humphrey's Executor, involving the Federal Trade Commission, held that the President could not, in his uncontrolled discretion, remove at his pleasure a member of the Federal Trade Commission before the expiration of his term. As a result it was concluded that a member so removed was entitled to recover on a claim for salary for the balance of his term. After reviewing the Federal Trade Commission Act, its legislative history, and the general purposes of the Act, the Court stated that they

> all combine to demonstrate the Congressional intent to create a body of experts who shall gain experience by length of service—a body which shall be independent of executive authority, *except in its selection*, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government.

295 U.S. at 625–26 (emphasis in original).

Other relevant quotations from the opinion are as follows:

> The commission is to be non-partisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi-judicial and

> quasi-legislative. Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of a body of experts "appointed by law and informed by experience."

Id. at 624 (quoting *Standard Oil Co. v. United States*, 283 U.S. 235, 239 (1931); *Illinois Cent. Ry. Co. v. ICC*, 206 U.S. 441, 454 (1907)).

> Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave, and, in the contemplation of the statute, must be free from executive control . . . . To the extent that it exercises any executive function—as distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government.

Id. at 628.

> The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted . . . .
>
> . . . The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there. . . .
>
> The power of removal here claimed for the President falls within this principle, since its coercive influence threatens the independence of a commission, which is not only wholly disconnected from the executive department, but which, as already fully appears, was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments.

Id. at 629–30.[11]

In a later decision it was held that *Humphrey's Executor* did not apply to the removal of a director of the Tennessee Valley Authority. *Morgan v. TVA*, 115 F.2d 990 (6th Cir. 1940), *cert. denied*, 312 U.S. 701 (1941). Said the Court:

> It is not to be aligned with the Federal Trade Commission, the Interstate Commerce Commission, or other administrative bodies mainly exercising clearly quasi-legislative or quasi-judicial functions—it is

[11] A lower federal court has similarly regarded the National Labor Relations Board. *Precision Castings Co. v. Boland*, 13 F. Supp. 877, 884 (W.D.N.Y. 1936).

> predominantly an administrative arm of the executive department. The rule of the Humphrey case does not apply.

Id. at 994.[12]

And, in another context, the Supreme Court has recognized that in certain of its functions the Civil Aeronautics Board was not free of executive control. *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948). Thus, with respect to the licensing of overseas air transportation, it was said that Congress had "completely inverted the usual administrative process. Instead of acting independently of executive control, the agency is then subordinated to it." *Id*. at 109.

What then is the full import of *Humphrey's Executor*? Is it to be interpreted as meaning that a regulatory commission established by Congress is so completely independent of the President that the doctrine of executive privilege has no meaning under any circumstances? In our opinion, the answer must be in the negative:

1. It is clear, as the Court itself noted, that where the statute vests in the President the power to appoint the members of the commission, to that extent the agency is not independent of executive authority. Accordingly, we think that even under *Humphrey's Executor* a member of a regulatory commission could validly invoke the doctrine of executive privilege as to conversations with the President or members of his staff concerning appointment of commission members.

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[12] Acting Attorney General Jackson had previously advised the President that *Humphrey's Executor* did not apply. *Power of the President to Remove Members of the Tennessee Valley Authority from Office*, 39 Op. Att'y Gen. 145 (1938). The Court of Claims has held that even though the War Claims Commission exercises quasi-judicial and quasi-legislative functions, nevertheless the President could remove a member of the commission at his pleasure because Congress had imposed no specific limitation on the President's removal power. *Wiener v. United States*, 142 F. Supp. 910 (Ct. Cl. 1956). The Supreme Court has granted certiorari and the case is now pending for argument. [Editor's Note: The decision of the Court of Claims was reversed by the Supreme Court in *Wiener v. United States*, 357 U.S. 349 (1958).]

Several cases of a peripheral interest may be noted: In *Appeal of SEC*, 226 F.2d 501 (6th Cir. 1955), the court sustained, in a suit between private parties, the validity of a regulation of the commission making confidential its internal investigative reports. The court did not differentiate between regulations issued by executive departments and those issued by administrative agencies. *In re Petition of the Finance Committee of the Legislature of the Virgin Islands*, 242 F.2d 902 (3d Cir. 1957), involved a contest between the Governor of the Virgin Islands and its legislature. A legislative committee was upheld in its claim to examine the records of the Commissioner of Finance as against the contention that the committee's authority had expired. The highest court of Massachusetts has inferentially recognized the existence of the doctrine of executive privilege. In *Opinion of the Justices*, 102 N.E.2d 79 (Mass. 1951), the state senate was advised that it was entitled, as against the claim of a violation of the constitutional doctrine of separation of powers, to inspect a report of the state industrial commission, there not being any question of diplomatic or military secrets. In *Morss v. Forbes*, 132 A.2d 1 (N.J. 1957), the Supreme Court of New Jersey held that a county prosecuting attorney could not assert as against the state legislature the doctrine of executive privilege since under New Jersey law it was not sufficiently clear that he was a part of the executive branch.

2. In *Humphrey's Executor*, the Court dealt with the power of Congress to limit the President's constitutional authority to remove members of the Federal Trade Commission appointed by him. This question was resolved by the Court on an evaluation of the President's control over the exercise of functions vested in the FTC. Where the primary functions of the commission are, like those of the Federal Trade Commission, quasi-legislative and quasi-judicial, and Congress has restricted the President's power of removal, the commission may be, with respect to the exercise of its quasi-legislative and quasi-judicial powers, free of executive control. Hence as to such matters it would seem that the members of the commission may not invoke the doctrine of executive privilege.

But what about an agency which has important executive functions? Professor Robert E. Cushman of Cornell University notes in his work, *The Independent Regulatory Commissions* (1941),[13] that the Interstate Commerce Commission, for example,

> carries on the executive task of enforcing the Safety Appliance Acts, a task certainly not "incidental" to the quasi-judicial job of rate making. The commission is obviously not purely executive in the sense in which the Humphrey opinion uses the term; neither is it purely quasi-legislative and quasi-judicial. This is true of most of the regulatory commissions and this means that their constitutional status was not determined by the Humphrey cases.

Id. at 457–58.

For our purposes, a more striking example is the Federal Maritime Board. That board was established by Reorganization Plan 21 of 1950 (15 Fed. Reg. 3178) as an agency within the Department of Commerce. The members of the board are appointed by the President, by and with the advice and consent of the Senate. With respect to its regulatory functions the board is independent of the Secretary of

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[13] Professor Cushman's book is a comprehensive study of American regulatory commissions. For our purposes, of particular interest is chapter VI, pages 417–78, dealing with the constitutional status of the independent regulatory commissions, and more specifically, pages 448–67, dealing with the relations of the commissions to Congress and the President. Professor Cushman does not discuss the precise question considered in this memorandum. However, the conclusions reached by him on the broader questions of the relationship of the commissions to Congress and the President support the conclusions reached by us in this memorandum. Another study (of little help here) is Wilson Keyser Doyle, *Independent Commissions in the Federal Government* (1939).

None of the commentators who have dealt with the question of executive privilege has, to our knowledge, discussed the matter from the special standpoint of the regulatory agencies. *See, e.g.*, Herman Wolkinson, *Demands of Congressional Committees for Executive Papers*, 10 Fed. B.J. 103 (pt. 1), 223 (pt. 2), 319 (pt. 3) (1949); Note, *Power of the President to Refuse Congressional Demands for Information*, 1 Stan. L. Rev. 256 (1949); Philip R. Collins, *The Power of Congressional Committees of Investigation to Obtain Information from the Executive Branch: The Argument for the Legislative Branch*, 39 Geo. L.J. 563 (1951); Joseph W. Bishop, Jr., *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 Yale L.J. 477 (1957).

Commerce. These functions include the regulation and control of rates, service, practices, and agreements of common carriers by water, making rules and regulations affecting shipping in the foreign trade, and investigating discriminatory practices in such trade. They are obviously quasi-legislative and judicial. The board also has important executive functions, including the making of investigations and determinations antecedent to the award of ship construction and ship-operating differential subsidy construction and ship-operating differential subsidy contracts and awarding such contracts. As to these functions it is expressly provided that the board is to be guided by the general policies of the Secretary of Commerce. *Id.* § 106, 15 Fed. Reg. at 3179.

It is obvious that an agency like the Maritime Board cannot be characterized, within the meaning of *Humphrey's Executor*, as independent of executive control or as an agency of the Legislative Branch. In the performance of its executive functions the Maritime Board must consider the policies of the executive branch as expressed by the Secretary of Commerce. Since the President therefore, through the Secretary of Commerce, exercises a supervisory role over the non-regulatory functions of the Maritime Board it is our opinion that communications between the board and the President with respect to such matters are privileged.

Another example, indicated earlier, is the Civil Aeronautics Board, one of whose statutory functions, 49 U.S.C. § 602, is to consult with and assist the State Department in the negotiation of agreements with foreign governments for the establishment or development of air transportation, air navigation, air routes and services. The conduct of foreign relations is constitutionally vested in the President. It is an area in which Presidents have vigorously asserted the right to withhold information from the Congress. It may be assumed *arguendo* that for purposes of removal of its members the Civil Aeronautics Board, like the Federal Trade Commission, is independent of executive control within the meaning of *Humphrey's Executor*. But that independence, which is derived from the board's exercise of quasi-legislative and quasi-judicial functions, cannot, in our opinion, extend to its participation in the negotiation of foreign agreements, a matter constitutionally vested in the President. Accordingly, in our judgment, the board in this respect would be obliged to respect the President's wishes concerning the release of information.

3. In some areas Congress has itself subjected the independent regulatory commissions to executive control. For example, under the Act of August 26, 1950, Pub. L. No. 81-733, § 3, 64 Stat. 476, 477, it has authorized the President to extend to all departments and agencies of the government the authority vested in specified department and agency heads to make summary suspensions and dismissals of their civilian employees in the interest of the national security. *See Cole v. Young*, 351 U.S. 536 (1956). Under Executive Order 10450, the President has extended applications of the provisions of the act to all departments and agencies, and by section 9(c) of the order the President has imposed a confidential status on "reports and other investigative material and information developed by

investigations." 18 Fed. Reg. 2489, 2492 (1950). We do not think that even though a regulatory commission may be characterized as "independent" for certain purposes, it may properly ignore the President's direction as to the confidential status of this material on the theory that it is not subject to presidential control.

4. In some instances Congress has vested in the President the power to remove members of the regulatory commissions for "inefficiency, neglect of duty, or malfeasance in office."[14] On this basis Professor Cushman makes the argument, which we think is a valid one, that the President under penalty of removal "may exact reasonable efficiency and absolute integrity" and

> can force an independent regulatory commission to comply with executive orders of general application unless Congress clearly indicates that such orders should not apply. These executive orders relate to a multitude of matters which affect the general efficiency of the government. . . . [T]he refusal of the commission to obey the President's executive order would constitute neglect of duty or misconduct, which would justify the removal of the commissioners from office.

Independent Regulatory Commissions at 464, 465. It is also to be noted that the President is vested with managerial responsibility over regulatory agencies by the Reorganization Act of 1949, 5 U.S.C. § 133z.

Where the President is vested with general managerial powers over a regulatory commission it would seem proper to regard the doctrine of executive privilege as extending to the disclosure of communications between the commission and the President or his staff concerning managerial matters.

5. As a matter of practice the independent regulatory commissions have never been regarded as so divorced from the executive branch as to preclude them from seeking, with approval of the President, the advice of the Attorney General. Thus, Attorney General Biddle gave such advice for the benefit of the Interstate Commerce Commission (*Extension of Time to Pay Rail Carriers' Freight Charges*, 40 Op. Att'y Gen. 353 (1945)); Attorney General Murphy furnished an opinion for the benefit of the Securities and Exchange Commission concerning the applicability of statutes regulating the transmission of publications free of postage (*Free Mailing of Publications by the Securities and Exchange Commission*, 39 Op. Att'y. Gen. 405 (1940)); and Acting Attorney General Keenan issued an opinion for the benefit of the Maritime Commission concerning the applicability of the civil service laws to appointments of attorneys to its staff (*Applicability of Civil Service Rules to Appointment of Attorneys by United States Maritime Commission*,

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[14] *See, e.g.*, 15 U.S.C. § 41 (Federal Trade Commission); 42 U.S.C. § 1802 (Atomic Energy Commission); 49 U.S.C. § 11 (Interstate Commerce Commission); 49 U.S.C. § 421 (Civil Aeronautics Board).

39 Op. Att'y. Gen. 50 (1937)). On June 15, 1955, you advised the President, upon submission of a question by the Federal Communications Commission, regarding the scope of statutory prohibitions against the disclosure of certain information (unpublished opinion, File No. 19-2-547).

These instances reflect the thought that at least with respect to matters not involving quasi-legislative or quasi-judicial functions it is appropriate to consider the independent regulatory commissions in administrative matters as part of the executive branch of the federal government. This would seem to be sound not only in legal theory but as a matter of good management.

VI. Conclusion

We conclude in short that a case cannot be made for absolute exclusion of the so-called independent regulatory agencies from the doctrine of executive privilege. Although free from executive control in the exercise of quasi-legislative and quasi-judicial functions, they frequently exercise important functions executive in nature. As to these they are subject to executive control. From a managerial standpoint they may also be amenable to executive direction. Whatever may be the validity of the argument that the doctrine of executive privilege is inapplicable if attempted to be invoked with respect to the performance of a quasi-legislative or quasi-judicial function, it does not follow that the doctrine is equally irrelevant in relation to the performance of executive and managerial functions. As to the latter we think the doctrine of executive privilege is as much applicable to regulatory commissions as to the executive departments and officers of the government.

W. WILSON WHITE
Assistant Attorney General
Office of Legal Counsel

Constitutionality of Enrolled Bill Restricting the Withdrawal of Public Land for National Defense

The constitutionality of an enrolled bill providing that withdrawals of public lands for national defense purposes shall not become effective until approved by act of Congress involves a question as to the relationship between the President's constitutional powers as Commander in Chief and the constitutional authority of Congress over the public lands.

The exception that would make the enrolled bill's restrictions inapplicable in time of national emergency declared by the President may be adequate to resolve whatever doubt there may be as to the constitutionality of the bill in favor of a conclusion that it makes sufficient provision for the exercise in time of national emergency of the President's powers as Commander in Chief.

February 24, 1958

MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL

As requested in your memorandum of February 20, 1958, there are submitted the following comments on this enrolled bill "[t]o provide that withdrawals, reservations, or restrictions of more than five thousand acres of public lands of the United States for certain purposes shall not become effective until approved by Act of Congress, and for other purposes." H.R. 5538, 85th Cong. (1957).

The bill presents a constitutional question which is not entirely free of doubt and to which it may be advisable to invite attention. It concerns the relationship between the powers of the President as Commander in Chief and the authority of Congress over the public lands.

Section 1 of the bill would provide that, notwithstanding any other provisions of law, except in time of war or national emergency, hereafter declared by the President or by Congress on and after the date that the bill becomes law, its provisions shall apply to the withdrawal and reservation for, restriction of, and utilization by, the Department of Defense for defense purposes of the public lands of the United States, including those in the Territories of Alaska and Hawaii. There is a proviso to section 1 concerning the applicability of the bill to various classes of federal lands and waters. I should prefer not to express any views respecting the matters referred to in the first three subparagraphs in that proviso until I have the benefit of the comments of the Lands Division.

The fourth subparagraph in that proviso would except from sections 1, 2, and 3 of the bill (a) those reservations or withdrawals which expired due to the ending of the unlimited national emergency of May 27, 1941, and which have since been and are now used by the military departments with the concurrence of the Department of the Interior, and (b) the withdrawals of public lands for three specified military facilities. The President in Proclamation 2487, dated May 27, 1941, proclaimed the existence of an unlimited national emergency, 55 Stat. 1647, 3 C.F.R 234 (1938–1943), and in Proclamation 2974, dated April 28, 1952,

declared that such emergency was terminated that day upon the entry into force of the Treaty of Peace with Japan, 66 Stat. C31, 3 C.F.R. 30 (Supp. 1952).[1]

By reference to the dates of these proclamations there can be ascertained the otherwise unspecified military projects and facilities on reservations or withdrawals of public lands which would not be subject to sections 1, 2, and 3 of the bill. According to the conference report on the bill, the fourth proviso would exempt military projects and facilities on 19 specific areas of public lands from the requirement that Congress approve public land withdrawals in excess of 5,000 acres. H.R. Rep. No. 85-1347, at 3 (1958).

Section 2 of the bill would provide that no public land, water, or land and water area shall, except by Act of Congress, hereafter be (1) withdrawn from public entry for the use of the Department of Defense for defense purposes; (2) reserved for such use; or (3) restricted from operation of the mineral leasing provisions of the Outer Continental Shelf Lands Act, Pub. L. No. 83-212, 67 Stat. 462 (1953) (codified at 43 U.S.C. §§ 1331–1343 (1958)), if such actions would result in the withdrawal, reservation, or restriction of more than five thousand acres in the aggregate for any one defense project or facility of the Department of Defense.

Sections 3 to 6, inclusive, of the bill concern matters as to which I prefer not to express any views until I have the benefit of any comments of the Criminal and Lands Division. Accordingly, I now turn to the constitutional question.

Article II, Section 2, Clause 1 of the Constitution provides in pertinent part as follows:

> The President shall be Commander in Chief of the Army and Navy of the United States.

Article IV, Section 3, Clause 2 provides in relevant part as follows:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States.

In his memorandum of July 12, 1956,[*] commenting on H.R. 10362, 84th Cong., and several other bills for the same general purposes, Assistant Attorney General Rankin expressed the opinion that sections 1 and 2 thereof presented a serious constitutional question which the courts have never passed on in regard to the

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[1] This latter proclamation also provided that nothing therein shall be construed to affect Proclamation 2914, dated December 16, 1950, proclaiming that, because of communist imperialism, there exists a national emergency, requiring the strengthening of the national defenses, and the continuance of certain World War II measures respecting the use of certain property. 64 Stat. A454, A455, 3 C.F.R. 99 (1949–1953).

[*] Editor's Note: That memorandum is included earlier in this volume (*Constitutionality of Pending Bills Restricting the Withdrawal of Public Land for National Defense*, 1 Op. O.L.C. Supp. 163 (July 12, 1956)).

President's power as Commander in Chief. He recommended that the Department report that it was opposed to section 1 and 2 of those bills as imposing an unwarranted restriction upon the President's power to use the public domain for national defense purposes, and as presenting a serious question regarding an unconstitutional restriction on the President's powers as Commander in Chief, Dep't of Justice File No. 90-1-01-65. It does not appear that the Department did so.

The judicial decisions and opinions of the Attorney General to which Mr. Rankin referred generally concern the President's powers as Commander in Chief in time of war in which the United States is a belligerent, or of national emergency because of the existence of a state of war between other governments. It may be noted that Mr. Rankin observed that the decisions have not made a clear demarcation of the boundaries of such powers.

Mr. Rankin's memorandum does not, however, refer to the majority per curiam opinion, in which Justice Reed concurred, that under Article IV, Section 3, Clause 2 of the Constitution the power of Congress over the public lands is "without limitation," *Alabama v. Texas*, 347 U.S. 272, 274 (1954) (per curiam), and the earlier decisions cited therein, including *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915). The legislative reports on this bill show that these are among the decisions on which Congress relied to support the constitutionality of the bill. *See* S. Rep. No. 85-857, at 10 (1957); H.R. Rep. No. 85-215, at 9 (1957).

It may be noted that the questions in *Alabama v. Texas* did not involve the President's power as Commander in Chief. Nevertheless, the views of a majority of the Court are expressed in such absolute terms as to make one reluctant to state that the bill clearly infringes upon the President's constitutional powers as Commander in Chief.

In any views that the Department may submit on the bill, it would seem to be appropriate, however, to point out that it involves a question as to relationship between the President's constitutional powers as Commander in Chief, on the one hand, and the constitutional authority of Congress over the public lands, on the other hand. If so, it is suggested that attention also be invited to the exception in the bill, which would make its restrictions on withdrawal or reservation of public lands for defense purposes inapplicable in time of national emergency hereafter declared *inter alia* by the President. This exception may be adequate to resolve whatever doubt there may be as to the constitutionality of the bill in favor of a conclusion that it makes sufficient provision for the exercise in time of national emergency of the President's powers as Commander in Chief.

Finally, it may be noted that the bill does not contain a separability provision. There are returned the attachments to your memorandum.

MALCOLM R. WILKEY
Assistant Attorney General
Office of Legal Counsel

Authority of the President to Blockade Cuba

Under international law, the President may institute a blockade of Cuba as an incident to a state of war, and conceivably a blockade could also be justified as a necessary measure of defense.

The legality of the blockade could probably be tested by Cuba, by other countries, and by their nationals in the courts of the United States, and Cuba and other countries could raise the legality issue before the United Nations and the Organization of American States. It is not clear whether this issue could be raised before the International Court of Justice.

January 25, 1961

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL*

In response to your request, I am transmitting the attached memorandum on the above-entitled subject. In view of the length of the memorandum, I believe it would be helpful to summarize the conclusions reached.

The memorandum concludes that the President is authorized to institute a blockade as an incident to a state of war. However, a blockade is a belligerent act which, as a matter of international law, is ordinarily justified only if a state of war, legal or de facto, exists. Conceivably a blockade could also be justified in circumstances in which the blockading country can establish it to be a necessary measure of defense. Whether the necessary facts required to support such a contention exist, however, is not known to me.

The legality of the blockade could probably be tested by Cuba, by other countries, and by their nationals in the courts of the United States. In addition, Cuba and other countries could raise the issue of the legality of the blockade before the United Nations and the Organization of American States. It is not clear whether this issue could be raised before the International Court of Justice.

* * * * *

This is in response to your request for the views of this Office as to the President's authority to declare a blockade, by the naval air forces of the United States, of the ports and coast of Cuba. We first discuss the legal circumstances which have been held to justify the imposition of a blockade, and in this connection the President's authority to act. Next, we consider whether under applicable principles of law a case may be made for a blockade of Cuba. Finally, we consider the question of the forums, both domestic and international, which may be available for challenging the validity of a United States blockade of Cuba. In view of the way in which the question has been put to us, we have not undertaken in any manner to consult with the Department of State, the expert agency in this field.

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* Editor's Note: The matter preceding the asterisks is the cover memorandum to the Attorney General. Assistant Attorney General Kramer signed both the cover and the main memorandum.

I.

At the outset it should be noted that both courts and commentators are agreed that a blockade involves a state of war; i.e., it is the right of a belligerent alone. Thus, in the *Prize Cases*, 67 U.S. (2 Black) 635 (1862), in which the Supreme Court sustained the power of the President to proclaim a blockade of the ports of the United States seized by the southern states in rebellion, the decision turned on the question whether a state of war existed. As the Court put it: "Let us enquire whether, at the time this blockade was instituted, a state of war existed which would justify a resort to these means of subduing the hostile force." *Id.* at 666. The Court concluded that the military insurrection of the Southern States gave rise to a state of war which "[t]he President was bound to meet . . . in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact." *Id.* at 669. On this basis, the Court held that the President "had a right, *jure belli*, to institute a blockade of ports in possession of the States in rebellion, which neutrals are bound to regard." *Id.* at 671.

Other decisions of the Supreme Court recognize the principle that blockade is an incident of a state of war. In *McCall v. Marine Ins. Co.*, Justice Story, writing for the Court, stated:

> The right to blockade an enemy's port with a competent force, is a right secured to every belligerent by the law of the nations. No neutral can, after knowledge of such blockade, lawfully enter, or attempt to enter, the blockaded port. It would be a violation of neutral character, which, according to established usages, would subject the property engaged therein to the penalty of confiscation. In such a case, therefore, the arrest and restraint of neutral ships attempting to enter the port, is a *lawful* arrest and restraint by the blockading squadron.

12 U.S. (8 Cranch) 59, 65 (1814) (emphasis in original). And in *Olivera v. Union Ins. Co.*, Chief Justice Marshall stated, that "a belligerent may lawfully blockade the port of his enemy, is admitted." 16 U.S. (3 Wheat.) 183, 194 (1818). A forthright statement was made by the Supreme Court of West Virginia in the case of *Grinnan v. Edwards*:

> A blockade, is the exercise of belligerent right; before a blockade can be declared, a war must exist; and a blockade lawfully declared, is conclusive evidence that a state of war exists between the nation declaring such a blockade, and the nation whose ports are blockaded.

21 W. Va. 347, 356 (1883).

International law experts have the same view of the blockade. George Grafton Wilson, Professor Emeritus of International Law, Harvard University, states: "The term blockade, properly used, involves a state of war." 4 *Encyclopedia Americana* 98d (1958). In the seventh edition of *Oppenheim's International Law*, edited by the late Professor Lauterpacht (subsequently a judge of the International Court of Justice), it is stated:

> Blockade is the blocking by men-of-war of the approach to the enemy coast, or a part of it, for the purposes of preventing ingress and egress of vessels or aircraft of all nations. . . . Although blockade is . . . a means of warfare against the enemy, it concerns neutrals as well, because the ingress and egress of neutral vessels are thereby interdicted, and may be punished.

2 *id.* at 768 (1952). In a fairly recent article, a blockade is described as the means by which a belligerent cuts off "all access to the coast of the enemy." S.W.D. Rowson, *Modern Blockade: Some Legal Aspects*, 1949 Brit. Y.B. Int'l L. 346, 349. Our own Department of State took the position in 1919 that no blockade could be instituted absent a state of war. In that year, in connection with a proposal that the Allied Governments blockade Bolshevist Russia, it telegraphed the American Commission to Negotiate Peace as follows: "A blockade before a state of war exists is out of the question. It could not be recognized by this Government." *Scope of Blockade*, 7 Hackworth Digest § 624, at 125.

A technical departure from the rule that a blockade can be imposed only as an incident to a state of war is President McKinley's action in 1893. On April 20, 1898, Congress by joint resolution directed the President to use the land and naval forces of the United States to compel the Government of Spain to relinquish its authority over Cuba. Pub. Res. No. 55-24, 30 Stat. 738. In accordance with this resolution, President McKinley, on April 22, 1898, issued a proclamation instituting a naval blockade of the north coast of Cuba. 14 *Compilation of the Messages and Papers of the Presidents* 6472 (James D. Richardson ed., 1909). It was not until April 25, 1898, that Congress declared that a state of war with Spain existed. Pub. L. No. 55-189, 30 Stat. 364 (1898). In the declaration it was stated, however, that a state of war had existed since April 21, 1898. *Id*. This was, of course, prior to the date of the blockade. At best, the departure from the established rule was only a technical one.

The other incident that is worthy of note is President Truman's order in 1950 blockading Korea. On June 30, 1950, President Truman announced that "[i]n keeping with the United Nations Security Council's request for support to the Republic of Korea in repelling the North Korean invaders and restoring peace in Korea," he had authorized the United States Air Force "to conduct missions on specific military targets in northern Korea wherever militarily necessary, and had ordered a naval blockade of the entire Korean coast." White House Statement

Following a Meeting Between the President and Top Congressional and Military Leaders to Review the Situation in Korea, *Pub. Papers of Pres. Harry S. Truman* 513 (1950). It should be observed that, under Article 42 of the United Nations Charter, the Security Council is authorized "to take such action by air, sea or land forces as may be necessary to maintain or restore international peace," and a blockade by Members of the United Nations is expressly included among the permissible actions. The Korean blockade is not a precedent here. There the blockade was authorized by the United Nations; in the instant case, as we understand it, the United States would proceed unilaterally. Moreover, it would appear that the Korean blockade was justified under the traditional rule that such action can be taken only in connection with a state of war. There was a de facto state of war between North Korea and the United Nations.

Mention should also be made of what is termed a "pacific blockade." This is said to be "a blockade during time of peace"; it has been used by several European nations "as a compulsive means of settling an international difference." 2 *Oppenheim's International Law* at 144–45; Wilson, 4 *Encyclopedia Americana* at 98d. There appears to be some question, however, as to whether a pacific blockade is a permissible form of international conduct. Professor Hyde states:

> Such action is to be deemed pacific merely in the sense that the blockading State is disposed to remain at peace, while the State whose territory is blockaded does not elect to treat the operation as one constituting an act of war or as compelling it to make war upon its adversary.

2 Charles Cheney Hyde, *International Law, Chiefly As Interpreted and Applied by the United States* § 592, at 179–80 (1922). Professor Hyde notes that, while on certain occasions European countries have found it possible to resort to blockade without producing a state of war, the United States "has never had recourse to pacific blockade." *Id*. at 180. Moreover, the United States appears to have taken the position that a pacific blockade does not authorize the blockading state to interfere with United States shipping. *Id*. at 180–82.

Assuming the existence of a state of war, both practice and authority indicate that the President, in the exercise of his constitutional power as Commander in Chief, can order a blockade of the enemy. President Lincoln took such action in 1861, and his authority was sustained in the *Prize Cases*, 67 U.S. (2 Black) 635 (1863). President Truman took similar action in Korea. With respect to the latter, it has been said that the blockade "was supported and respected by other Members [of the United Nations] except the members of the Soviet bloc." Leland M. Goodrich & Anne P. Simons, *The United Nations and the Maintenance of International Peace and Security* 481 (1955).

II.

The United States is not in a state of war with Cuba in the traditional sense. From the facts available to us, it does not appear that Cuba has resorted to military action against the United States or that the United States has resorted to such action against Cuba. Nor has Congress declared that a state of war exists between the United States and Cuba. Accordingly, the principles of international law, as presently developed and followed by the United States, would seem to furnish no legal justification for the imposition by this government of a blockade of Cuba. Moreover, to the extent that a pacific blockade is a permissible instrument of international conduct, resort thereto by the United States would apparently represent a reversal of United States policy. A further obstacle in this regard is that the blockaded state must also choose not to regard the blockade as an act of war. We are not in a position to judge whether this course would be followed by Cuba.

In this posture, we turn to the question whether it is, nevertheless, possible to argue that a blockade of Cuba is justifiable. That the United States is engaged in a "cold war" with major communist nations and with Cuba is plain. To keep communist imperialism from engulfing the United States is a matter of vital national interest. As one author has put it, with respect to United States policy to further this interest, and also to keep Axis aggression from American shores during World War II:

> Interventions undertaken to further these interests were lawful if those who authorized them believed that intervention was a last resort to safeguard the nation from extreme peril and proper means of intervention were used. . . .

Doris A. Graber, *Crisis Diplomacy: A History of U.S. Intervention Policies and Practices* 211–12 (1959).

An example of the exercise of presidential power of this nature in the naval field is the action of President Roosevelt in 1941, when Nazi power was at its zenith and the peril to the United States great. On July 7, 1941, the President sent a message to Congress announcing that as Commander in Chief he had ordered the Navy to take all necessary steps to insure the safety of communications between Iceland and the United States as well as on the seas between the United States and all other strategic outposts and that troops had been sent to Iceland in defense of that country. The President justified these actions on the ground that the United States could not permit "the occupation by Germany of strategic outposts in the Atlantic to be used as air or naval bases for eventual attack against the Western Hemisphere." *Memorandum on the Authority of the President to Repel the Attack in Korea*, 23 Dep't of State Bull. 173, 175 (1950).

If the President is satisfied, on the basis of the facts known to him, that the Cuban situation presents a grave threat to the safety of the free nations of the

Western Hemisphere, as for example, that they are in imminent danger of attack from hostile forces stationed in Cuba or en route to Cuba from communist countries, it is arguable that, whatever the earlier history of the doctrine of blockade, that concept ought to be accommodated to the situation in hand, not as a device of making war but as a reasonable and internationally permissible means of preventing aggression against peaceful nations. Whatever the facts mobilized to justify a blockade, they would receive careful scrutiny in the forums in which the legality of the action is open to challenge. In addition, the reaction of world opinion would depend upon the strength of the factual justification for the action. We are not, of course, in any position to know what the actual facts are which could be relied upon as justification, and therefore we cannot possibly assess the strength of the possible factual justification.

III.

This portion of the memorandum discusses which forums may be available for challenging the validity of a blockade of Cuba.

A. Domestic Forums

In the *Prize Cases*, 67 U.S. (2 Black) 635, 665 (1863), involving the blockade of southern ports during the Civil War, the Supreme Court stated that "[n]eutrals have a right to challenge the existence of a blockade de facto, and also the authority of the party exercising the right to institute it." There several neutral vessels were captured and brought in as prizes by public ships of the United States. Libels were filed by the proper United States Attorneys, and in each such case the United States district court pronounced a decree of condemnation on the ground that the ships had broken or were attempting to break the blockade. The owners of the ships appealed from these decrees. And, as pointed out above, the Supreme Court held the blockade to be a proper exercise of power by the United States as a belligerent. This method of challenging the validity of a blockade would appear to be available to neutral ships today. If such ships are captured on the ground that they were attempting to break the Cuban blockade, they could be treated as prizes and placed within the prize jurisdiction of the federal district courts, provided the captures could be deemed to have been made "during war." 10 U.S.C. §§ 7651, 7652 (1958).[1]

If the vessels were not placed under prize jurisdiction by the United States itself, the ship and cargo owners would not have that avenue of access to our courts. *Ling v. 1,689 Tons of Coal*, 78 F. Supp. 57 (W.D. Wash. 1942). However, in addition to suits in admiralty against the United States under 28 U.S.C. § 1333

[1] Section 7651 provides that the prize jurisdiction of the federal courts "applies to all captures of vessels as prize during war by authority of the United States or adopted and ratified by the President."

(1958), they and others claiming loss by reason of the blockade might be authorized to file suits "founded . . . upon the Constitution" in the Court of Claims pursuant to 28 U.S.C. § 1491 (1958), or, in certain cases, the district courts, pursuant to 28 U.S.C. § 1346 (1958). Furthermore, the blockade might give rise to litigation in domestic courts exclusively between private parties owing to its interference with rights under contracts or with other rights. The domestic remedies available for challenging the validity of the blockade would be open to all neutral countries and their nationals, including those of the Communist bloc. In the absence of a state of war, it might also be possible for Cuban nationals to resort to our courts for the purpose of testing the legality of the blockade.

B. International Forums

In addition to the courts of the United States, a number of international forums appear to be available in which the legality of the blockade as a matter of international law could be raised. It appears that this question could properly be brought before (1) the Security Council and General Assembly of the United Nations and (2) the Organization of American States. It is unclear whether it could be raised before the International Court of Justice.

1. The Charter of the United Nations is a collective treaty concluded for the purpose of safeguarding peace, and provides a means for investigating and determining complaints of alleged aggressive action by a member of State. In our opinion, the procedure provided by the U.N. Charter for these purposes would be available to Cuba and other nations affected by the blockade.

The matter could be brought either before the General Assembly or the Security Council. The former, however, is empowered only to discuss problems and make recommendations to the member nations and to the Security Council. U.N. Charter arts. 10–12. Chapter VII (arts. 39–51) deals with action respecting threats to the peace, breaches of the peace and acts of aggression. It provides that "[t]he Security Council shall determine the existence of any threat to the peace . . . or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace . . . ." (art. 39). The Security Council is authorized to decide "what measures not involving the use of armed forces are to be employed to give effect to its decisions"; and it may call upon members of the United Nations to apply such measures, including various economic sanctions and severance of diplomatic relations (art. 41). As noted earlier, in the event these measures prove to be inadequate, the Security Council may resort to other action to restore peace, including "blockade, and other operations by air, sea, or land forces of members of the United Nations" (art. 42). For this purpose, the Security Council may call on all members of the United Nations to contribute to the maintenance of international peace with armed forces, assistance and facilities (art. 43). The Charter also provides that nothing in it shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member

of the United Nations, until the Security Council has taken the measures necessary to maintain international peace (art. 51).

It seems reasonably clear that in providing that the Security Council may take action to deal with threats to peace, including specifically blockade measures, the members of the United Nations intended that such action should not be taken unilaterally except as provided by Article 51 (where the individual member suffering an armed attack may take such action in self-defense). That the United States, England and France have so construed the U.N. Charter is demonstrated by the position taken by these nations in bringing to the attention of the Security Council the threat to peace created by the Soviet blockade of West Berlin. It was claimed that the Soviet blockade was a method used for the expansion of its power in disregard of its responsibility under international agreements, and that it constituted duress and threat of force wholly inconsistent with the obligations imposed on members of the United Nations by the Charter.[2] The Security Council was requested to remove the threat to peace,[3] and it took jurisdiction over the matter. However, the Security Council failed to adopt the resolution offered by the Allied Powers because of the Soviet veto. U.N. Doc. S/1048 (Oct. 22, 1948); 1948–49 U.N.Y.B. 286, U.N. Sales No. 1950.I.11.

Another case involved the Egyptian blockade of the Suez Canal to prevent goods from reaching the State of Israel. Egypt claimed that the Egyptian-Israel Armistice Agreement of 1949 did not end but merely suspended hostilities, that its belligerent rights were left intact, and that it was legally justified in imposing restrictions on the free use of the Canal. When attempts to mediate the dispute failed, Israel brought the matter up for consideration by the Security Council. On September 1, 1951, the Security Council passed a resolution which called upon Egypt "to terminate the restrictions on the passage of international commercial shipping and goods through the Suez Canal wherever bound and to cease all interference with such shipping beyond that essential to the safety of shipping in the Canal itself and to the observance of the international conventions in force." S.C. Res. 95, U.N. Doc. S/RES/95 (Sept. 1, 1951). When Egypt defied the Security Council, the Government of Israel brought the matter up again before the Security Council. 1954 U.N.Y.B. 62, U.N. Sales No. 1955.I.25. On March 19, 1954, a draft resolution was placed before the Security Council which called upon Egypt, "in accordance with its obligations under the Charter to comply" with the 1951 resolution. U.N. Doc. S/3188. Eight members of the Security Council, including the United States, voted for it, but the Soviet Union vetoed the resolution. 1954 U.N.Y.B. 74.

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[2] Statement by Philip C. Jessup, Deputy U.S. Representative in the Security Council, *Review of Allied Action on Berlin Blockade*, 19 Dep't of State Bull. 541 (Oct. 31, 1948).

[3] *Id.* at 547; Statement by Philip C. Jessup, Deputy U.S. Representative in the Security Council, *The United Nations and Specialized Agencies: U.S. Urges Acceptance of Draft Resolution on Berlin Crisis*, 19 Dep't of State Bull. 572 (Nov. 7, 1948).

Thus it would appear to be fairly clear from these incidents that blockade measures taken unilaterally by a nation, other than in self-defense or in a war, and outside the framework of the United Nations Charter, are likely to be brought before, and considered by, the Security Council. Whether the blockade was undertaken as a justifiable measure of self-defense would obviously be the issue in the instant situation. Of course, any proposed action in the Security Council would be subject to the veto power of the United States.

2. The Organization of American States ("OAS"), of which both the United States and Cuba are members, is also a forum in which the legality of a Cuban blockade could be subjected to investigation and determination. Although there is no express reference to blockade in the OAS Charter, there are many provisions designed to bar unilateral action by any member constituting a threat to the common peace. *See id.* arts. 13, 16–18, 24–25, Apr. 30, 1948, 2 U.S.T. 2416, T.I.A.S. No. 2361, 119 U.N.T.S. 3.[4]

Article 25 provides that in the event of aggression endangering the peace of America, the member States shall apply the measures and procedures established in the special treaties on the subject. The pertinent "special" treaty for security purposes appears to be the Rio Pact,[5] which is closely linked with the Charter. Under the Rio Pact, an Organ of Consultation (meeting of Foreign Ministers) shall gather "without delay" (art. 3) in case of an armed attack, and "immediately" (art. 6) if the integrity or political independence of any American state should be affected by an act of aggression or by any fact or situation that might endanger the peace of America.

The Organ is to decide, by two-thirds vote (art. 17) "the measures which must be taken" for the common defense and preservation of peace (art. 6). Decisions are binding upon all states, except that no state can be required to use armed force without its consent (art. 20). The measures agreed upon by the Organ shall be executed through procedures and agencies in existence or those which may be created (art. 21). It would seem clear that in the circumstances here involved the OAS would be authorized to determine whether a blockade is an act of aggression.

In its relationships with Cuba, the United States has stated that "the proper forum for the discussion of any controversies between the Government of Cuba and the governments of other American Republics is the Organization of American States." *Security Council Considers Cuban Complaint: Statement of July 18*, 43 Dep't of State Bull. 199, 199 (Aug. 8, 1960) (statement of U.S. Representative Henry Cabot Lodge) ("Lodge Statement"). On June 27, 1960, the United States Government submitted to the Inter-American Peace Committee a memorandum entitled *Provocative Actions of the Government of Cuba Against the United States*

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[4] The text of the OAS Charter appears in 18 Dep't of State Bull. 666 (May 23, 1948).

[5] Inter-American Treaty of Reciprocal Assistance, *opened for signature* Sept. 2, 1947, 62 Stat. 1681, T.I.A.S. No. 1838, *reprinted in* 17 Dep't of State Bull. 565 (Sept. 21, 1947).

Which Have Served to Increase Tensions in the Caribbean Area, U.N. Doc. S/4388 (July 15, 1960), *reprinted in* 43 Dep't of State Bull. 79, 79 (July 18, 1960). This memorandum, which sets forth many provocative acts of Cuba in contributing to international tension, was in response to requests made by the Peace Committee under a study assignment given to it by the American Foreign Ministers in 1959. *Id.*; *American Foreign Ministers Conclude Santiago Talks*, 41 Dep't of State Bull. 342, 343 (Sept. 7, 1943); Lodge Statement, 43 Dep't of State Bull. at 199.

The United States Representative to the Security Council has taken the position that the Security Council of the U.N. should take no action on the Cuban complaint until discussions of the problem have taken place in the Organization of American States and an attempt to resolve it has been made in that forum. Lodge Statement, 43 Dep't of State Bull. at 200. In Mr. Lodge's opinion, the procedure was to go to the regional organization first and to the United Nations as a last resort. In the event the United States undertook the action here considered, presumably the OAS machinery would be available to Cuba as it has been to the United States.

3. It is unclear to what extent the International Court of Justice would have jurisdiction to pass upon the legality of the blockade.

It seems doubtful whether the Court could accept jurisdiction if Cuba sought to institute an action against the United States. In filing its acceptance of the compulsory jurisdiction of the Court, the United States has agreed (except for its reservation on domestic matters[6]) to be bound only "in relation to any other state accepting the same obligation." Statute of the International Court of Justice art. 36(2), June 26, 1945, 59 Stat. 1055, 1060. Cuba has not filed its acceptance of the compulsory jurisdiction of the International Court. It would, therefore, appear that Cuba has not accepted the same obligation[7] as the United States, and that an essential condition is lacking for the Court's exercise of compulsory jurisdiction over the United States in a case which Cuba is the plaintiff.

However, even if the validity of the blockade cannot be decided by the Court in on action to Cuba, it is possible that the question is subject to adjudication in a suit

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[6] On the basis of the reservation, the United States could defeat the jurisdiction of the court merely by asserting that a blockade of Cuba involved a domestic matter.

[7] Oliver J. Lissitzyn, in *The International Court of Justice: Its Role in the Maintenance of International Peace and Security* (1951), indicates the bases of the Court's jurisdiction as follows:

> The jurisdiction of the Court over disputes submitted to it as contentious cases rests in principle on the consent of the parties. This consent can be given either (1) by a declaration recognizing as compulsory the jurisdiction of the Court, with or without limitation, under the "optional clause" of Article 36 of the Statute, or (2) by an undertaking in any other form to recognize as compulsory the jurisdiction of the Court with respect to a class of existing or future disputes, or (3) by an express or tacit agreement to submit a particular dispute to the Court.

Id. at 61.

by a third state which is adversely affected by the blockade and which has accepted compulsory jurisdiction. In addition it should be noted that Article 96 of the United Nations Charter provides that the General Assembly or the Security Council may ask the Court for an advisory opinion "on any legal question," and that the Assembly may authorize other organs, or specialized agencies to do so. Thus, although a state is not authorized to request an advisory opinion, it may persuade one of the designated organs to make the request.

However the matter is presented, a basic problem for the Court would be whether a blockade raises a political or a legal issue. The U.N. Charter provides that "legal disputes" should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court (art. 36). The implication is that "political questions," unlike "legal questions," should not, therefore, be decided by the Court. What is a legal, as opposed to a political, question presents an extremely difficult issue. *See* Lissitzyn, *supra* note 7, at 74. No case of a blockade appears to have been presented to the Court. The closest precedents are the Corfu Channel Case, *id*. at 78–81, in which Albania's action in laying a clandestine minefield was treated as a legal question within the jurisdiction of the Court, and the Fisheries Case (U.K. v. Nor.), Judgment, 1951 I.C.J. 116 (Dec. 18), in which the Court accepted jurisdiction over a dispute between Norway and the United Kingdom as to whether Norway had the right to reserve to its nationals fishing rights in certain areas off the Norwegian coast. These precedents do not appear necessarily to control the question presented by a blockade. In addition, it is of significance that no attempt has been made to bring either the Berlin blockade or the Egyptian blockade of Israel before the Court.

ROBERT KRAMER
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Authority of the President to Designate Another Member as Chairman of the Federal Power Commission

While a substantial argument can be made to support the President's the authority to change the existing designation of the Chairman of the Federal Power Commission and to designate another member of that agency as Chairman, sufficient doubt exists so as to preclude a reliable prediction as to the result should the matter be judicially tested.

Apparently the only remedies the present Chairman would have, if his designation should be recalled and another member of the Commission designated as Chairman, would be to bring an action in the nature of *quo warranto* or sue for the additional $500-a-year annual salary of the Chairman in the Court of Claims. Since the Chairman has no functions additional to those of any other commissioner affecting parties appearing before the Commission, their rights could not be affected even if he should win such a suit.

February 28, 1961

MEMORANDUM OPINION FOR THE ASSISTANT SPECIAL COUNSEL TO THE PRESIDENT

This memorandum examines the President's authority to change the existing designation of the Chairman of the Federal Power Commission and to designate another member of that agency as Chairman. It concludes that, while a substantial argument can be made to support the President's authority to do so, sufficient doubt exists so as to preclude a reliable prediction as to the result should the matter be judicially tested. Nevertheless, it should be emphasized that apparently the only remedies the present Chairman would have, if his designation should be recalled and another member of the Commission designated as Chairman, would be to bring an action in the nature of *quo warranto* or sue for the additional $500-a-year annual salary of the Chairman in the Court of Claims. Since the Chairman has no functions additional to those of any other commissioner affecting parties appearing before the Commission, their rights could not be affected even if he should win such a suit.

I.

Section 3 of Reorganization Plan 9 of 1950, 3 C.F.R. 166 (Supp. 1950), 64 Stat. 1265, relating to the Federal Power Commission, provides:

> *Designation of Chairman*.—The functions of the Commission with respect to choosing a Chairman from among the commissioners composing the Commission are hereby transferred to the President.

Plan 9 was submitted to the Congress by President Truman on March 13, 1950, along with six others relating to six of the regulatory boards and commissions. The plans were "designed to strengthen the internal administration of these bodies,"

and a feature was to vest in the President the function of designating the Chairman "in those instances where this function is not already a Presidential one." H.R. Doc. No. 81-504, at 4 (1950).

At the time Plan 9 was transmitted, section 1 of the Federal Water Power Act, as amended, provided for election of the Chairman "by the commission itself," and permitted "each chairman when so elected to act as such until the expiration of his term of office." Pub. L. No. 65-280, § 1, 41 Stat. 1063 (June 10, 1920), *as amended by* Pub. L. No. 71-412, 46 Stat. 797 (June 23, 1930).

The President explained, in his transmittal message, with respect to Plans 7–13:

> In the plans relative to four commissions—the Interstate Commerce Commission, the Federal Trade Commission, the Federal Power Commission, and the Securities and Exchange Commission—the function of designating the Chairman is transferred to the President. The President by law now designates the Chairmen of the other three regulatory commissions covered by these plans. The designation of all Chairmen by the President follows out the general concept of the Commission on Organization for providing clearer lines of management responsibility in the executive branch.

H.R. Doc. No. 81-504, at 5.[1] No mention was made in the message of the statutory provision relating to the term of service of the Chairman of the Federal Power Commission until the expiration of his term of office. Nor was it mentioned by Budget Director Frederick J. Lawton, when he supported Plan 9 in hearings before the Senate Committee which considered it along with others. Mr. Lawton testified:

> The plans affecting the Interstate Commerce Commission, the Federal Trade Commission, and the Federal Power Commission provide that the President shall designate a Commissioner to serve as Chairman. These provisions will vest uniformly in the President the function of designating Commission Chairmen. At present he already designates the Chairmen in the Federal Communications Commission, the National Labor Relations Board, and the Civil Aeronautics Board. . . .
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> . . . .

[1] For a further discussion of the concept of the Commission on Organization of the Executive Branch of the Government in this area, see Commission on Organization of the Executive Branch of the Government, *The Independent Regulatory Commissions*, Rep. No. 12, at 5–6 (1949), *reprinted in* H.R. Doc. No. 81-116, at 5–6 (1949), which emphasized the desirability of the Chairman exercising administrative control.

> Since the President now designates some Chairmen and does not designate others, and since Presidential designation has . . . advantages pointed out by the task force, these plans authorize Presidential designation of Chairmen in all cases.

Reorganization Plans Nos. 7, 8, 9, and 11 of 1950: Hearings on S. Res. 253, 254, 255, and 256 Before the S. Comm. on Expenditures in the Executive Departments, 81st Cong. 30–31 (1950) ("Reorganization Hearings"). Because the President at that time had the power to designate the Chairman of each of the three regulatory bodies referred to,[2] it could be inferred that the intent to produce uniformity in this respect extended to the Federal Power Commission. However, the fact that Plan 9 dealt only with the designation of the Chairman, and left his term, as fixed by the Federal Water Power Act, untouched was expressly called to the attention of the Senate Committee on Expenditures in the Executive Departments, the only congressional body which held a hearing on the plan.[3] That Committee had before it comments, submitted at its request, by the Federal Power Commission. A separate statement was also submitted by one of its commissioners.

The Commission commented favorably on the plan and observed that, although it had "recommended that the present statutory provision that a Chairman be elected and retain office for the balance of his term be amended, so as to provide that the Chairman be elected annually," it saw "no serious objection to the proposed designation of the Chairman by the President." Reorganization Hearings at 215.

In his separate statement, Commissioner Thomas C. Buchanan took sharp issue with the provision for choosing a Chairman. He stated:

> The provision for the selection of the Chairman by the President changes only the method of "choosing" and does not affect the term of the Chairman so selected under existing law.
>
> The term of a Federal Power Commissioner is presently 5 years, therefore, a President in the fourth year of his term might select as Chairman the member of the Commission nominated by him and confirmed by the Senate during that year. Under the terms of plan 9 as applied to the old law, the Chairman so selected would serve as such not only during the fourth year of the Presidential term in which

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[2] The Federal Communications Act, Pub. L. No. 73-416, § 4, 48 Stat. 1064, 1066 (1934), and the National Labor Relations Act, Pub. L. No. 74-198, § 3, 49 Stat. 449, 451 (1935), provided no fixed term for the Chairmen. However, the Civil Aeronautics Act, Pub. L. No. 75-706, § 201, 52 Stat. 973, 980 (1938), provided for designation of the Chairman annually by the President.

[3] No resolution for disapproval of Plan 9 was introduced in the House of Representatives. Consequently, there were no hearings or discussion on the floor in that branch of the Congress.

> he was appointed, but likewise 4 years of the succeeding term even though there may be a change in the Presidential office.
>
> The provision of plan 9 relating to appointment might better carry out the intent of the administration if it provided that . . . chairmen shall be appointed annually by the President.

Id. at 215–16.

Despite the Buchanan observations, the Senate Committee reported favorably and recommended that the Congress approve Plan 9. It reported:

> The designation of the Federal Power Commission Chairman by the President would provide an entirely normal channel of communication to the Commission without impairing its independence in any way. The alleged "inherent dangers" which some witnesses projected into the future simply do not exist in fact as was proved conclusively during the committee hearings when witnesses were unable to cite any evidence whatsoever of Presidential domination of the chairmen of the five regulatory agencies which he presently appoints.

S. Rep. No. 81-1563, at 5–6 (1950).

When the Plan reached the floor of the Senate, the matter of presidential designation of the Chairman was an important subject of debate. Strong objection was voiced by Senator Long to permitting the President "to name the chairman." 96 Cong. Rec. 7380 (May 22, 1950). Senator Capehart likewise opposed the Plan "for the simple reason that under it the President will be given authority to name the Chairman." *Id*. Senator Johnson called attention of the Senate to the peculiar application of the presidential designation provisions to the Federal Power Commission, quoting the statement filed with the Senate Committee by Commissioner Buchanan, and noted that none had "found any fault with Mr. Buchanan's facts" in regard to the proposal. *Id*. at 7381. Senator Johnson's reference was not pursued. Objections to presidential designation did not prevail and the resolution to disapprove the Plan was defeated by a vote of 37 to 36. *Id.* at 7383 (disapproving S. Res. 255, 81st Cong.). As a result Plan 9 became effective—pursuant to the provisions of the Reorganization Act of 1949, Pub. L. No. 81-109, 63 Stat. 203 (codified at 5 U.S.C. §§ 133z *et seq*. (1958))—on May 24, 1950. 64 Stat. 1265.

II.

In light of the foregoing history a substantial argument can be made that approval of Plan 9 by the Congress resulted in vesting in the President the authority to designate the Chairman of the Federal Power Commission and to change that designation from time to time without limitation. The argument would rest on the

reasoning that the purpose of the plans, as described in the presidential message and executive testimony, was to bring uniformity into the designation arrangements for all seven of the regulatory commissions for which plans were submitted. Since Congress was aware of the existing right of the Chairman to serve as such throughout his term in the Federal Power Commission, it might be assumed that in the interest of uniformity it was meant to substitute for that arrangement an unlimited authority in the President with respect to the designation and removal of the Chairman of the Federal Power Commission and that this was accomplished by Plan 9.

Moreover, the power to remove an officer is traditionally regarded as an incident of the power to designate or choose him, *cf. Myers v. United States*, 272 U.S. 52, 161 (1926), and it seems it would be logical to conclude that, in context, the power to choose a Chairman conferred on the President by Plan 9 was intended to be broad enough to cover the incidental power of replacing him. This is made plain by the President's statement that the purpose of the plans was to give the President the same powers with respect to the Federal Power Commission as he already had with respect to at least two other regulatory commissions and by the testimony of the Budget Director emphasizing the need for uniformity. In other words, the function of "choosing a chairman" was intended to include all the powers incident thereto, including removal as Chairman, and therefore the plan, when it became effective, operated as subsequent legislation repealing previous inconsistent legislation.

It is true that Commissioner Buchanan had presented to the Committee his view that once a commissioner had been designated as Chairman the designation could not be changed during that commissioner's term. However, there is no evidence that the Committee adopted this view, the report being silent in this respect. Similarly, it can be argued that the fact that Commissioner Buchanan's view was also brought to the attention of the Senate is no indication that this was the view the Senate took of the matter. Further, if Plan 9 had been enacted in the course of the removal legislative process, greater weight might have to be given to Congress's failure to adopt an appropriate amendment to meet the problem raised by the contention that Plan 9 dealt only with the method of designating the Chairman as provided in the Federal Water Power Act, and not with his term. But the process of adoption of a reorganization plan differs markedly from the normal legislative process, and less weight must, therefore, be afforded to the failure to amend. Under section 6 of the Reorganization Act of 1949 (5 U.S.C. § 133z-4 (1958)) Congress had no opportunity to amend. A plan could either be permitted to take effect or be rejected by a resolution of either House expressing disfavor.

Finally, it appears clear that the President intended to place the Federal Power Commission in a situation similar to the other regulatory agencies. The House permitted the plan to go into effect on his recommendation without discussion, thereby adopting his view of the matter. Furthermore, in the absence of an

opportunity to amend, the Senate discussion should not be regarded as establishing a different intention.

On the other hand, Plan 9 literally refers only to "[t]he functions of the Commission with respect to *choosing* a Chairman" (emphasis supplied). It does not purport to deal with his term. This interpretation gains strength from the fact that the Chairman of the Civil Aeronautics Board, one of the agencies to which the President pointed as a model, had a fixed term of one year. 49 U.S.C. § 1321(a)(2) (1958). It can, therefore, be contended that the intent was actually to deal only with designation and that, even if broader powers to replace had been intended to be conferred upon the President, the language simply failed to effectuate this result. It may be of significance in this respect that, as it now appears in the United States Code, section 1 of the Federal Water Power Act, which incorporates both the original provisions of the Federal Water Power Act and Plan 9, states that the President shall designate the Chairman and that "[e]ach Chairman, when so designated, shall act as such until the expiration of his term of office." 16 U.S.C. § 792 (1958). Thus, rather than repealing prior legislation, the language of Plan 9 can be read consistently with section 1 of the Federal Water Power Act.

Removal of the limitation can, of course, be effected through amending legislation. It is not altogether clear that the reorganization method (if lapsed reorganization authority is reinstated as presently proposed) would be an available means for action which only alters the statutory term of the Chairman. Section 4(2) of the Reorganization Act of 1949 provides that any plan transmitted by the President, pursuant to section 3, "may include provisions for the appointment and compensation of the head" of an agency. 5 U.S.C. § 133z-2(2). The term of office of the head of the agency so provided for "shall not be fixed at more than four years." However, section 4(2) appears to limit the President's authority to provide for the appointment of the head of an agency only to circumstances in which "the President finds, and in his message transmitting the plan declares, that by reason of a reorganization made by the plan such provisions are necessary." The implication, therefore, is that the authority conferred by section 4(2) may be used only in support of a reorganization plan containing other provisions. It would follow that, unless the provision relating to the Chairman were part of a reorganization plan affecting other operations of the Federal Power Commission, the authority contained in the section would not be available.

Even if the President should designate a new Chairman and it should ultimately be decided by the courts that the President was not authorized to do so, the decision would not appear appreciably to affect the operations of the Commission in the interim. The provisions of the statute which created the Federal Power Commission (Pub. L. No. 66-280), the legislation which reorganized the Commission in 1930 (Pub. L. No. 71-412), and its rules and regulations have been examined, and nothing therein indicates that the powers of the Commission are to be exercised other than by the Commission as a whole. There are no unique powers vested in the Chairman which are any different from those vested in other

members of the Commission. The Commission is authorized and empowered to act as a body no matter which of its members is Chairman. 16 U.S.C. § 797 (1958).

The provisions of Reorganization Plan 9 did not change this statutory pattern. The plan transferred administrative functions to the Chairman, but it was intended, as the President explained in his message transmitting the plan, that the changes affected only "[p]urely executive duties." H.R. Doc. No. 81-504, at 4 (1950) (quotation omitted). It was made clear that the plan vested

> in the Chairman . . . responsibility for appointment and supervision of personnel employed under the Commission, for distribution of business among such personnel and among administrative units of the [Federal Power] Commission, and for the usage and expenditure of funds.

Id. The Senate Committee found that the Plan did not "derogate from the statutory responsibilities placed upon the other members of the Commission. They remain exactly as they are . . . ." S. Rep. No. 81-1563, at 3 (1950) (quotation omitted). Accordingly, it is difficult to see how a change in the chairmanship could affect the Commission or the rights of third parties. The possibility exists that administrative actions, e.g., employments, discharge, etc., taken by a Chairman, later determined to have been improperly designated, could be challenged, but this is believed to be of minimal consideration.

III.

Even if it were to be assumed that the Chairman had functions which were unique to his office, the authority of his successor to act as Chairman probably could not be challenged by third parties under the "well-recognized rule that the title of one holding a public office is not subject to collateral attack and that his title can only be inquired into in some direct proceeding instituted for that purpose." Annotation, *Habeas Corpus on Ground of Defective Title to Office of Judge, Prosecuting Attorney, or Other Officer Participating in Petitioner's Trial or Confinement*, 58 A.L.R. 529, 529 (1945); *see also Ex parte Henry Ward*, 173 U.S. 452 (1899); *McDowell v. United States*, 159 U.S. 596 (1895).

It is assumed, however, that if the present Chairman were replaced his remedy would be either to sue in the Court of Claims for the additional salary ($500 per year) of which he would be deprived, for the period between the date of the change and the date on which his term of office expires, or to bring an action in the nature of *quo warranto*. Such an action was initiated by a member of the War Claims Commission upon his removal by President Eisenhower. The action was dismissed on the merits in the District Court, and in the Court of Appeals the appeal was dismissed as moot by stipulation of the parties. *See Wiener v. United*

States, 357 U.S. 349, 351 n.* (1958), *cf. Newman v. United States ex rel. Frizzell*, 238 U.S. 537 (1914).

As pointed out above, even if the present Chairman should prevail in any such suit, this would not affect the actions of the Federal Power Commission in the interim.

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Participation of the Vice President in the Affairs of the Executive Branch

There is no general bar, either of a constitutional or statutory nature, against the President's transfer of duties to the Vice President; however, where, by the nature of the duty or by express constitutional or statutory delegation, the President must exercise individual judgment, the duty may not be transferred to anyone else.

In foreign relations, at the will and as the representative of the President, the Vice President may engage in activities ranging into the highest levels of diplomacy and negotiation and may do so anywhere in the world.

In matters of domestic administration, the nature and number of the Vice President's executive duties are, as a practical matter, within the discretion of the President, with the recent and important exception of statutory membership on the National Security Council. Since the Vice President is not prevented either by the Constitution or by any general statute from acting as the President's delegate, the range of transferrable duties would seem to be co-extensive with the scope of the President's power of delegation.

March 9, 1961

MEMORANDUM OPINION FOR THE VICE PRESIDENT

This memorandum is in response to your recent request concerning the extent to which the Vice President may properly perform functions in the Executive Branch of the government.

The Constitution allots specific functions to the Vice President in the transaction of business by the Legislative Branch of the government (art. I, § 3) but neither grants nor forbids him functions in the conduct of affairs of the Executive Branch. The extent to which he may properly take part in those affairs must be assessed primarily in terms of historical precedents.[1] The courts have not had occasion to consider this matter and judicial precedents do not exist.

I. Presidential Powers of Delegation

As will be seen below, the role of the Vice President in the Executive Branch has varied greatly through the years and at any given time has been determined largely by the President. A brief reference to the latter's powers of delegation is thus pertinent. It has long been recognized that the President has the power to

[1] There is no inherent conflict between the legislative role given to the Vice President by the Constitution and any executive duties he may be called upon to carry out. As pointed out by one writer, "[t]he Founding Fathers never intended to immobilize the second officer in the chair of the Senate, for they empowered that body to choose a President *pro tempore*, in the absence of the Vice President." Irving G. Williams, *The American Vice-Presidency: New Look* 70 (1954) (internal quotation marks omitted). Nixon once estimated that he spent only ten percent of his time presiding over the Senate. *Nixon: Likes His Job—Happy, Working Hard*, U.S. News & World Rep., June 26, 1953, at 71.

delegate tasks for which he is responsible and that "in general, when Congress speaks of acts to be performed by the President, it means by the executive authority of the President." *Relation of the President to the Executive Departments*, 7 Op. Att'y Gen. 453, 467 (1855) (Cushing, A.G.). In 1950, Congress expressly gave the President broad authority to delegate to department and agency heads, and to certain lesser officials, functions vested in him by law if such law did not affirmatively prohibit delegation. Pub. L. No. 81-673, 64 Stat. 419 (codified at 3 U.S.C. §§ 301–303). This legislation, which was designed to lighten the burden of the President by permitting him to slough off without question a substantial number of tasks thought by some authorities to require his personal attention,[2] recognized the "inherent right of the President to delegate the performance of functions vested in him by law" and specifically disavowed any intention to limit or derogate from that right. 3 U.S.C. § 302. Thus, there is no general bar, either of a constitutional or statutory nature, against the President's transfer of duties to the Vice President. It remains to be noted, however, that

> [w]here . . . from the nature of the case, or by express constitutional or statutory declaration, it is evident that the personal, individual judgment of the President is required to be exercised, the duty may not be transferred by the President to anyone else.

3 Westel Woodbury Willoughby, *Constitutional Law of the United States* § 961, at 1482 (2d ed. 1929).

The President's obligation to pass on bills sent to him by Congress is one example of a non-delegable duty. The exercise of judgment required by 49 U.S.C. § 1461 in the matter of the certification of overseas air transport routes may well be another.

II. History

The history of the Vice Presidency begins with the last period of the Constitutional Convention of 1787.[3] During most of the Convention the delegates had sought to perfect a plan whereby the Congress would elect the President and, if necessary, his successor to fill an unexpired term. However, dissatisfaction with this method ultimately led to the creation of the Electoral College and the office of Vice President. Under the original provisions of the Constitution (art. II, § 1) each elector voted for two persons for President, and the person receiving the highest

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[2] S. Rep. No. 81-1867 (1950).

[3] The brief history set forth in the following portion of this memorandum has been digested mainly from the work of Irving G. Williams (*supra* note 1) and a later and expanded work by the same author, *The Rise of the Vice Presidency* (1956). Attached as an appendix to this memorandum is a list containing other recent source material bearing on the office of the Vice Presidency.

number of votes became President if such number was a majority of the whole number of electors appointed by the States. The runner-up in the balloting became Vice President. The present system of separate electoral balloting for the offices of President and Vice President was established following the tie in the electoral vote of 1800 between Jefferson, who was the first choice of the Republican Party of the day, and Burr, also a Republican, intended by his Party for the Vice Presidency. Burr's refusal to step aside together with the tactics of the strong Federalist bloc in the "lame duck" House of Representatives into which the election was thrown necessitated 36 ballots before Jefferson was elected. This crisis, which was the outcome of the unforeseen growth of the party system, four years later produced the Twelfth Amendment requiring the members of the Electoral College to vote for one individual for President and another for Vice President.

John Adams, the first Vice President, was one of the most influential. He originally conceived of his Constitutional duties in the Chair of the Senate as tantamount to leadership, and, to some extent because of the great number of casting votes occasioned by the small roster of the Senate, played a decisive part in its work during the first few years of its existence. Later, as it increased in membership and its organization and procedures were strengthened, his influence was greatly diminished. On the executive side, he enjoyed Washington's confidence and was consulted by him frequently, particularly in regard to diplomatic matters. However, despite his extensive experience in diplomacy abroad, Adams in 1794 rejected a suggestion that he travel to England to negotiate a commercial treaty, taking the position that the Constitution required him to preside over the Senate. In addition, he questioned the propriety of leaving the country in view of the necessity of his taking over the Presidency in case the office became vacant. This dubious precedent, followed in 1797 by a similar refusal by Jefferson to carry on diplomatic negotiations in France when he was Vice President under Adams, held good until 1936 when Garner made trips to the Far East and to Mexico on official business.

The Twelfth Amendment had a prompt and unfortunate effect on the Vice Presidency as appears from the contrast between the abilities and attainments of Adams, Jefferson and Burr, who held it prior to the adoption of the Amendment, and the lackluster of Clinton, Gerry, and Tompkins, who served during the next two decades. Calhoun and Van Buren, the next occupants of the office, lent great prestige to it, but not Van Buren's successor, Richard M. Johnson, whose main claim to distinction seems to be that he failed of a majority in the Electoral College and become the only Vice President in the country's history to be elected by the Senate. John Tyler, the next Vice President, served a term of one month, succeeding to the Presidency upon the death of William Henry Harrison on April 4, 1841, the first of a Chief Executive in office. Tyler took the presidential oath believing and contending that the office of President had devolved on him

and not merely its powers and duties.[4] Many members of the Congress and others, including former President John Quincy Adams, took sharp issue and argued that Tyler was merely "acting" President. Whatever the merits of the controversy, Tyler's position prevailed. All Vice Presidents succeeding to the Presidency after him followed his lead, and his view was written into the Constitution by the language of the Twenty-Second Amendment.

From Tyler's time to that of Woodrow Wilson, the office of the Vice Presidency by and large played an unimportant part in the government except for providing Fillmore, Andrew Johnson, Arthur and Theodore Roosevelt as successors to the Presidency upon the deaths of Taylor, Lincoln, Garfield and McKinley.

Thomas R. Marshall, Vice President during both of Wilson's terms, brought the office back into public esteem and ultimately became the most popular Vice President up to his time. The first after Calhoun to win reelection, Marshall was also the first after John Adams to attend a Cabinet meeting. Adams had sat in at a meeting in 1791 on Washington's request while the latter was on a tour of the South. Similarly, at the request of Wilson, concurred in by the Cabinet, Marshall presided over its meetings during Wilson's attendance at the Paris Peace Conference. The temporary seat in the Cabinet afforded to Marshall became Coolidge's permanent seat at the invitation of Harding. On the other hand, Dawes, who was Vice President during Coolidge's elected term, refused to follow his example and attended no meetings of the Cabinet whatever. Curtis was not asked to sit during Hoover's term and it was only after the election of Franklin D. Roosevelt, and beginning in 1933 with Garner, that participation by the Vice President in the deliberations of the Cabinet became a matter of course.

What has been called the "contemporary renaissance" of the Vice Presidency[5] stems in large part from the second Roosevelt's reliance on the men who served in that office during his administrations. Garner's aid to Roosevelt was important in his first term, particularly in the area of congressional liaison. Garner also made his presence felt in the Cabinet and, further, was often asked by Roosevelt for his views on matters of foreign policy. As mentioned above, Garner broke the negative precedent set by the first Adams, and in 1936 became the first Vice President in office to travel beyond the country's borders in an official capacity.

By the end of his first term, Garner began to have misgivings about the New Deal and by the middle of his second he was completely out of sympathy with Roosevelt's policies. In the last days of 1938 both Roosevelt and he recognized that they had come to the parting of the ways and at the close of 1939 Garner

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[4] Article II, Section 1 of the Constitution provides that "In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President . . . ." Tyler took the position that the word "same" related back to the word "Office."

[5] Williams, *American Vice-Presidency*, *supra* note 1, at 9.

announced himself a candidate for the Presidency in the election of the following year. Although Garner continued to attend Cabinet meetings until the expiration of his second term, he obviously was little more than an observer after 1938. Thus, the powerful and useful partnership of the President and Vice President, probably without prior parallel except for the Washington-Adams relationship, came to an unfortunate end after some five years and the Executive Branch reverted to a sole proprietorship.

During Roosevelt's third term the executive partnership with the Vice Presidency was revived and Wallace received responsibility and power in measures never known to a Vice President before and, in certain aspects, not known to one since. Only in the more or less traditional task of congressional liaison were Wallace's activities limited—and then not because of a presidential interdiction but rather by reason of Wallace's lack of talent for and interest in this facet of the Vice President's work.

Wallace's major duties in the Executive Branch began on July 30, 1941, when the President issued Executive Order 8839 (6 Fed. Reg. 3823, 3823) creating the Economic Defense Board composed of the Vice President, who was designated Chairman, and several Cabinet officers. The stated purpose of the Board was to develop and coordinate "policies, plans, and programs designed to protect and strengthen the international economic relations of the United States in the interest of national defense." Four weeks later, Executive Order 8875 of August 28, 1941 (6 Fed. Reg. 4483, 4484) created the Supply Priorities and Allocations Board ("SPAB"), consisting of the Chairman of the Economic Defense Board (Wallace), a number of Cabinet officers, and the heads of a number of emergency agencies. Wallace was named Chairman of the SPAB presumably to coordinate the domestic and international economic defense programs. Finally, Wallace was made a member of a presidential advisory committee on atomic energy created in October 1941, together with Secretary of War Stimson, Chief of Staff Marshall, Dr. Vannevar Bush, and Dr. James B. Conant. According to Stimson, this committee was the basic agency for making major policy decisions on the development and use of atomic energy.

Wallace's work on the SPAB was of relatively short duration because the Agency was abolished shortly after Pearl Harbor and replaced by the greatly expanded War Production Board with Donald Nelson, the Executive Director of the superseded SPAB, as its full time Chairman. Wallace's membership on the atomic energy committee continued throughout his whole term but because of the secret nature of the committee it is of course impossible to evaluate his contribution to its work.

It was in the first of his major Executive Branch assignments, the Economic Defense Board (renamed the Board of Economic Warfare ("BEW") a few days after Pearl Harbor), that Wallace had responsibilities and carried out duties unique in the history of the Vice Presidency. The order setting up the Board had directed

that the administration of economic defense activities in the international field by the various government departments and agencies "shall conform to the policies formulated or approved by the Board." Exec. Order No. 8839, 6 Fed. Reg. at 3823. Thus, owing to the scope of the activities embraced within the concept of "economic defense," Wallace in a variety of situations became the superior of every Cabinet officer and most of the important independent agency heads. The ubiquity of the BEW and the boldness and tenacity of its staff embroiled it soon after Pearl Harbor in a series of running battles over policy with other government agencies, including specifically the Department of State and the Reconstruction Finance Corporation. The course of these battles need not be detailed here and it is enough to note that conflicts with the latter two powerful agencies led to the BEW's downfall. In the summer of 1943 the President removed Wallace as its Chairman and then terminated it.

It is generally agreed that the BEW performed its work well and substantially furthered the war effort. Its demise is therefore not to be laid to any difficulties inherent in the dual role of Vice President and Chairman played by Wallace. The real trouble was frequent policy disagreement reflecting a clash of Wallace's liberal views with the relatively conservative views of Secretary of State Hull and RFC Chairman Jones.

In addition to his domestic duties Wallace undertook tasks farther afield. Continuing Garner's example, he made several trips to Latin America as a good-will ambassador and in 1944 traveled to the Far East on a combined political and good-will mission.

Following Wallace, Truman sat with the Cabinet during his short service as Vice President, as did Barkley after he became Vice President in 1949. In the same year Congress at the request of Truman made the Vice President a statutory member of the National Security Council. National Security Act Amendments of 1949, Pub. L. No. 81-216, § 3, 63 Stat. 578, 579 (codified at 50 U.S.C. § 402(a)). Thus, the combination of Cabinet and National Security Council service placed the Vice President in a position to keep informed about the most important affairs of the nation and to join in the making of policy at the highest levels.

Nixon carried out perhaps a greater variety of duties than any of his predecessors. In his first year of office he became and thereafter remained Chairman of the President's Committee on Government Contracts. He attended and in the absence of the President presided at Cabinet meetings and meetings of the National Security Council. He acted as a "trouble-shooter" for the White House in its dealings with Congress and in matters political. And he was prominent in the field of foreign relations, traveling in other lands to an extent much greater than any of his predecessors and apparently having a significant voice from time to time in the Eisenhower Administration's formulation of foreign policy.

From this brief outline of the history of the Vice Presidency, it is apparent that during the past half century, and markedly since 1933, the office has moved closer

and closer to the Executive. This development, aided by the deference of the party nominating conventions to their presidential nominees in the selection of running mates, is easily understandable when related to the enormous increase in the responsibilities and burdens of the Presidency which took place concurrently.

III. Limits of Vice President's Part in Work of Executive Branch

In considering what the proper limits of the role of the Vice President in the Executive Branch may be, it is convenient to discuss separately the two areas of foreign affairs and domestic administration. In the former area, it is evident that at the will and as the representative of the President, the Vice President may engage in activities ranging into the highest levels of diplomacy and negotiation and may do so anywhere in the world.[6] The refusal of John Adams during the Washington Administration to engage in such activities abroad cannot be given any weight at the present time. His reasons, good or bad as they were, have been obviated by the fact that lengthy absences of the Vice President from the Senate have become the custom and not the exception and the fact that, even if abroad, the Vice President would today be able to return to the seat of government within hours in the event the office of President became vacant. Indeed, Adams either advanced the reasons merely as an excuse or soon changed his mind, for the day before his own presidential administration began he asked Vice President-elect Jefferson to undertake the same kind of task he himself had declined. Jefferson's rejection of the request, ostensibly based on Adams's own grounds, was really motivated by political considerations.[7] At any rate, aside from location, the propriety of assignments to the Vice President in the field of foreign relations was plainly taken for granted in the beginning years of our history and justifiably so in the absence of any constitutional proscription, express or implied. Nothing that has occurred since then suggests that this earlier assumption was incorrect.

In matters of domestic administration, the nature and number of the Vice President's executive duties, with the recent and important exception of statutory membership in the National Security Council, are, as a practical matter, within the discretion of the President. Since the Vice President is not prevented either by the Constitution or by any general statute from acting as the President's delegate, the range of transferrable duties would seem to be co-extensive with the scope of the President's power of delegation. The outer limits of that range were approached, if not touched, by Wallace's post as Chairman of the BEW. Although that presiden-

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[6] For a discussion of the President's right to employ diplomatic agents without the concurrence of the Senate despite his obligation under Article II, Section 2, Clause 2 of the Constitution to submit for its advice and consent his nominations of "Ambassadors, other public Ministers and Consuls," *see* Legislative Reference Serv., Library of Cong., *The Constitution of the United States of America: Analysis and Interpretation*, S. Doc. No. 82-170, at 447–49 (Edward S. Corwin ed., 1953).

[7] Williams, *Rise of the Vice Presidency*, *supra* note 3, at 25.

tial assignment was the outgrowth of war, there is no visible bar to commensurate posts for the Vice President in other times.

The Vice President's formal domestic assignments from the President in recent years—that is, his seat with the Cabinet and his chairmanship of the Committee on Government Contracts—are beyond doubt consistent with the Constitution and laws. The statutory duty of the Vice President as a member of the National Security Council is to advise the President. 50 U.S.C. § 402(a). Thus, the Vice President's affiliation with that body partakes of the same character as his service with the Cabinet and raises no constitutional questions. The same would be true of his statutory membership on the advisory National Aeronautics and Space Council (42 U.S.C. § 2471(a)) if, as the President recently stated he would recommend to Congress,[8] the latter body were to amend the present law to provide for such membership.

A caveat is appropriate with respect to bestowals of functions upon the Vice President by Congress. To the extent that legislation might attempt to place power in the Vice President to be wielded independently of the President, it no doubt would run afoul of Article II, Section 1 of the Constitution, which provides flatly that "[t]he executive Power shall be vested in a President of the United States." Furthermore, since the Vice President is an elective officer in no way answerable or subordinate to the President, the practical difficulties which might arise from such legislation are as patent as the constitutional problem.

IV. Separation of Powers

In the course of the brief discussion of the office of the Vice President at the Constitutional Convention, some of the delegates complained that making him the presiding officer of the Senate would blur the separation of powers between the Executive and Legislative Branches. In particular, they seemed to fear that the President would somehow gain ascendance over the Senate through the Vice President.[9] Inasmuch as the chair of the Senate has had a relatively unimportant part in its proceedings since the time it was held by John Adams, this complaint has proved groundless. Thus, active as a Vice President may be in the conduct of the business of the Executive, it is difficult to perceive that as a practical matter his service in the Senate would diminish the powers of the Legislature. However, in the event that the Senate were to take up a bill affecting a specific executive activity the Vice President was engaged in, it would of course be the better part of decorum and prudence for him to absent himself from the chair.

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[8] The President's News Conference of March 1, 1961, *Pub. Papers of Pres. John F. Kennedy* 135, 138 (1961).

[9] Williams, *Rise of the Vice Presidency*, *supra* note 3, at 19.

Aside from practicalities, it does not appear that doctrinal considerations block the Vice President's performance of important functions in the Executive Branch. Despite his position as President of the Senate, he is certainly not one of its members.[10] Nor can he be convincingly described as a third member of the Legislative Branch alongside the two houses of Congress. His office was created by Article II of the Constitution dealing with the Executive Branch, and Section 4 of that article makes him, just as the President, subject to impeachment by the Legislative Branch. Since the power of impeachment is a check devised to safeguard the principle of separation of powers against depredations by the Executive, it is troublesome conceptually to categorize the Vice President as a member of the Legislature.

Perhaps the best thing that can be said is that the Vice President belongs neither to the Executive nor to the Legislative Branch but is attached by the Constitution to the latter. Whatever the semantic problems, however, they would not seem to be especially relevant to the question whether the President or Congress may designate the Vice President to undertake executive responsibilities. As Mr. Justice Holmes once noted in a similar context, "[t]he great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other."[11] If a judicial test of the employment of the Vice President in the affairs of the Executive were ever to occur, there is little reason to think that it would be decided purely on the basis of abstractions. To the contrary, the comparative silence of the Constitution in regard to the Office of the Vice President virtually guarantees that the decision would be based primarily on considerations of practice and precedent. In short, theoretical arguments drawn from the doctrine of separation of powers merit little attention in the face of history, like that to the present, disclosing that the Office of the Vice President has become a useful adjunct to the Office of the President without causing harm to the Legislative Branch.

V. Conclusion

To sum up, what was once essentially a bare waiting room for the Presidency has become a lively office participating more and more in the affairs of the

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[10] Article I, Section 6, Clause 2 of the Constitution provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." Since the Vice President holds "an Office under the United States," it would do violence to this language to argue that the Founding Fathers conceived of him as a member of the Senate. Moreover, Clauses 1 and 2 of Article I, Section 5, which provide that each House shall be the judge of the elections, returns, and qualifications of its own members and may punish and expel them, plainly do not apply to the Vice President.

[11] *Springer v. Philippine Islands*, 277 U.S. 189, 209 (1928) (dissenting).

Executive. Such participation has not threatened the unity of the Executive. Unless it should do so in the future, it will not meet a constitutional bar.

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APPENDIX

Select Bibliography of Recent Material on the Vice Presidency

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Intervention by States and Private Groups in the Internal Affairs of Another State

It would appear to be a violation of international law relating to neutrality if a neutral state permits the launching of an attack by organized armed forces from within its borders, permits the passage of organized armed forces through its territory, or permits armed forces to be organized and trained for such purpose within its borders.

There would appear to be no violation of international law where a neutral state permits the mere provision of arms by private parties, even the stockpiling of arms, as long as they remain within the control of private groups rather than belligerent parties, or permits volunteers to be recruited, assembled, and perhaps even trained, so long as this does not approach the point of an organized military force.

April 12, 1961

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

I. General Principles

The structure of international law has traditionally been viewed as imposing obligations upon states only, and not (with very rare exceptions) upon individuals or sub-national groups. Therefore international law with respect to intervention in the internal affairs of another state, by force or other means, is designed to set standards for the conduct of states. If the provision of arms, personnel, or other assistance by private groups is in violation of international law, it can only be because a state actively assists such groups—therefore making it state action—or fails to take measures required by international law to prevent such activities. It should be said at the outset that there is very little in the way of authority or precedent with regard to the obligations of states to control or prevent such activities within their borders. The prohibitions of national laws relating to neutrality in general go much further than international law would seem to require.

What international law and precedent there appears to be on the subject is primarily concerned with the obligations of neutral states in the event of war or civil war abroad where the revolutionary forces have been accorded belligerent status. Under these circumstances it would appear to be a violation of international law relating to neutrality if a state permits the launching of an attack by organized armed forces from within its borders; permits the passage of organized troops through its territory; and, it would seem, permits armed forces to be organized and trained for such purpose within its borders. On the other hand, there would appear to be no violation of this precedent by the mere provision of arms by private parties, even the stockpiling of arms, as long as they remain within the control of private groups rather than belligerent parties, or by permitting volunteers to be recruited, assembled, and perhaps even trained so long as this did not approach the point of an organized military force.

The foregoing would apply to activities by foreign nationals and equally to activities by one's own nationals so long as these activities were "private" and there was no official participation by the state claiming neutrality.

It would appear that the foregoing brief description derived from international law relating to neutrality would be the most severe test possible in a situation where war had not broken out. That is, it would seem that the obligations of the state to prevent revolutionary activities aimed at the government of a foreign state from taking place within its borders could not be more than its obligations as a neutral in the event hostilities had taken place. Indeed, these obligations may be considerably less since the state involved is not claiming a formally neutral status and since the primary purpose of international law relating to neutrality is to prevent the spread of hostilities. Viewed in terms of this overriding objective, a good case could be made for the fact that a state may be more tolerant of activities within its borders aimed at the overthrow of a foreign government than it could be in the event of actual warfare sufficiently extensive to warrant laws of war being applied.

One or two general comments with regard to the purpose of international law may be useful in this connection. The inherited doctrine from the pre-World War I period is geared to concepts of independent states within a security structure largely related to neutrality of alignment; that is, the security system which existed in the nineteenth century was closely related to the balance of power political system, which in turn depended upon the absence of long-term, enduring relationships among states. States had to be free to change their alignment any time the balance was threatened, and free to use force whenever the system required it. Checks on the use of force were, therefore, political ones rather than legal ones, and war was not formally outlawed.

The political structure today is vastly different. Alignments within the Communist Bloc and within the West are long-term political alignments with considerable aspects of supra-national authority. As a result, the security system from the point of view of each bloc depends less upon neutrality of alignment than it does upon preserving the alignments which exist. Therefore, despite changed legal doctrine, there is considerable pressure for intervention in situations where bloc security is threatened. There is nothing in the existing legal structure which recognizes this state of affairs, but there are numerous instances where intervention has been tolerated in the postwar period; for example, Hungary, Guatemala, Lebanon, and, in 1948, Israel.

II. Intervention by States

I think it is a fair reading of international law today that military intervention by an individual state is not permissible under the United Nations ("U.N.") Charter except in the following circumstances:

> (1) Force may be used in self-defense under Article 51 of the Charter, and may be employed under this Article by states not directly affected as a result of collective security arrangements;
>
> (2) Intervention may be employed pursuant to an order of the U.N. Security Council or, more doubtfully, the General Assembly under the Uniting for Peace Resolution, G.A. Res. 377 (V), U.N. GAOR, 5th Sess., Supp. No. 20, U.N. Doc. A/1775, at 10 (Nov. 3, 1950);
>
> (3) Intervention may be employed by states collectively under regional arrangements such as the Organization of American States ("OAS") where the objective is to restore peace and security to an area otherwise threatened;
>
> (4) A state may legitimately intervene by assisting the government of another state in repressing revolutionary activities if requested by the legitimate government of the state in question to assist. This latter idea is the basis for our military aid programs (along with Article 51) and for the interventions in Lebanon by the United States and Hungary by the Union of Soviet Socialist Republics ("USSR"). It would justify shipment of arms by Russia today to the Castro government in Cuba, unless the United States were successfully to persuade the OAS or the United Nations that such conduct endangered international peace and security.

The foregoing indicates that it is a great deal easier legally to preserve the status quo than it is to change it. In general, it would seem that U.S. support for strict policies of non-intervention is based upon the fact that it is generally the USSR which is trying to subvert an existing government and the U.S. which is trying to preserve it. Wherever this is the case, the formal legal structure supports the country endeavoring to protect the existing status quo, since military aid and assistance are under these circumstances legitimate.

The United Nations Charter and the Charter of the Organization of American States forbid only intervention by states. Article 15 of the OAS Charter goes somewhat further than the U.N. Charter since it prohibits intervention "directly or indirectly." Article 15 reads as follows:

> No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements.

OAS Charter, Apr. 30, 1948, T.I.A.S. No. 2361, 2 U.S.T. 2416, 2419–20, 119 U.N.T.S. 48, 56. The exact meaning of the prohibition with regard to "indirect" intervention is by no means clear. But it would seem to be aimed at something which a state did rather than, in most circumstances, something which a state failed to do. It might easily be argued that it is a formal prohibition against a state actively assisting revolutionary forces through the provision of weapons, money, or government facilities. It is much more questionable that it requires a state actively to prohibit revolutionary activities within its borders, though it may do so when these approach a certain formal status; that is, permitting an armed attack to be mounted within one's borders.

III. Activities of Private Groups

As has been indicated above, there is relatively little authority as to the scope of state responsibility for preventing and repressing revolutionary acts of private persons against foreign states. The Russians have relied upon this absence of authority repeatedly in the past; for example, the "volunteers" in the Korean conflict, and those threatened at the time of the Suez and Lebanon crises. The late Judge Lauterpacht summarized the law in 1928 as follows:

> International law imposes upon the state the duty of restraining persons resident within its territory from engaging in such revolutionary activities against friendly states as amount to organized acts of force in the form of hostile expeditions against the territory of those states. It also obliges the state to repress and to discourage activities in which attempts against the life of political opponents are regarded as a proper means of revolutionary action.
>
> Apart from this, states are not bound to prohibit, on their territory, the commission of acts injurious to other states.

H. Lauterpacht, *Revolutionary Activities by Private Persons Against Foreign States*, 22 Am. J. Int. L. 105, 126 (1928).

I find relatively little precedent since 1928 which would lead me to question Lauterpacht's conclusions. I think these can be justified on quite sound policy grounds. Surely international law does not require a state to restrict private activities in any absolute fashion. Furthermore, the provisions against warfare are primarily aimed at the kind of organized activities which can be only mounted by a state because these are the kinds of activities which raise serious international consequences and which constitute the greatest danger in the world today. It would seem to me that a tolerance in regard to private assistance of revolutionary groups raises questions of a quite different order in most circumstances. This is not always the case, because in certain parts of the world, particularly on the East-

West border, even the smallest incident could result in large-scale hostilities. But surely this is not true in areas such as, for example, Latin America.

Furthermore, in Latin America the United States has gained the acquiescence of other Latin American countries in the basic principle that a communist government in the area constitutes a threat to all. While the refusal of other states to act collectively, as provided in the Rio Pact (Inter-American Treaty of Reciprocal Assistance, *opened for signature* Sept. 2, 1947, 62 Stat. 1681), might preclude unilateral U.S. activity, it seems to me that the collective adoption of this principle would justify the United States in tolerating activities aimed at an overthrow of the communist government to a greater degree than would otherwise be the case.

Finally, our own neutrality laws go much further in preventing private activities of the type discussed herein than international law would go. At the same time, these laws are primarily aimed at a highly organized revolutionary force being mounted in this country for the purpose of overthrowing a foreign government.

NICHOLAS deB. KATZENBACH
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Authority of the President to Reassign the Chairmanship of the Federal Power Commission

The President has the power to remove the commissioner now serving as Chairman of the Federal Power Commission and reassign the chairmanship to another commissioner, and if the matter were to be litigated by the commissioner following his involuntary removal from chairmanship, the President's power to remove him would probably, but not certainly, be sustained.

May 11, 1961

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL[*]

A question has arisen concerning the power of the President to designate a new Chairman of the Federal Power Commission prior to the expiration of the term of the commissioner now exercising that function under a designation by President Eisenhower. The problem is current: On January 26, 1961, it was announced that Mr. James C. Swidler of Tennessee would be designated by the President as the new Chairman of the Commission. Because the law pertaining to the designation of the Chairman is somewhat ambiguous, there is ground for the proposition that the incumbent Chairman cannot be removed by the President until his term as a member ends. For the incumbent Chairman, Jerome K. Kuykendall, this will not occur until June 22, 1962. According to press reports, Mr. Kuykendall's associates say that he has no intention of resigning. If he takes the position that the President cannot remove him from the chairmanship, the administration will be faced with an embarrassing impasse arising out of the January 26th announcement that Mr. Swidler is to be Chairman. If Mr. Kuykendall is removed, the matter might be forced into litigation.

Mr. Kuykendall's remedies, in the event of his removal by the President are: (1) to sue in the five-judge court of claims under 28 U.S.C. § 1491 for the $500 additional salary allowed to the Chairman of the Federal Power Commission;[1] or (2) to test his successor's right to office as Chairman by a suit against him in the District Court for the District of Columbia in the nature of *quo warranto*. This action is specifically authorized by District of Columbia Code sections 16-1601 through 16-1611, and may be maintained by a private person directly interested in the federal office involved. *Newman v. United States ex rel. Frizzell*, 238 U.S. 537 (1915); *see Wiener v. United States*, 357 U.S. 349, 351 n.* (1958). A suit for reinstatement in the district court against the removing authority, the form

[*] Editor's Note: This opinion for the Attorney General addresses the same issue as the opinion for the Assistant Special Counsel to the President, rendered three months earlier and also included in this volume (*Authority of the President to Designate Another Member as Chairman of the Federal Power Commission*, 1 Op. O.L.C. Supp. 206 (Feb. 28, 1961)).

[1] While Chairman, a commissioner's compensation is $500 more per annum than he would otherwise receive. Pub. L. No. 84-854, §§ 105(7), 106(45), 70 Stat. 736, 737–38 (1956) (codified at 5 U.S.C. §§ 2204(7), 2205(45) (1958)).

normally used to test the legality of dismissals of subordinate employees of the government under the civil service laws, would not be available to Mr. Kuykendall because the President is not subject to suit in personam testing the legality of his official actions. *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1866).

In the event that Mr. Kuykendall pursues either of the remedies available to him, there is some risk that a decision adverse to the President which might be entered by a lower court will not be accepted for review by the Supreme Court. Mr. Kuykendall's term expires in 14 months. Because the question is confined to the Federal Power Commission alone, and because prospective difficulties can be clarified by a new reorganization plan for the Federal Power Commission, the Supreme Court may not consider the matter sufficiently important to review on certiorari.[2]

I have reviewed the relevant statutes and legal materials bearing on this problem and conclude: (1) substantial arguments can be made for both sides of the question; but (2) if the matter were to be litigated by Mr. Kuykendall following his involuntary removal from chairmanship, the President's power to remove him would probably, but not certainly, be sustained. The qualification I have stated is necessary because the laws pertaining to the Federal Power Commission chairmanship are sufficiently ambiguous to subject litigation of the question to definite risks for both sides.

I.

The Office of the Chairman of the Federal Power Commission was created and defined by the Federal Water Power Act of 1930, which provided:

> That a commission is hereby created and established, to be known as the Federal Power Commission (hereinafter referred to as the "commission") which shall be composed of five commissioners who shall be appointed by the President, by and with the advice and consent of the Senate, one of whom shall be designated by the President as chairman and shall be the principal executive officer of the commission: *Provided*, That after the expiration of the original term of the commissioner so designated as chairman by the President, chairmen shall be elected by the commission itself, each chairman when so elected to act as such until the expiration of his term office.

Pub. L. No. 71-412, 46 Stat. 797, 797.

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[2] If Mr. Kuykendall sues in the district court (from which appeal can be taken to the Court of Appeals for the District of Columbia Circuit) his action for relief *quo warranto* would become moot when his term as a member expires. It is most likely therefore that he will sue in the Court of Claims for the extra salary due him.

This language indicates that the Chairman is simply a commissioner who, in addition to his responsibilities as a voting member of the Commission performing adjudicatory and quasi-legislative functions, also performs executive and administrative functions as principal executive officer of the agency. The designation of a new Chairman therefore merely constitutes a reassignment of those executive and administrative functions. The former Chairman continues to act as a commissioner performing the same adjudicatory and quasi-legislative functions as any other commissioner.

In 1949, as a result of studies undertaken by a task force of the Commission on Reorganization of the Executive Branch of the Government, commonly known as the Hoover Commission, President Truman forwarded to the Congress, under the provisions of the Reorganization Act of 1949, Pub. L. No. 81-109, 63 Stat. 203 (codified at 5 U.S.C. §§ 133z *et seq.* (1958)), certain changes in the manner of selecting and in the executive role of the chairmen of four independent regulatory commissions, including the Federal Power Commission. *Reorganization Plans Nos. 1 to 13 of 1950*, H.R. Doc. No. 81-504 (1950). The changes pertaining to the latter were set forth in Reorganization Plan No. 9 of 1950, 3 C.F.R. 166 (Supp. 1950), which became effective on May 24, 1950, 64 Stat. 1265. Section 3 of the Plan changed the manner of selection of the Chairman from election by the commissioners to designation by the President:

> *Designation of Chairman.*—The functions of the Commission with respect to choosing a Chairman from among the commissioners composing the Commission are hereby transferred to the President.

A similar provision appeared in the plans submitted for the three other commissions. H.R. Doc. Nos. 81-511, 81-512, 81-514 (1950). As is shown by the history of the plans discussed herein, it was the President's purpose to make uniform his powers with respect to the appointment of the chairmen of such commissions.

The solution to the problem of the President's power to reassign the chairmanship of the Federal Power Commission turns upon the technical effect that section 3 of Reorganization Plan 9 had upon the provisions of the Federal Water Power Act of 1930, quoted above. One view is that section 3 did not affect the Chairman's term because it made no reference to it; the other, which I set out in detail herein, is that no specific grant of a power of removal was necessary once designation of the Chairman had been vested in the President.

In considering the technical effect of section 3, it should be noted that Dean Landis, in his *Report on Regulatory Agencies to the President-Elect*, viewed the law as being so ambiguous that a new reorganization plan for the Federal Power Commission was necessary "making clear that the tenure of its Chairman is at the pleasure of the President." Staff of S. Comm. on the Judiciary, 86th Cong., *Report on Regulatory Agencies to the President-Elect* 85 (Comm. Print 1960) (recommendation 3). In discussing presidential control of chairmanships, Dean Landis

observed that "[t]he situation with respect to the Federal Power Commission is somewhat confused in this respect due to a palpable error in the drafting of the reorganization plan covering that agency." *Id.* at 31. These comments would undoubtedly be used to support Mr. Kuykendall's position in litigation.

In considering this problem a clear distinction must be drawn between the issue at hand—the President's power to control the term of the incumbent of an office which is purely executive and administrative—and the entirely distinct question of the President's power to remove from office as commissioners members of a tribunal performing quasi-judicial and quasi-legislative functions. The chairmanship of the Federal Power Commission does not carry with it any increased powers insofar as concerns the latter: the Chairman, like his fellow commissioners, has only one vote on matters which must be considered by the Commission in its regulatory capacity. The chairmanship is simply an additional assignment to a commissioner of duties and responsibilities of an executive nature. Cases concerning the term of office *as commissioner* of a commissioner of an independent agency performing regulatory functions, therefore, may be put aside. *See, e.g.*, *Wiener v. United States*, 357 U.S. 349 (1958); *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935). The question at hand is concerned only with the intent of the President and the Congress in changing the manner of designating the Commission's executive head, as that intent was manifested and made effective by Reorganization Plan 9.

The purpose of changing the mode of selecting the Chairman from election by the commission to designation by the President was explained in President Truman's message transmitting Reorganization Plans 1 to 13 of 1950 to the Congress:

> In the plans relative to four commissions—the Interstate Commerce Commission, the Federal Trade Commission, the Federal Power Commission, and the Securities and Exchange Commission—the function of designating the Chairman is transferred to the President. The President by law now designates the Chairmen of the other three regulatory commissions covered by these plans. The designation of all Chairmen by the President follows out the general concept of the Commission on Organization for providing clearer lines of management responsibility in the executive branch. The plans are aimed at achieving more fully these management objectives and are not intended to affect the independent exercise of the commissions' regulatory functions.

H.R. Doc. No. 81-504, at 5.

Under section 6(a) of the Reorganization Act of 1949, a reorganization plan proposed by the President becomes effective sixty days of continuous session after it is submitted to the Congress, unless either house passes a resolution stating that

that house does not favor the plan. 63 Stat. at 205 (codified at 5 U.S.C. § 133z-4(a)). Legislative inaction constitutes acquiescence.

No objection to Plan 9 was raised in the House of Representatives. But because of concern that designation of the Chairman by the President might derogate from the independence of the Federal Power Commission, as well as for other reasons, a resolution was introduced in the Senate stating that the Senate was not in favor of that plan. S. Res. 255, 81st Cong. (1950).

Hearings on Senate Resolution 255 and similar resolutions for other plans were conducted by the Senate Committee on Expenditures in the Executive Departments. *Reorganization Plans Nos. 7, 8, 9, and 11 of 1950: Hearings on S. Res. 253, 254, 255, and 256 Before the S. Comm. on Expenditures in the Executive Departments*, 81st Cong. (1950) ("Reorganization Hearings"). At the hearings, Budget Director Frederick J. Lawton explained:

> The plans affecting the Interstate Commerce Commission, the Federal Trade Commission, and the Federal Power Commission provide that the President shall designate a Commissioner to serve as Chairman. These provisions will vest uniformly in the President the function of designating Commission Chairmen. At present he already designates the Chairmen in the Federal Communications Commission, the National Labor Relations Board, and the Civil Aeronautics Board. The Commission on Organization itself took no position on this issue, pro or con. The task force of the Commission, which reported on the regulatory commissions, however, recommended:
>
> > The Chairman of each Commission should be designated by the President.
> >
> > In support of this proposal the task force stated:
> >
> > This will facilitate communication between the President and the Commission on matters of mutual concern and assist in coordination with the rest of the Government without impairing the independence of the Commission. It will also promote more effective internal administration of the Commission.
>
> Since the President now designates some Chairmen and does not designate others, and since Presidential designation has these advantages pointed out by the task force, these plans authorize Presidential designation of Chairmen in all cases.

Id. at 30–31.

The task force referred to by Mr. Lawton was the Hoover Commission's Committee on Independent Regulatory Commissions, whose report had been transmitted to the Congress on January 13, 1949. *Task Force Report on Regulatory Commissions [Appendix N], Prepared for the Commission on Organization of the Executive Branch of the Government* (Jan. 1949). This report, after a complete survey of the independent regulatory commissions, had recommended that the Chairman of each commission should be designated from among the members by the President and should serve as Chairman at his pleasure, although protected against removal as a member. The purpose of this recommendation was, first, to facilitate communication between the President and the Commission by having each commission headed by the member most acceptable to the President; and second, to strengthen the Chairman's role as administrative head of the agency by conferring presidential support upon him, thereby improving the internal administration of the commission. *Id.* at 31–33.

The members of the Federal Power Commission did not appear as witnesses in the hearings. On behalf of the Commission, however, its Chairman submitted to the committee a brief statement favoring Reorganization Plan 9. Reorganization Hearings at 214–15. Mr. Thomas C. Buchanan, a member of the Commission, submitted a separate statement, in which he took the position that the provision in the plan for presidential designation of the Chairman did not affect the Chairman's term. He stated:

> The provision for the selection of the Chairman by the President changes only the method of "choosing" and does not affect the term of the Chairman so selected under existing law.
>
> The term of a Federal Power Commissioner is presently 5 years, therefore, a President in the fourth year of his term might select as Chairman the member of the Commission nominated by him and confirmed by the Senate during that year. Under the terms of plan 9 as applied to the old law, the Chairman so selected would serve as such not only during the fourth year of the Presidential term in which he was appointed, but likewise 4 years of the succeeding term even though there may be a change in the Presidential office.

Id. at 215–16.

The Senate Committee, in reporting against the resolution of disapproval, did not refer to this testimony. It recommended that Plan 9 be permitted to go into effect. S. Rep. No. 81-1563 (1950). In debates on the floor of the Senate, Senator Edwin C. Johnson of Colorado, who opposed presidential designation of the chairmen of independent regulatory commissions, quoted, in the course of his remarks, Commissioner Buchanan's statement about the term of the Chairman's office. 96 Cong. Rec. 7381 (1950). The matter was not otherwise discussed, however, and the debate turned to other aspects of the plan. The resolution of

disapproval was defeated, thereby permitting Reorganization Plan 9 of 1950 to become effective. 96 Cong. Rec. 7383 (1950).

That Commission Buchanan's opinion was quoted on the floor of the Senate by an opponent of Reorganization Plan 9 is not of significance in determining the meaning and effect of the plan. There is nothing in the legislative history to indicate that either the committee or the Senate considered Commissioner Buchanan's view to be correct. Moreover, the legislative history of plans proposed under the Reorganization Act of 1949 cannot be read as evidencing the kind of legislative intent associated with the enactment of statutes. Under the Act, it is the President who promulgates reorganization plans. Congress cannot change the wording or the effect of his plans. It must either reject each plan totally by a resolution of disapproval or acquiesce by silence. Unless a plan is disapproved, therefore, the Congress must be deemed to have acquiesced in the President's intent in promulgating it.

As noted above, substantially the same language was used in section 3 of Reorganization Plans 7, 8, 9, and 10 (H.R. Doc. Nos. 81-511, 81-512, 81-513, and 81-514) to confer on the President authority to designate the Chairmen of the Interstate Commerce Commission ("ICC"), Federal Power Commission, Federal Trade Commission, and Securities and Exchange Commission. Although the plan for the ICC was disapproved by Senate Resolution 253, 81st Cong., 96 Cong. Rec. 7173, the plans for the other three commissions, including the provisions in each plan's section 3, became effective. Reorg. Plan No. 8 (64 Stat. 1264–65), No. 9 (64 Stat. 1265), No. 10 (64 Stat. 1265–66). Further, Budget Director Lawton's testimony quoted above reflects that the President's powers were to be uniform with respect to the chairmanship of all four of the commissions to be affected. The intent of Reorganization Plan 9 is therefore clear.

The foregoing history demonstrates that it was the purpose of the President, in proposing section 3 of that plan, and the intent of the Congress in acquiescing therein, that the Chairman, as chief administrative and executive officer of the Commission, should be acceptable to the incumbent President. This intent was implemented by the provisions of section 3 as is shown by a reading of the plain language of the section and the statute it affected.

I do not find that the failure of Reorganization Plan 9 to mention the term of the Chairman as specified in the Federal Water Power Act of 1930 resulted in a technical defect which prevented the plan from accomplishing its manifest purpose. The term of the Chairman, as specified in the 1930 Act, was merely an incident of the method of selection; the provision fixing that term therefore fell when that method was abandoned.

Since the Chairman was to be elected, he had to be chosen for some specified period; in this instance, the Congress determined that this period should be the term of membership of the commissioner elected as Chairman. The term, however, was made expressly contingent upon the mode of selection, because the statute, in

providing that the Chairman should "be elected by the commission itself," provided in the clause immediately following: "each chairman *when so elected* to act as such until the expiration of his term of office." Pub. L. No. 71-412, 46 Stat. at 797 (emphasis added). The term of the Commissioner elected to act as Chairman, therefore, was contingent solely upon the manner in which he was chosen—i.e., election. When the manner of selection was changed from election by the commission to presidential designation, the qualifying clause defining the Chairman's term became a nullity.

If this analysis is sound, and I believe it is, then Commissioner Buchanan's view is erroneous not only as a matter of the general intent of section 3, but also with regard to its technical effect. Assuming section 3 did not modify the provisions of the 1930 Act fixing the term of the Chairman, those provisions continue to apply to an elected Chairman; therefore the result envisaged by Commissioner Buchanan cannot follow. A commissioner designated as Chairman by the President under Plan 9 is not "elected" under the language of the 1930 Act; since he was not elected, such a Chairman cannot rely on the 1930 definition of his term to sustain his continued incumbency.

The editors of the United States Code have apparently taken the view that section 3 of Reorganization Plan 9 modified the language of the 1930 Act limiting the Chairman's term, even though it made no express reference to it. As published in the Code, the law reads:

> A commission is created and established, to be known as the Federal Power Commission (hereinafter referred to as the "commission") which shall be composed of five commissioners who shall be appointed by the President, by and with the advice and consent of the Senate, one of whom shall be designated by the President as chairman and shall be the principal executive officer of the commission. Each chairman, when so designated, shall act as such until the expiration of his term of office.

16 U.S.C. § 792 (1958). But if the view be accepted that the language of section 3 modified the language in the 1930 Act defining the Chairman's term, I see no reason why that effect should be confined to substituting "when so designated" for "when so elected." If the 1930 Act was changed at all it was changed for accomplishing the whole intent of the Plan; the change adopted by the editors of the Code is not provided by either the language or the purpose of the Plan.

II.

Even if it should be assumed, contrary to the conclusion reached above, that the provisions of the Federal Water Power Act limiting the term of the chairmanship subsist under Reorganization Plan 9, it can be argued that the President neverthe-

less retains power to reassign that executive and administrative function to another commissioner prior to the expiration of the current Chairman's term as a member of the Commission. It is a well-established rule that when the Congress sets forth a limitation to the term of an executive or administrative post, but vests in the President the power to designate the incumbent of that post, the President acquires, as an incident of the power to appoint, the power to remove a designee prior to the expiration of his term. *Parsons v. United States*, 167 U.S. 324 (1897); *Myers v. United States*, 272 U.S. 52 (1926); *Morgan v. TVA*, 115 F.2d 990 (6th Cir. 1940), *cert. denied*, 312 U.S. 701 (1941). Therefore, when the function of designating the Chairman was conferred upon the President by section 3 of Reorganization Plan 9, it was unnecessary to add any language to the plan expressly reserving to him power to reassign the chairmanship prior to expiration of the term limited in the Water Power Act. "The provision for a removal from office at pleasure was not necessary for the exercise of that power by the President, because of the fact that he was then regarded as being clothed with such power in any event." *Parsons*, 167 U.S. at 339; *see Myers*, 272 U.S. at 164. The executive functions[3] of the Chairman of the Federal Power Commission, like those of the United States Attorney in *Parsons* and the postmaster in *Myers*, are to be performed by the President's designee; and, as in those cases, the law presumes that the designee will perform those functions for the specified term, unless sooner removed by the President.

It is open to us to argue that any other interpretation with respect to the power of the President to relieve a presidential appointee from the performance of purely executive functions prior to the expiration of a statutory term would raise serious constitutional questions. *Myers*, 272 U.S. 52; *see Wallace v. United States*, 257 U.S. 541, 545 (1922); *United States v. Perkins*, 116 U.S. 483, 484 (1886).

Whether the "executive function" contention set forth above can be sustained in litigation is not clear. While it is true that the functions of the Chairman are "executive" in the sense that he is the Commission's chief manager, those functions can be analogized to the administrative role of a chief judge. Under such a view, the "executive" functions are purely incidental and subsidiary to the performance of the Commission's regulatory role. Relying on the rationale of *Wiener*, Mr. Kuykendall could contend that in establishing the Commission as an independent regulatory agency, and giving its Chairman a fixed term, Congress put him beyond the pale of executive control; the independence of the commissioner designated as Chairman, under this view, cannot be compromised by the threat of presidential removal except as expressly provided by law.

It is possible to answer this by showing that, in its non-regulatory functions, the Federal Power Commission is not independent of executive control. Its budget

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[3] As noted above, the commissioner who is relieved by the President of the executive and administrative functions of the chairmanship continues to exercise the independent regulatory functions of a commissioner.

must be submitted through the President (31 U.S.C. §§ 11, 16 (1958)); internal management surveys may be required by the Bureau of the Budget under 31 U.S.C. § 18 (1958) (*see* General Government Matters Appropriation Act, 1961, Pub. L. No. 86-642, 74 Stat. 473, 475 (1960)); and Dean Landis has pointed out that even proposed legislation to be submitted by the independent agencies must be cleared through the Bureau of the Budget. *Report on Regulatory Agencies to the President-Elect* at 31. Moreover, the Commission's subordinate employees are subject to the Civil Service laws and regulations (16 U.S.C. § 793 (1958)), which are promulgated by the President under the Civil Service Act (5 U.S.C. § 631 (1958); *see* Exec. Order No. 10577, 3 C.F.R. 218 (1954–1958), 19 Fed. Reg. 7521 (1954)). Apart from these express statutory powers, the President has some measure of responsibility for the regulatory agencies under his constitutional duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. While the theory of the independent regulatory commission requires that its administration of the regulatory laws should be independent of executive control, the laws administered by the Chairman in his executive capacity are not regulatory at all—they are substantially the same as those administered by the head of any department or office. The chairmanship, therefore, is not an office which is independent in the way that the office of commissioner is independent. The threat of presidential removal does not compromise the chairmanship of the Federal Power Commission any more than it compromises the chairmanships of the other regulatory agencies.

III.

For the foregoing reasons I conclude that the President has power to remove Mr. Kuykendall from the chairmanship of the Commission, and to reassign the chairmanship to another commissioner. But in arriving at this conclusion, it should be noted that Mr. Kuykendall can find respectable support for the contrary proposition. He would rely upon Commissioner Buchanan's statement, the comment in Dean Landis's report, and the interpretation of the effect of Reorganization Plan 9 by the editors of the U.S. Code. The latter, under 1 U.S.C. § 204(a) (1958), is prime facie, but not conclusive, evidence of the law. Therefore, the question is not entirely free from doubt, and it may well be preferable to seek a legislative solution under the current reorganization plan proposals rather than run the risks of litigation.

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Office of Legal Counsel

Lobbying by Executive Branch Personnel

Title 18, section 1913 of the U.S. Code does not bar conversations which a Peace Corps employee had with certain members of Congress at the direction of the Director of the Peace Corps in an attempt to enlist their support for a bill to establish the Peace Corps on a statutory basis.

A literal interpretation of 18 U.S.C. § 1913, which would prevent the President or his subordinates from formally or informally presenting his or his administration's views to the Congress, its members, or its committees regarding the need for new legislation or the wisdom of existing legislation, or which would prevent the administration from assisting in the drafting of legislation, would raise serious doubts as to the constitutionality of that statute. As so interpreted, it would seriously inhibit the exercise of what is now regarded as a basic constitutional function of the President concerning the legislative process.

October 10, 1961

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

This is in response to your request for my comment regarding Congressman H.R. Gross's letter of August 24, 1961 to the Attorney General. Mr. Gross called the Attorney General's attention to testimony given on August 4, 1961 by Sargent Shriver, Director of the Peace Corps, before the Subcommittee on Manpower Utilization of the House Post Office and Civil Service Committee, to the effect that Bill Moyers, a paid employee of the Peace Corps, had joined him in conferring with various congressmen to enlist their support of a bill to establish that organization on a statutory basis. Mr. Gross is of the view that this action by Messrs. Shriver and Moyers conflicted with section 209 of the General Government Matters Appropriation Act, 1961,[1] and he requests a "review and disposition" of the matter.

I.

The statute referred to by Mr. Gross reads as follows:

> No part of any appropriation contained in this or any other Act, or of the funds available for expenditure by an individual, corporation, or agency included in this or any other Act, shall be used for publicity or propaganda purposes designed to support or defeat legislation pending before Congress.

[1] Pub. L. No. 86-642, 74 Stat. 473, 478.

Id. § 209. A similar or identical provision has been enacted in one or more appropriation acts each year since 1951,[2] when it appeared in section 408 of the Department of Agriculture Appropriation Act, 1952[3] and shortly thereafter in section 603 of the Independent Offices Appropriation Act, 1952.[4]

The provision made its way into the Department of Agriculture Appropriation Act, 1952, by means of a floor amendment in the House.[5] The sponsor of the amendment, Congressman Smith of Wisconsin, was critical of the number of public relations personnel employed in the government agencies and of the great volume of government publications. He recommended his amendment and it was adopted in the context of stemming the flow of such publications.[6] Although there was no discussion of this amendment in the Senate Committee report and no mention of it in debate on the Senate floor, Senate discussion of the same amendment in the Independent Offices Appropriation Act disclosed a concern only with the expenditure of government funds for personal services and publications intended to affect the course of legislation by molding public opinion.[7] The enactment of this provision in the years since 1951 has been routine and without significant congressional comment.

It will be seen that the legislative history of the language in section 209 of the General Government Matters Appropriation Act of 1961 does not support the application of that section, or of the identical legislation currently in effect,[8] to purely private meetings by Executive Branch officials with members of Congress. Furthermore, the "publicity or propaganda purposes" which are the sine qua non of the expenditures made unlawful by section 209 cannot reasonably be found to inhere in such private meetings. I am of the opinion, therefore, that Mr. Shriver and Mr. Moyers did not violate the statutory provision referred to by Mr. Gross when they visited Members of Congress in support of the Peace Corps legislation.

Although Mr. Gross did not mention 18 U.S.C § 1913, that statute has some relevance in connection with his complaint. In the absence of an express congressional authorization to the contrary, it prohibits the use of appropriated funds

> to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed

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[2] The provision was most recently enacted as section 509 of the General Government Matters, Department of Commerce, and Related Agencies Appropriation Act, 1962, Pub. L. No. 87-125, 75 Stat. 268, 283 (Aug. 3, 1961).

[3] Pub. L. No. 82-135, 65 Stat. 225, 247 (1951).

[4] Pub. L. No. 82-137, 65 Stat. 268, 291 (1951).

[5] 97 Cong. Rec. 5474–75 (May 17, 1951).

[6] *Id.*

[7] 97 Cong. Rec. 6733–39 (June 19, 1951); 97 Cong. Rec. 10,065 (Aug. 15, 1951); 97 Cong. Rec. 10,111 (Aug. 16, 1951).

[8] *See supra* note 2.

> to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, . . . but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to Members of Congress on the request of any Member or to Congress, through the proper official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business.[9]

Section 1913 is derived from section 6 of the Third Deficiency Appropriation Act, Fiscal Year 1919.[10] While the committee reports make no mention of this section, the floor manager of the bill in the House explained that

> It is new legislation, but it will prohibit a practice that has been indulged in so often, without regard to what administration is in power—the practice of a bureau chief or the head of a department writing letters throughout the country, sending telegrams throughout the country, for this organization, for this man, for that company to write his Congressman, to wire his Congressman, in behalf of this or that legislation. . . . The gentleman from Kentucky, Mr. Sherley, former chairman of this committee, during the closing days of the last Congress was greatly worried because he had on his desk thousands upon thousands of telegrams that had been started right here in Washington by some official wiring out for people to wire Congressman Sherley for this appropriation and for that. Now, they use the contingent fund for that purpose, and I have no doubt that the telegrams sent for that purpose cost the Government more than $7,500. Now, it was never the intention of Congress to appropriate money for this purpose, and section [6] of the bill will absolutely put a stop to that sort of thing.[11]

It is apparent that 18 U.S.C. § 1913 was enacted for essentially the same purpose as the recent appropriation act provisions considered above. However, applied literally, 18 U.S.C. § 1913 would seem to preclude Executive Branch officials from speaking or otherwise communicating in support of proposed legislation to members of Congress, as distinguished from Congress as a body, except upon the request of a member. Moreover, applied literally, the section would seem to preclude any communications whatsoever, whether invited or not,

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[9] A search has revealed no judicial or formal administrative precedents concerned with 18 U.S.C. § 1913.

[10] Pub. L. No. 66-5, 41 Stat. 35, 68.

[11] 58 Cong. Rec. 403 (May 29, 1919).

from representatives of the Executive Branch to Congress or members of Congress for the purpose of expressing opposition to proposed legislation. These extreme prohibitions have not been observed by either the Legislative or the Executive Branch and, as a practical matter, could not be observed without great harm to the lawmaking process. Accordingly, I agree with the conclusion reached by now Senator Thomas J. Dodd in his memorandum of June 7, 1940 to Mr. Rogge (a copy of which you forwarded) that this statute is to be construed in the light of its purpose in order to avoid any absurd results flowing from its literal application. Viewing the statute in this light in relation to the instant matter, I am of the opinion that it did not bar the conversations which Mr. Moyers had with certain members of Congress at the direction of Mr. Shriver even though the conversation took place at the instance of Mr. Shriver and not at the request of the congressmen.

II.

Passing to the inquiry of the Deputy Attorney General as to "how Justice personnel can be used on the hill," I might observe at the outset that the so-called "federal lobby" has more than once been the subject of criticism by members of Congress and others.[12] However, the criticism has almost always arisen from activities by government officials which are considered to be aimed at rallying opinion for or against pending legislation and not from the occurrence of personal conferences between such officials and members of Congress or their aides.[13]

In 1949 the House constituted a Select Committee on Lobbying Activities to investigate, among other things, "all activities of agencies of the Federal Government intended to influence, encourage, promote or retard legislation."[14] In the course of remarks made at the beginning of hearings on this phase of the Committee's assignment, the Chairman stated:

> As I said in opening our previous sessions in this series of hearings, it is necessary in a democracy, for our citizens, individually or collectively, to seek to influence legislation. It is equally necessary for the executive branch of Government to be able to make its views known to Congress on all matters in which it has responsibilities, duties, and opinions. The executive agencies have a definite requirement to express views to Congress, to make suggestions, to request

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[12] See Dorothy C. Tompkins, *Congressional Investigation of Lobbying: A Selected Bibliography* 16–23 (1956), for a list of writings on the legislative activities of the federal agencies.

[13] For example, the Subcommittee on Publicity and Propaganda of the House Committee on Expenditures conducted an investigation in 1947–48 to inquire into "reports of the persistent efforts within the administrative agencies of Government to discredit Congress and to influence legislation." H.R. Rep. No. 80-2474, at 1 (1948).

[14] H.R. Res. 298, 81st Cong. (enacted).

> needed legislation, to draft proposed bills or amendments, and so on. . . .
>
> What I am trying to make abundantly clear here at the start is that the executive agencies have the right and responsibility to seek to "influence, encourage, promote or retard legislation" in many clear and proper—and often extremely effective—respects, and that definite machinery is provided by law and by established custom for the exercise of these rights, but that, under certain conditions, Federal funds cannot be spent to influence Congress.[15]

The concern of the Committee members during this portion of the hearings was almost exclusively with conduct of agency heads and lesser officials which generated public pressure on members of Congress. Only two or three brief exchanges in the hearings dealt with personal efforts on the part of government officials to persuade congressmen to vote for or against legislation.[16]

In an interim report[17] the Select Committee pointed out that Article II, Section 3 of the Constitution, relating to the duties and powers of the President, provides that "he shall from time to time give to the Congress Information on the State of the Union and recommend to their Consideration such Measures as he shall judge necessary and expedient." The Committee went on to comment that

> in furtherance of basic responsibilities the executive branch, and particularly the Chief Executive and his official family of departmental and agency heads, inform and consult with the Congress on legislative considerations, draft bills and urge in messages, speeches, reports, committee testimony and by direct contact the passage or defeat of various measures.[18]

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[15] *Legislative Activities of Executive Agencies: Hearings Before the H. Select Comm. on Lobbying Activities*, 81st Cong., pt. 10, at 2 (1950).

[16] For example, Congressman Halleck at one point asked the Administrator of the Housing and Home Finance Agency whether he or any subordinate "unsolicited, undertook to persuade Members of Congress in respect to the legislation." After receiving a negative response, Mr. Halleck observed that it seemed to him many times that "the executive departments have pressed with undue vigor on matters of legislation almost to the point of usurpation of the legislative authority." *Id*. at 51. At another point the Federal Security Administrator averred that "there is no law that says I cannot try to influence Congress on my own" as an officer, if not using federal funds for that purpose. *Id*. at 341.

[17] H.R. Rep. No. 81-3138, at 51 (1950).

[18] *Id*. at 52; *see also id.* at 54.

In its final report the Select Committee made no criticism of any particular lobbying practices by government officials and concluded that 18 U.S.C. § 1913 is adequate to prevent improper lobbying activities by these officials.[19]

The Select Committee was sound in emphasizing that the participation of the President in the legislative function is based on the Constitution. "[I]t was the intention of the Fathers of the Republic that the President should be an active power [in legislation] . . . . [H]e is made by the Constitution an important part of the legislative mechanism of our government."[20] "The President's right, even duty, to propose detailed legislation to Congress touching every problem of American society, and then to speed its passage down the legislative transmission belt, is now an accepted usage of our constitutional system."[21] This constitutionally established role in the legislative process has become so vital through the years that the President has been aptly termed the Chief Legislator.[22]

The Select Committee was also sound in recognizing that the President cannot carry out his constitutional duties in the legislative arena by himself and that necessarily he must entrust authority to his chief subordinates to act, and in turn to direct their own subordinates to act, in this arena in his stead.[23] The Hoover Commission's Task Force on Departmental Management made a similar point in stating that a department head is at all times an assistant to the Chief Executive but that

> as a part of the executive branch, he has also the constitutional obligation both to consult with and inform the legislature, as well as to see that legislative intentions expressed through statutes are realized.[24]

Congress itself has given specific recognition to the propriety of "lobbying" activities on the part of government officials in section 308 of the Federal Regulation of Lobbying Act of 1946.[25] That section in general imposes registration requirements on persons who are paid for attempting to influence passage or

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[19] H.R. Rep. No. 81-3239, pt. 1, at 35–36 (1951). The minority party members of the Committee, although not advocating any legislation in addition to 18 U.S.C. § 1913, criticized the Committee as having "seen fit to defend lobbying by Government." *Id*. pt. 2, at 4.

[20] Thomas J. Norton, *The Constitution of the United States: Its Sources and Its Application* 123 (special ed. 1940, 8th printing 1943).

[21] Clinton Rossiter, *The American Presidency* 108 (2d rev. ed. 1960).

[22] Lawrence H. Chamberlain, *The President, Congress and Legislation* 14 (1946); Rossiter, *supra* note 21, at 38; *see also* Edward S. Corwin, *The President: Office and Powers* 265–77 (4th ed. 1957).

[23] Examples of significant legislative activities by executive agency personnel of varying ranks during the period beginning about 1890 appear in Chamberlain, *supra* note 22.

[24] 3 U.S. Comm'n on Org. of the Exec. Branch of the Gov't, Report of the Task Force on Departmental Mgmt. in Fed. Admin., *Departmental Management in Federal Administration* 40 app. E (1949).

[25] Pub. L. No. 79-601, 60 Stat. 812, 839, 841 (codified at 2 U.S.C. § 267).

defeat of any legislation by Congress. However, certain categories of persons are excepted from these requirements, including in particular a "public official acting in his official capacity." *Id.*

It must be conceded that the constitutional activities of the President, and of subordinate officers of the Executive Branch acting on his behalf to influence legislation, can, like other areas of his constitutional authority, be subjected to a measure of control by limitations imposed by Congress upon the use of appropriated funds. Congress

> may grant or withhold appropriations as it chooses, and when making an appropriation may direct the purposes to which the appropriation shall be devoted. It may also impose conditions with respect to the use of the appropriation, *provided always that the conditions do not require operation of the Government in a way forbidden by the Constitution*.

Authority of Congressional Committees to Disapprove Action of Executive Branch, 41 Op. Att'y Gen. 230, 233 (1955) (emphasis supplied); *see also United States* v. *Butler*, 297 U.S. 1, 73–74 (1936). I would therefore consider it most doubtful whether Congress could impose limitations upon the use of appropriated funds which go so far as to render it altogether impractical or impossible for the President, and those acting pursuant to his direction, to carry out a basic constitutional function.

I would not be prepared to take the position that the limitation contained in the General Government Matters Appropriation Acts on the use of appropriated funds for publicity or propaganda campaigns does go so far. I believe, however, that a literal interpretation of 18 U.S.C. § 1913 which would prevent the President or his subordinates from formally or informally presenting his or his administration's views to the Congress, its members or its committees as to the need for new legislation or the wisdom of existing legislation, or which would prevent the administration from assisting in the drafting of legislation, would raise serious doubts as to the constitutionality of that statute. As so interpreted, it would seriously inhibit the exercise of what is now regarded as a basic constitutional function of the President concerning the legislative process. It seems clear that this consideration significantly affected the view of 18 U.S.C. § 1913 taken by the House Select Committee on Lobbying. As understood by that committee, 18 U.S.C. § 1913 prohibits only substantially the same activities as are covered by the limitation in the appropriation acts. In addition, it should be noted that the consistent practice in the over forty years during which 18 U.S.C. § 1913 has been in effect is based upon the assumption that it goes no further.

III.

Having in mind the constitutional provision and other material referred to above, I make the following observations in response to the Deputy Attorney General's inquiry as to the use of department personnel at the Capitol:

1. There is no legal objection to the use of any officer or employee of the Department to call upon members or aides of the Congress to express the position of the Department with regard to proposed legislation in which it has a proper interest.

2. There is no legal objection to the Department's rendering drafting assistance to a member of Congress or a congressional committee which requests it—or volunteering such assistance when the Department deems it appropriate.

3. There is no legal objection to the Department's placing members of its staff at the disposal of a congressional committee which is meeting in executive session either to study or to mark up a bill.[26]

4. There is no legal objection to the Department's requesting permission for a representative to testify at public hearings of a congressional committee. Whether a request will be granted is, of course, within the discretion of the committee and it is therefore desirable, if possible, to ascertain in advance of the request what the reaction is likely to be.

5. Representatives whom the Department sends to the Capitol should leave no doubt that they are acting solely in an official capacity and they should make certain that any department views and positions they may present are identified as such rather than as their own personal views.

NICHOLAS deB. KATZENBACH
Assistant Attorney General
Office of Legal Counsel

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[26] It is interesting to note that an executive branch employee, Benjamin V. Cohen, was present on the floor of the House of Representatives during a session in 1934 at the request of Speaker Rayburn, then Chairman of the Committee on Interstate and Foreign Commerce, to aid him in explaining the bill that became the Securities Exchange Act of 1934. 78 Cong. Rec. 7943–44 (May 2, 1934).

Authority of Congress to Regulate Wiretapping by the States

Congress has authority under the Commerce Clause to regulate state wiretapping practices by prescribing a rule of evidence in state courts, limiting the authority of state officials to tap wires and to disclose and use information thereby obtained, prescribing the grounds and findings on which a state court may issue wiretap orders, and directing state courts to file reports with federal officials.

February 26, 1962

MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL

One question presented by the Department's wiretap bill is the constitutional authority of Congress to prescribe a rule of evidence in state courts, to limit the authority of state officials to tap wires and to disclose and use information thereby obtained, to prescribe the grounds and findings on which a state court may issue wiretap orders, and to direct state courts to file reports with federal officials.

Congress's power to do all of these things rests primarily on its power to regulate interstate commerce. The nation's telephone and telegraph systems are integrated networks, used for the transmission of messages across state lines. Congress has the power to preserve the integrity of those systems, and hence to prohibit interception of both interstate and intrastate communications. *Weiss v. United States*, 308 U.S. 321 (1939). In so doing, it may prohibit action by state officers pursuant to state law. *Benanti v. United States*, 355 U.S. 96 (1957). Since Congress can prohibit all interceptions of wire communications, it can also permit interception on such terms and conditions as it deems appropriate to protect the public interest. In particular, it can adopt appropriate safeguards to protect the privacy of users of the telephone and telegraph systems. To aid in enforcing these limitations, it can remove an incentive to unlawful wiretapping by making inadmissible any evidence derived therefrom. And to enable Congress to review the effectiveness of its legislation, it can require reports.

Unregulated wiretapping would "impinge severely on the liberty of the individual." *Schwartz v. Texas*, 344 U.S. 199, 205 (1952) (Douglas, J., dissenting). The fear of such tapping may be a deterrent to free expression. Hence, while the Fourth Amendment is inapplicable, *Olmstead v. United States*, 277 U.S. 438 (1928),[*] unregulated wiretapping by public officials might well raise constitutional issues under the Due Process Clauses of the Fifth and Fourteenth Amendments. Hence

[*] Editor's Note: *Olmstead* was subsequently overruled in relevant part by *Katz v. United States*, 389 U.S. 347 (1967); *see also Berger v. New York*, 388 U.S. 41, 64 (1967) (Douglas, J., concurring) ("I join the opinion of the Court because at long last it overrules *sub silentio Olmstead v. United States*, 277 U.S. 438, and its offspring and brings wiretapping and other electronic eavesdropping fully within the purview of the Fourth Amendment.").

the provisions of the bill restricting state action can also be sustained as an exercise of Congress's power to enforce the Fourteenth Amendment.

Where Congress has regulatory authority under the Commerce Clause, the war power, etc., the Supreme Court has frequently sustained limitations on state courts and other state officials as "necessary and proper" to carry into execution the granted powers. U.S. Const. art. I, § 8, cl. 18. For example:

> *Ullmann v. United States*, 350 U.S. 422 (1956) (immunity from prosecution in a state court);
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> *Adams v. Maryland*, 347 U.S. 179 (1954) (prohibition against use in state court of evidence given before congressional committee);
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> *Kalb v. Feuerstein*, 308 U.S. 433 (1940) (prohibition against state court foreclosure proceeding);
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> *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525 (1959) (immunity from state libel action); and
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> *Testa v. Katt*, 330 U.S. 386 (1947) (requirement that state courts enforce federal act).

In situations in which Congress has required state courts to enforce federal rights, it has prescribed state practice in considerable detail. Thus, in the Immigration and Nationality Act of 1952, Congress conferred jurisdiction to naturalize persons as citizens of the United States on state courts of record (8 U.S.C. § 1421(a) (Supp. II 1959–60)); prescribed in detail the form of petitions, the procedure on hearings, and the form of certificates (8 U.S.C. §§ 1445–1449 (1958)); and required clerks of state courts to file certain reports with the Attorney General (8 U.S.C. § 1450 (1958)). Similarly, in numerous cases in state courts under the Federal Employers' Liability Acts, 45 U.S.C. §§ 51 *et seq.* (1958), and the Jones Act, 46 U.S.C. § 688 (1958), the courts have held that various state rules of evidence and practice—such as burden of proof of contributory negligence, rules of construction of pleadings, right to directed verdict or to judgment notwithstanding the verdict, and statutes of limitation—have been superseded by the federal act. *E.g.*, *Second Employers' Liability Cases*, 223 U.S. 1 (1912); *Cent. Vt. Ry. v. White,* 238 U.S. 507 (1915); *Bailey v. Cent. Vt. Ry*. 319 U.S. 350 (1943); *Brown v. W. Ry. of Ala.*, 338 U.S. 294 (1949); *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359 (1952); *Cox v. Roth*, 348 U.S. 207 (1955).

In *Schwartz* v. *Texas*, 344 U.S. 199, 203 (1952), the Court reserved decision on whether Congress had power to render evidence obtained by illegal wiretapping inadmissible in a state court. However, in *Benanti* v. *United States*, 355 U.S. 96, 101 (1957), the rationale of the *Schwartz* decision was stated to be that Congress

would not be presumed to have thwarted a state rule of evidence "in the absence of a clear indication to that effect."

The *Schwartz* decision rested in part (344 U.S. at 201) on *Wolf v. Colorado*, 338 U.S. 25 (1949), which has since been overruled by *Mapp v. Ohio,* 367 U.S. 643 (1961). In holding, in *Mapp*, that the Fourth and Fourteenth Amendments require the exclusion in state courts of evidence derived from an unlawful search, the Court relied on the following practical considerations: (1) the exclusionary rule is the only effective means to enforce the prohibition against unlawful searches, since it removes the incentive to disregard it (367 U.S. at 656); (2) by admitting evidence unlawfully seized, the states encourage disobedience to the Federal Constitution (*id.* at 657); (3) the coexistence of two different rules of evidence in federal and state courts is productive of confusion and mischief, and an invitation to evasion of the law (*id.* at 657–58). These considerations are essentially applicable to the rule of evidence proposed in section 3 of the present bill. Since the Court deemed the exclusionary rule an appropriate means of enforcing the constitutional prohibition against unlawful seizures, Congress can properly deem it an appropriate means of enforcing the statutory prohibition of unlawful wiretaps.

NICHOLAS deB. KATZENBACH
Assistant Attorney General
Office of Legal Counsel

Authority Under International Law to Take Action If the Soviet Union Establishes Missile Bases in Cuba

In the event that missile bases should be established in Cuba by the Soviet Union, international law would permit use by the United States of relatively extreme measures, including various forms and degree of force, for the purpose of terminating or preventing the realization of such a threat to the peace and security of the western hemisphere.

An obligation would exist to have recourse first, if time should permit, to the procedures of collective security organizations of which the United States is a member.

The United States would be obliged to confine any use of force to the least necessary to the end proposed.

August 30, 1962

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

The attached memorandum makes reference to an appendix of historical materials which has not yet been typed in final form. It will be delivered later today.

As you will see, the memorandum has some of the tone of a brief; it devotes little space to any counter-arguments that might be made. This approach seemed desirable in order to avoid any appearance of doubt or indecision in case any public use of the material should be made. I do not mean to suggest that we doubt our conclusions, but only that greater emphasis could have been given to the opposing arguments that exist. Nick and I discussed the memorandum this morning and agreed that it might be a good idea to prepare a supplemental memorandum on the opposing arguments and some of the non-legal factors that may be relevant.

The form of any statement that might be made, and the question whether one should be made at all, depend greatly on what information and evidence are available. There are strong reasons for withholding any statement until the President is ready to take some action. If this subject is raised and discussed and nothing happens, the international community may grow used to the problem of Soviet missiles in Cuba and it will become more difficult for us as time passes to generate the sense of urgency needed to get action approved in the Organization of American States ("OAS"). On a political level, there might be charges of inaction and of "no win" policy. On the other hand, if no statement is made we would lose the chance that a mere warning would be sufficient. I think the Soviet Union and Cuba are already aware that any attempt to install missiles in Cuba might provoke the most extreme countermeasures on our part.*

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* Editor's Note: This opinion has previously been published in 6 Green Bag 2d 195 (2003), but without the cover memorandum (the material that precedes this note) and without the appendix of historical materials that starts on page 260. We have not been able to locate the supplemental memorandum that is mentioned in the second paragraph above.

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This is in response to your request for the views of this Office as to certain legal issues bearing upon a proposed declaration by the President of the intentions of this government in the event that missile bases should be established in Cuba by the Soviet Union. In general, it is our view that international law would permit use by the United States of relatively extreme measures, including various forms and degree of force, for the purpose of terminating or preventing the realization of such a threat to the peace and security of the western hemisphere. An obligation would exist to have recourse first, if time should permit, to the procedures of collective security organizations of which the United States is a member. The United States would, further, be obliged to confine any use of force to the least necessary to the end proposed.

Part I of this memorandum deals with the function and content of the concept of self-defense in international law generally. The next part examines certain regional differences which have developed in the application of that concept as a result of historical attitudes and practices and other factors. The memorandum concludes with several concrete suggestions as to the form and content of the proposed statement by the President.

I.

International law relating to the use of force centers about the polar concepts of aggression and self-defense. Although forcible violation of a state's boundaries or of its most highly developed systems of municipal law permit the use of force in self-defense within relatively narrow limits, in the international community, where there exists no centralized authority capable of maintaining order, states must have, and are accorded by law, a proportionately greater freedom to protect their vital interests by unilateral action. Not only customary international law but the United Nations Charter and substantially all other conventions and treaties which relate to this subject recognize the indispensable role of self-defense under present conditions.

The concept of self-defense in international law of course justifies more than activity designed merely to resist an armed attack which is already in progress. Under international law every state has, in the words of Elihu Root, "the right . . . to protect itself by preventing a condition of affairs in which it will be too late to protect itself."[1] Cases commonly cited as illustrative of this principle include that of the Virginius,[2] in which Spanish forces seized an American vessel on the high

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[1] Elihu Root, *The Real Monroe Doctrine*, 8 Am. J. Int'l L. 427, 432 (1914).

[2] 2 John Bassett Moore, *A Digest of International Law* §§ 309, 315, at 895–903, 980–83 (1906); William Edward Hall, *A Treatise on International law* § 86, at 328–31 (A. Pearce Higgins, ed., 8th ed. 1924).

seas en route to Cuba carrying arms for the use of insurgents. Britain demanded reparations for arbitrary treatment of its subjects found on board the vessel after the seizure was effected, but conceded the legality of the seizure itself. The United States withdrew its initial protest and eventually adopted the British view of the incident as its own. Similarly, in the case of the Caroline,[3] Canadian forces invaded the United States and destroyed the vessel, which was to be used by Canadian insurgents and American sympathizers in an attack on Canada. Many other illustrations of the principle could be cited.[4]

Although it is clear that the principle of self-defense may justify preventive action in foreign territory and on the high seas under some circumstances, it is also clear that this principle is subject to certain limitations. For example, such defensive action is subject to a rule of proportionality. Thus in the Caroline case the United States called upon Great Britain not only to justify the taking of preventive action, but also to show that its forces "did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity and kept clearly within it."[5]

A further limitation on preventive action, at least unilateral action not sanctioned by any collective security arrangement, relates to the degree of urgency that must exist before it is invoked. In the next section of this Memorandum it is argued that, under the special regime applicable to the Western Hemisphere, the mere maintenance of facilities for certain kinds of armed attack, without more, may justify preventive action. However, apart from such special regimes, it is clear that preventive action in self-defense is warranted only where the need for it is "instant, overwhelming, leaving no choice of means, and no moment for deliberation."[6] It thus is clear that preventive action would not ordinarily be lawful to prevent the maintenance of missile bases or other armaments in the absence of evidence that their actual use for an aggressive attack was imminent.

Another limitation upon the concept of self-defense, as derived from customary law, is imposed by the United Nations Charter (59 Stat. 1031) and the charters of regional collective security organizations, such as the Organization of American States ("OAS"), of which the United States is a member. The charters of these organizations in each case preserve the right of individual states to use force in self-defense, and, although certain ambiguities are presented by the language used, it appears that none of the charters prohibits the taking of unilateral preventive

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[3] Hall, *supra* note 2, § 84, at 322–25; 1 Charles Cheney Hyde, *International Law Chiefly as Interpreted and Applied by the United States* § 66, at 239–40 (2d ed. 1945).

[4] *See, e.g.*, D.W. Bowett, *Self-Defense in International Law* (1958).

[5] Letter for Henry Stephen Fox, Envoy Extraordinary and Minister Plenipotentiary, from Daniel Webster, Secretary of State, Apr. 24, 1841, *reprinted in* 29 *British and Foreign State Papers* 1129, 1138 (1840–41).

[6] *Id*. Mr. Webster's statement was quoted with approval by the International Military Tribunal at Nuremberg. Judgment of Oct. 1, 1948, *reprinted in* 41 Am. J. Int'l L. 172, 205 (1947).

action in self-defense prior to the occurrence of an armed attack. However, although it is arguable that there is no express commitment in these charters to utilize the procedures they afford in situations calling for preventive action, adherence to such an organization undoubtedly carries with it a commitment to have recourse to the organization's procedures if at all possible before acting unilaterally.[7] Indeed, an obligation to this effect might well be deduced from the general rules as to preventive action, summarized above, to the effect that such action is lawful only as a last resort. In any event, the United States is heavily committed to the use of collective security procedures as a matter of policy.

A further principle recognized in the U.N. Charter (art. 51) is that action may be taken in self-defense, pursuant to a regional collective security arrangement, by a state which is not directly threatened. If a sufficient threat against any member state is established, the organization and all its members may act. In this respect, the Charter has the effect of expanding the area in which preventive action is regarded as lawful.

Both the U.N. Charter and the Charter of the OAS (Apr. 30, 1948, T.I.A.S. No. 2361, 2 U.S.T. 2416, 119 U.N.T.S. 48) authorize collective action upon less provocation than would be required to justify unilateral action. The Security Council may take action against any "threat to the peace" or "breach of the peace" as well as any "act of aggression" (U.N. Charter art. 39). Such action may include not only the economic and political sanctions listed in article 41 but also "demonstrations, blockade, and other operations by air, sea, or land forces," as provided in article 42. Action proposed in the Security Council is, of course, subject to veto by any one of the five permanent members. Upon a less explicit legal basis, the General Assembly may take similar action under the "Uniting-for-Peace" resolution. Under article 25 of the Charter of the OAS and article 5 of the Rio Treaty (or "Rio Pact," Inter-American Treaty of Reciprocal Assistance, *opened for signature* Sept. 2, 1947, 62 Stat. 1681, *reprinted in 17* Dep't of State Bull. 565 (Sept. 21, 1947)), which are interrelated, measures for the common defense may be taken not only in the event of an armed attack but also if the "territory or the sovereignty or political independence of any American State" is affected by "an act of aggression that is not an armed attack" or by "any other fact or situation that might endanger the peace of America . . . ." Under article 17 of the Rio Treaty, enforcement action requires a two-thirds vote in the Organ of Consultation.

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[7] Article 51 of the U.N. Charter requires that action taken in the exercise of the right of self-defense be reported to the Security Council. Unilateral action such as a blockade or an armed attack could, further, be brought before the OAS for review by any member nation. Decisions by two-thirds vote of the Organ for Consultation created by the Rio Pact are binding upon all member states (art. 20), except that no state can be required to use armed force without its consent.

II.

Since the Monroe Doctrine was announced in 1823, the United States has consistently maintained that it has the right to take all necessary action to prevent any non-American power from obtaining control over territory in the Western Hemisphere. Since 1846, when the so-called Polk Corollary of the Doctrine was added, it has been understood that this right is claimed regardless of whether the foreign intervention occurs with the consent of inhabitants of the area affected. In modern times, it has been understood that the right is claimed not only on behalf of the United States but on behalf of all American states. The right has repeatedly been respected and acknowledged throughout the Americas and the world.

Historical materials with respect to the Monroe Doctrine are collected in the Appendix which is attached. Perhaps the most relevant of these materials are those relating to action taken by the United States and other nations in the Western Hemisphere during the period of 1940–41, prior to their involvement in World War II. In 1940, by the Act of Havana, the American powers agreed to prevent by collective action, or by unilateral action if necessary, changes in the control of territory in the Western Hemisphere as a result of the European hostilities. In 1941, the United States occupied Greenland and dispatched troops to Iceland. Although the occupation of Greenland was justified in part under a treaty with the Danish government in exile, it seems clear that the true basis for the action taken by the United States was the concept of regional self-defense expressed in the Monroe Doctrine.[8]

The historical materials which are appended show that the Doctrine has from the beginning represented a regional variation in the international law of self-defense. The Doctrine asserts that, in order to insulate the Americas from dangers to peace and security stemming from conflicts involving non-American states, the occupation or control of American territory by a non-American power in itself shall be deemed to present a sufficient danger to warrant exercise by the United States and other American powers of the right of self-defense. The result of the consistent adherence to this attitude by the United States and most other American states, together with the acquiescence of the rest of the civilized world, has been to create a specialized, regional body of law under which preventive action in self-defense is, in the Americas, authorized under less restrictive conditions than would be required in some other regions.

In more recent years, the United States has ceased to maintain the Monroe Doctrine in the more extreme forms which it assumed in the late nineteenth and early twentieth centuries. The Doctrine today does not protect purely economic or political interests, as it once did, or even security interests which are less than fundamental. Thus the United States has refrained from direct intervention in Cuba

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[8] *See, e.g.*, Herbert W. Briggs, Editorial Comment, *The Validity of the Greenland Agreement*, 35 Am. J. Int'l L. 506 (1941).

to prevent the mere continuance in office, apart from any specific military threat, of a government which is allied with the communist bloc and which has not hesitated to destroy economic interests of the United States in the island. The United States has further refrained from forcible intervention to prevent shipment of conventional arms to Cuba, thus tolerating a certain degree of danger that such arms might be used for aggressive purposes against the United States or against other American nations. So far the United States has withheld action in deference to conceptions, entertained strongly in some quarters in Latin America, of self-determination and non-intervention. However, thus far it has been arguable that under modern conditions, no critical danger to the peace and security of other countries in the Western Hemisphere was presented; that shipments of conventional arms to the Castro government could not necessarily be ascribed to any purpose beyond the defense of Cuba. The same cannot be said of missiles, certainly not of ground-to-ground missiles. The use of Cuban territory to mount such weapons, usable by the Soviet Union only to attack other states and not merely for the defense of Cuba against attack, falls wholly outside the reasons for mitigation by the United States of some aspects of the Monroe Doctrine. Equally important, it falls wholly outside the reasons advanced by our allies in Latin America for opposing interventionist aspects of the Doctrine.

There is nothing unique about the concept of regional differences, based upon historical attitudes and practices, in the impact and requirements of international law. In the Anglo-Norwegian Fisheries Case,[9] for example, the International Court of Justice upheld a system for determining the baselines and boundaries of Norway's territorial sea that could be valid outside Norway, if at all, only in the Scandinavian region. In so doing, the Court relied upon "interests peculiar to [the] region, the reality and importance of which are clearly evidenced by a long usage," and upon the "general toleration of foreign States" over an extended period.[10] Regional variations are also familiar features of the law of the sea with respect to bays and with respect to sedentary fisheries.

In a memorandum for the Attorney General dated April 12, 1961, Assistant Attorney General Katzenbach noted that traditional legal doctrines relating to intervention date from the pre-World War I period and reflect the existence at that time of a security structure based upon flexibility of alignment. Since change of alignment to preserve a balance of power was the principal technique by which security was maintained, legal doctrines tended to develop that would promote freedom to change alignment and would discourage intervention for the purpose of maintaining existing alignments.

The memorandum continues as follows:

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[9] Fisheries Case (U.K. v. Nor.), Judgment, 1951 I.C.J. 116 (Dec. 18).

[10] *Id.* at 133, 138.

> The political structure today is vastly different. Alignments within the Communist Bloc and within the West are long-term political alignments with considerable aspects of supra-national authority. As a result, the security system from the point of view of each bloc depends less upon neutrality of alignment than it does upon preserving the alignments which exist. Therefore, . . . there is considerable pressure for intervention in situations where bloc security is threatened. There is nothing in the existing legal structure which recognizes this state of affairs, but there are numerous instances where intervention has been tolerated in the postwar period; for example, Hungary, Guatemala, Lebanon, and, in 1948, Israel.

Memorandum for Robert F. Kennedy, Attorney General, from Nicholas deB. Katzenbach, Assistant Attorney General, Office of Legal Counsel, *Re: Intervention by States and Private Groups* at 3 (Apr. 12, 1961).

Although it is true that traditional legal concepts of general application do not expressly recognize interests in bloc security, the Monroe Doctrine constitutes an explicit qualification on a regional basis of general legal concepts insofar as the Western Hemisphere is concerned. The history of the Doctrine includes many incidents which emphasize its purpose to prohibit flatly the adherence of territories in the Americas to European or Asiatic power blocs, or for that matter the transfer by them of allegiance from one bloc to another.[11] The premise underlying this purpose—that peace and security in the Hemisphere could be assured only by insulating it from the unstable alliances and rivalries of Europe and Asia—squarely contradicts the balance-of-power policies that infuse the doctrines of general application which are altered by the Doctrine.

Moreover, although publicists in the field of international law have not yet formulated concepts and doctrines which expressly recognize the changed world situation, it seems probable that international law, as reflected in the actual practices and expectations of states, already recognizes the decisive importance of bloc security today in certain geographic areas. International law is, after all, essentially a generalized statement in terms of rules and policies of the reasonable expectations of states as derived from their practices in making claims and reacting to the claims of others. The Western states have, of course, condemned as unlawful the Soviet intervention in Hungary, directed as it was against a revolt which at the time posed a purely political threat against the Soviet Union. It may be doubted, however, whether the United States would have protested seriously the use of force by the Soviet Union if it had been designed for the limited purpose of compelling abandonment of a plan to install Western missile bases in Hungarian territory.

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[11] *See generally* John A. Logan Jr., *No Transfer: An American Security Principle* (1961).

If in the future the government of Poland should become increasingly friendly to the United States, our government would undoubtedly defend strongly its legal right to withdraw from the communist political bloc. It seems altogether certain that we would, however, feel obliged to refrain from attempting to supply Poland with ground-to-ground missiles or other armaments readily susceptible of aggressive use. Yugoslavia, and perhaps Finland as well, provide examples of states which the international community as a whole probably regards as insulated, under threat of intervention by the Soviet Union, from full incorporation into the western military structure.

In appraising the rights of the United States vis-à-vis Cuba, the treaty of 1934[12] may have some relevance. The principal effect of the treaty was to abrogate the Cuban-American Treaty of 1903,[13] under which the United States had the right to intervene in Cuba virtually at will. However, the treaty of 1934 preserved existing agreements indefinitely with respect to the leasing of naval stations in Cuba insofar as they applied to the naval station at Guantanamo. The Treaty of 1934 did not expressly obligate Cuba to refrain from permitting the use of its territory for military purposes by other states. However, the fair inference arising from the cession of naval rights to the United States is that the island was to be a part of, or at least not a breach in, the defensive military system protecting the continental United States and the Caribbean countries. At the time of the treaty, of course, a military threat to these areas from Cuba could arise only as a consequence of naval and air installations of the type which the treaty secured to the United States. The evident intention of the parties to the treaty, broadly stated, thus was to restrict intervention by the United States on political or economic grounds, but to preserve the position of Cuba in the defensive military system of the United States. Certainly the treaty is not inconsistent with the position here expressed as to the legal rights of the United States in the event of military use of Cuban territory by the Soviet Union.

It should be apparent that the conclusions here reached do not undermine the legal position of the United States with respect to its own missile bases abroad. In no case of which we are aware is a country in which the United States maintains missile bases subject to a special regime comparable to the Monroe Doctrine. Moreover, in no case is any such country a member or former member of the Communist Bloc or within the acknowledged periphery of the Soviet security system. Finally, there is a basic factual difference in the military relationships of such countries to the Soviet Union and that of Cuba to the United States. The states in which bases are maintained by the United States are in each case among the major targets of Soviet Military preparations. No impartial observer could conclude that Cuba is a major object of the military program of the United States,

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[12] U.S. Dep't of State, Treaty Info. Bull. No. 56 (May 31, 1934).

[13] U.S. Dep't of State, *Foreign Relations of the United States* 243 (1905).

or that Cuba is in any danger of a missile attack by the United States. The United Kingdom may harbor U.S. missiles in self-defense because it is a likely target of Soviet missiles. For Cuba to harbor Soviet missiles would constitute a wholly disproportionate response to any sane estimate of its defensive needs against the United States.

III.

We assume that any statement by the President on this subject would begin by announcing that there is reason to believe the governments of Cuba and the Soviet Union may be actively considering the installation of Soviet missiles on Cuban territory, and would be designed generally to warn those countries of the intentions of the United States in any such eventuality. We offer the following suggestions with regard to such a statement by the President:

1. The statement should emphasize the historical and regional aspects of the rights being asserted by the United States.

2. The statement should emphasize the threat to other countries as well as the United States, and the defensive character of any action that might be taken by the United States. Possibly the statement should expressly disclaim any intention to act for economic or political ends, or for any purpose other than to compel an abandonment of plans to create a specific military threat in Cuba.

3. The statement should indicate an intention to have recourse first, if at all possible, to collective security arrangements to which the United States is a party, particularly the Organization of American States. It should also, without qualifying the strong commitment of the United States to the principle of collective security, make the point that the United States has an ultimate responsibility for its own safety which in situations of extreme gravity necessarily would take precedence over all other commitments. Consideration should be given to withholding the statement until it can be made as a first step in an integrated plan to secure collective action by the OAS. If made in that context, the statement should announce a call for a meeting of the Organ of Consultation pursuant to the Inter-American Treaty of Reciprocal Assistance (Rio Pact).

4. The statement should acknowledge an obligation on the part of the United States to observe a rule of proportionality. An express reference might be made to total blockade or to "visit and search" procedures as appropriate reactions by the American states or by the United States to meet a threat to install missile bases in Cuba. In this connection, care should certainly be exercised to avoid the implication that Cuba is under any immediate threat of nuclear attack.

NORBERT A. SCHLEI
Assistant Attorney General
Office of Legal Counsel

APPENDIX

Historical Material with Respect to the Monroe Doctrine

1. The Monroe Doctrine (1823)

The Monroe Doctrine was proclaimed by President Monroe in his message to Congress on December 9, 1823. This proclamation of fundamental principles of American foreign policy in the Western Hemisphere was induced by several factors—the intervention of the three leading absolute monarchies of Russia, Austria, and Prussia (the so-called "Holy Alliance") in the affairs of other European countries, the fear that they might attempt to overthrow the newly independent Latin-American states and restore them as Spanish colonies, and Russian claims in the Western Hemisphere.[14] President Monroe's message stated in part:

> [T]he occasion has been judged proper for asserting as a principle in which the rights and interests of the United States are involved, that the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European powers . . . .
>
> . . . The political system of the allied powers is essentially different in this respect from that of America. . . . We owe it, therefore, to candor, and to the amicable relations existing between the United States and those powers, to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. With the existing colonies or dependencies of any European power we have not interfered and shall not interfere. But with the Governments who have declared their independence, and maintained it, and whose independence we have, on great consideration and on just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European power, in any other light than as the manifestation of an unfriendly disposition towards the United States. . . .
>
> . . . It is impossible that the allied powers should extend their political system to any portion of either [American] continent without endangering our peace and happiness; nor can anyone believe that

[14] Alejandro Alvarez, *The Monroe Doctrine* 6–7 (1924).

> our southern brethren, if left to themselves, would adopt it of their own accord. It is equally impossible, therefore, that we should behold such interposition, in any form, with indifference.[15]

2. The Polk Corollary (1848)

In 1848 Mexican officials in Yucatan indicated a willingness to permit annexation of territory under their jurisdiction by Great Britain or Spain in return for protection against the rebellious native Indian population. To forestall any possibility of European intervention in Mexico, President Polk sent a special message to Congress on April 29, 1848, enunciating what is known as the Polk Corollary of the Monroe Doctrine. The President's message declared in part:

> I submit for the consideration of Congress several communications received at the Department of State from Mr. Justo Sierra, commissioner of Yucatan, and also a communication from the Governor of that State, representing the condition of extreme suffering to which their country has been reduced by an insurrection of the Indians within its limits, and asking the aid of the United States.
>
> . . . .
>
> In this condition they have, through their constituted authorities, implored the aid of this Government to save them from destruction, offering in case this should be granted to transfer the "dominion and sovereignty of the peninsula" to the United States. Similar appeals for aid and protection have been made to the Spanish and the English Governments.
>
> Whilst it is not my purpose to recommend the adoption of any measure with a view to the acquisition of the "dominion and sovereignty" over Yucatan, yet, according to our established policy, we could not consent to a transfer of this "dominion and sovereignty" either to Spain, Great Britain, or any other European power. In the language of President Monroe, in his message of December, 1823—
>
>> We should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety.
>>
>> . . . .

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[15] 2 *A Compilation of the Messages and Papers of the Presidents (New Series)* 778, 787, 788 (James D. Richardson ed., 1897).

> Our own security requires that the established policy thus announced should guide our conduct, and this applies with great force to the peninsula of Yucatan. It is situate in the Gulf of Mexico, on the North American continent, and, from its vicinity to Cuba, to the capes of Florida, to New Orleans, and, indeed, to our whole southwestern coast, it would be dangerous to our peace and security if it should become a colony of any European nation.[16]

3. President Johnson and European Intervention in Mexico (1865–66)

In 1861 and 1862, during the Civil War, France, Great Britain and Spain invaded Mexico. After the British and Spanish withdrew, Emperor Napoleon III of France selected Archduke Maximilian of Austria as Emperor of Mexico. Maximilian accepted on the basis of "proof" given by Napoleon and by Mexican exiles in France that the Mexican people wanted him. Because of its involvement in the Civil War, the United States could not interfere. After the war, Secretary of State Seward reaffirmed the principles of the Monroe Doctrine, although he did not refer to it by name.[17] The House of Representatives then adopted a resolution declaring that

> it does not accord with the policy of the United States to acknowledge any monarchical government erected on the ruins of any republican government in America under the auspices of any European power.[18]

In his First Annual Message to Congress on December 4, 1865, President Johnson said in this connection:

> From the moment of the establishment of our free Constitution the civilized world has been convulsed by revolutions in the interests of democracy or of monarchy, but through all those revolutions the United States have wisely and firmly refused to become propagandists of republicanism. It is the only government suited to our condition; but we have never sought to impose it on others, and we have consistently followed the advice of Washington to recommend it only by the careful preservation and prudent use of the blessing. . . . Twice, indeed, rumors of the invasion of some parts of America in the interest of monarchy have prevailed; twice my predecessors have had occasion to announce the views of this nation in respect to such

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[16] 5 Richardson, *supra* note 15, 2431, 2431–32.

[17] Julius W. Pratt, *A History of United States Foreign Policy* 342 (1955).

[18] *Id.*

> interference. On both occasion the remonstrance of the United States was respected from a deep conviction on the part of European Governments that the system of noninterference and mutual abstinence from propagandism was the true rule for the two hemispheres. . . . We should regard it as a great calamity to ourselves, to the cause of good government, and to the peace of the world should any European power challenge the American people, as it were, to the defense of republicanism against foreign interference. We can not foresee and are unwilling to consider what opportunities might present themselves, what combinations might offer to protect ourselves against designs inimical to our form of government. The United States desire to act in the future as they have ever acted heretofore; they never will be driven from that course but by the aggression of European powers, and we rely on the wisdom and justice of those powers to respect the system of noninterference which has so long been sanctioned by time, and which by its good results has approved itself to both continents.[19]

Finally, in 1866, the French Government withdrew its forces from Mexico and the Mexicans overthrew the Maximilian regime in 1867.

4. President Hayes and the Isthmian Canal Question (1880)

In 1879 it appeared imminent that a private French company was about to undertake the construction of a canal across the Panama Isthmus. The United States feared that control of the canal would fall into the hands of the French Government just as the British Government had earlier obtained control of the Suez Canal. On March 8, 1880, President Hayes sent a message to Congress expressing his opposition to the project as follows:

> The United States can not consent to the surrender of this control to any European power or to any combination of European powers. If existing treaties between the United States and other nations or if the rights of sovereignty or property of other nations stand in the way of this policy—a contingency which is not apprehended—suitable steps should be taken by just and liberal negotiations to promote and establish the American policy on this subject consistently with the rights of the nations to be affected by it.
>
> The capital invested by corporations or citizens of other countries in such an enterprise must in a great degree look for protection to

[19] 8 Richardson, *supra* note 15, 3551, 3566–67.

> one or more of the great powers of the world. No European power can intervene for such protection without adopting measures on this continent which the United States would deem wholly inadmissible. If the protection of the United States is relied upon, the United States must exercise such control as will enable this country to protect its national interests and maintain the rights of those whose private capital is embarked in the work.
>
> An interoceanic canal across the American Isthmus will essentially change the geographical relations between the Atlantic and Pacific coasts of the United States and between the United States and the rest of the world. It would be the great ocean thoroughfare between our Atlantic and our Pacific shores, and virtually a part of the coast line of the United States. Our merely commercial interest in it is greater than that of all other countries, while its relations to our power and prosperity as a nation, to our means of defense, our unity, peace, and safety, are matters of paramount concern to the people of the United States. No other great power would under similar circumstances fail to assert a rightful control over a work so closely and vitally affecting its interest and welfare.
>
> Without urging further the grounds of my opinion, I repeat, in conclusion, that it is the right and the duty of the United States to assert and maintain such supervision and authority over any interoceanic canal across the isthmus that connects North and South America as will protect our national interests. This, I am quite sure, will be found not only compatible with but promotive of the widest and most permanent advantage to commerce and civilization.[20]

In addition, both Houses of Congress formally protested against any canal which might be built by foreign capital or controlled by foreign nations.[21]

5. President Cleveland's Intervention in the Venezuela Boundary Dispute (1895)

In President Cleveland's second administration, he invoked the Monroe Doctrine in the British-Venezuela dispute concerning the boundaries between British Guiana and Venezuela. The British being unwilling to arbitrate the matter, the President in a special message to Congress on December 17, 1895, announced that under the principles of the Monroe Doctrine the United States would designate a

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[20] 10 Richardson, *supra* note 15, 4537, 4537–38.

[21] Thomas A. Bailey, *A Diplomatic History of the American People* 396–97 (1955).

commission which would itself investigate the boundary and render a report.[22] In the event the report favored Venezuela in the dispute, he said,

> it will, in my opinion, be the duty of the United States to resist by every means in its power as a willful aggression upon its rights and interests, the appropriation by Great Britain of any lands or the exercise of governmental jurisdiction over any territory which after investigation we have determined of right belongs to Venezuela.
>
> In making these recommendations I am fully alive to the responsibility incurred and keenly realize all the consequences that may follow.[23]

He further said:

> [I]t may not be amiss to suggest that the doctrine upon which we stand is strong and sound, because its enforcement is important to our peace and safety as a nation, and is essential to the integrity of our free institutions and the tranquil maintenance of our distinctive form of government. It was intended to apply to every stage of our national life and can not become obsolete while our Republic endures. If the balance of power is justly a cause for jealous anxiety among the Governments of the Old World and a subject for our absolute noninterference, none the less is an observance of the Monroe doctrine of vital concern to our people and their Government.
>
> Assuming, therefore, that we may properly insist upon this doctrine without regard to "the state of things in which we live" or any changed conditions here or elsewhere, it is not apparent why its application may not be involved in the present controversy.
>
> If a European power by an extension of its boundaries takes possession of the territory of one of our neighboring Republics against its will and in derogation of its rights, it is difficult to see why to that extent such European power does not thereby attempt to extend its system of government to that portion of this continent which is thus taken. This is the precise action which President Monroe declared to be "dangerous to our peace and safety," and it can make no differ-

[22] 13 Richardson, *supra* note 15, 6087, 6090 (1909).

[23] *Id.* at 6090.

> ence whether the European system is extended by an advance of frontier or otherwise.[24]

Addressing himself to the contention that the Monroe Doctrine found no support in any principle of international law derived from the general consent of nations, the President stated:

> Practically the principle for which we contend has peculiar, if not exclusive, relation to the United States. It may not have been admitted in so many words to the code of international law, but since in international councils every nation is entitled to the rights belonging to it, if the enforcement of the Monroe doctrine is something we may justly claim it has its place in the code of international law as certainly and securely as if it were specifically mentioned; and when the United States is a suitor before the high tribunal that administers international law the question to be determined is whether or not we present claims which the justice of that code of law can find to be right and valid.
>
> The Monroe doctrine finds its recognition in those principles of international law which are based upon the theory that every nation shall have its rights protected and its just claims enforced.[25]

The British Prime Minister acknowledged that the interests of the United States in the Caribbean area were as natural as British concern would be over any attempt by a great European power to secure control over the Channel ports of Belgium and the Netherlands. The British finally submitted the controversy to arbitration.[26]

6. Cuba—The Platt Amendment—President Theodore Roosevelt (1901)

Congress, on March 1, 1901, passed the Platt Amendment to the Army appropriation bill. 34 Cong. Rec. 3332–84. The amendment defined the relations between Cuba and the United States following the establishment of the Cuban republic. It provided that in order to permit the United States to maintain Cuba's independence, and to protect its people, Cuba would sell or lease to the United States lands necessary for coaling or naval stations at certain specified points, to be agreed upon with the President of the United States; and that Cuba would embody the foregoing provisions in a permanent treaty with the United States.[27]

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[24] *Id.* at 6088.

[25] *Id.* at 6088–89.

[26] Louis Martin Sears, *A History of American Foreign Relations* 431 (1938).

[27] Act of Mar. 2, 1901, ch. 803, 31 Stat. 895, 897–98.

The amendment in effect contemplated a United States quasi-protectorate over Cuba. Later that year Cuba incorporated these provisions as an appendix to its constitution.[28]

In his message to Congress on December 3, 1901, President Theodore Roosevelt discussed the Monroe Doctrine in relation to Cuba. The President said:

> The Monroe Doctrine should be the cardinal feature of the foreign policy of all the nations of the two Americans, as it is of the United States. Just seventy-eight years have passed since President Monroe in his Annual Message announced that "The American continents are henceforth not to be considered as subjects for future colonization by any European power." In other words, the Monroe Doctrine is a declaration that there must be no territorial aggrandizement by any non-American power at the expense of any American power on American soil. It is in no wise intended as hostile to any nation in the Old World. Still less is it intended to give cover to any aggression by one New World power at the expense of any other. It is simply a step, and a long step, toward assuring the universal peace of the world by securing the possibility of permanent peace on this hemisphere.
>
> During the past century other influences have established the permanence and independence of the smaller states of Europe. Through the Monroe Doctrine we hope to be able to safeguard like independence and secure like permanence for the lesser among the New World nations.
>
> . . . .
>
> Our attitude in Cuba is a sufficient guaranty of our own good faith. We have not the slightest desire to secure any territory at the expense of any of our neighbors. We wish to work with them hand in hand, so that all of us may be uplifted together, and we rejoice over the good fortune of any of them, we gladly hail their material prosperity and political stability, and are concerned and alarmed if any of them fall into industrial or political chaos. We do not wish to see any Old World military power grow up on this continent, or to be compelled to become a military power ourselves. The peoples of the Americas can prosper best if left to work out their own salvation in their own way.[29]

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[28] *See* Dep't of State, *Papers Relating to the Foreign Relations of the United States* 243, 244 (1905).

[29] 14 Richardson, *supra* note 15, 6641, 6664–65 (1909).

In the Cuban-American treaty of 1903,[30] Cuba agreed not to enter into any treaty or other compact with a foreign power which would impair the independence or permit military or naval control by a foreign power. It also agreed that the United States should have the right to intervene to preserve Cuban independence. The United States, for its defense as well as that of Cuba, was to have the right to maintain naval bases in Cuba. Pursuant to the treaty, a permanent naval base was established at Guantanamo.[31]

In 1905 the President addressed a message to Congress, stating:

> One of the most effective instruments for peace is the Monroe Doctrine as it has been and is being gradually developed by this Nation and accepted by other nations. No other policy could have been as efficient in promoting peace in the Western Hemisphere and in giving to each nation thereon the chance to develop along its own lines. If we had refused to apply the doctrine to changing conditions it would not be completely outworn, would not meet any of the needs of the present day, and, indeed, would probably by this time have sunk into complete oblivion. It is useful at home, and is meeting with recognition abroad because we have adapted our application of it to meet the growing and changing needs of the hemisphere. When we announce a policy such as the Monroe Doctrine we thereby commit ourselves to the consequences of the policy, and those consequences from time to time alter. It is out of the question to claim a right and yet shirk the responsibility for its exercise. Not only we, but all American republics who are benefited by the existence of the doctrine, must recognize the obligations each nation is under as regard foreign peoples no less than its duty to insist upon its own rights.
>
> That our rights and interests are deeply concerned in the maintenance of the doctrine is so clear as hardly to need argument. This is especially true in view of the construction of the Panama Canal. As a mere matter of self-defense we must exercise a close watch over the approaches to this canal; and this means that we must be thoroughly alive to our interests in the Caribbean Sea.

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[30] U.S.-Cuba, May 22, 1903, 33 Stat. 2248.

[31] Lease of Coaling or Naval Stations to the United States, U.S.-Cuba, Feb. 23, 1903, *in* Dep't of State, *Papers Relating to the Foreign Relations of the United States* 350 (1904); Lease to the United States by the Government of Cuba of Certain Areas of Land and Water for Naval or Coaling Stations in Guantanamo and Bahia Honda, U.S.-Cuba, Oct. 2, 1903, *in* Dep't of State, *Papers Relating to the Foreign Relations of the United States* 351 (1904).

> There are certain essential points which must never be forgotten as regards the Monroe Doctrine. In the first place we must as a Nation make it evident that we do not intend to treat it in any shape or way as an excuse for aggrandizement on our part at the expense of the republics to the south. We must recognize the fact that in some South American countries there has been much suspicion lest we interpret the Monroe Doctrine as in some way inimical to their interests, and we must try to convince all the other nations of this continent once and for all that no just and orderly Government has anything to fear from us. . . . It must be understood that under no circumstances will the United States use the Monroe Doctrine as a cloak for territorial aggression. We desire peace with all the world, but perhaps most of all with the other peoples of the American Continent.[32]

7. Elihu Root on the Monroe Doctrine (1914)

Elihu Root was President Roosevelt's Secretary of State from 1905 to 1909. Subsequently Root became President of the American Society of International Law. In his exposition in 1914 in the American Journal of International Law of the Monroe Doctrine, he said:

> No one ever pretended that Mr. Monroe was declaring a rule of international law or that the doctrine which he declared has become international law. It is a declaration of the United States that certain acts would be injurious to the peace and safety of the United States and that the United States would regard them as unfriendly. The declaration does not say what the course of the United States will be in case such acts are done. That is left to be determined in each particular instance.
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> . . . .
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> The doctrine is not international law but it rests upon the right of self-protection and that right is recognized by international law. The right is a necessary corollary of independent sovereignty. It is well understood that the exercise of the right of self-protection may and frequently does extend in its effect beyond the limits of the territorial jurisdiction of the state exercising it. The strongest example probably would be the mobilization of any army by another Power immediately across the frontier. Every act done by the other Power may be

[32] 15 Richardson, *supra* note 15, 6973, 6994–95.

> within its own territory. Yet the country threatened by the state of facts is justified in protecting itself by immediate war. The most common exercise of the right of self-protection outside of a state's own territory and in time of peace is the interposition of objection to the occupation of territory, of points of strategic military or maritime advantage, or to indirect accomplishment of this effect by dynastic arrangement. For example, the objection of England in 1911 to the occupation of a naval station by Germany on the Atlantic coast of Morocco; the objection of the European Powers generally to the vast forces of Russia extending its territory to the Mediterranean; the revision of the Treaty of San Stefano by the Treaty of Berlin; the establishment of buffer states; the objection to the succession of a German prince to the throne of Spain; the many forms of the eastern question; the centuries of struggle to preserve the balance of power in Europe; all depend upon the very same principle which underlies the Monroe Doctrine; that is to say, upon *the right of every sovereign state to protect itself by preventing a condition of affairs in which it will be too late to protect itself.* Of course each state must judge for itself when a threatened act will create such a situation. If any state objects to a threatened act and the reasonableness of its objection is not assented to, the efficacy of the objection will depend upon the power behind it.[33]

8. The Magdalena Bay Episode (1912)

In 1912 it was asserted that a Japanese private fishing company was about to lease from the Government of Mexico an extensive tract of land on the shore of Magdalena Bay, in Lower California, Mexico. This land could be used as the site of a naval base capable of intercepting communications between the Pacific coast of the United States and the Panama Canal. The Senate adopted a resolution proposed by Senator Lodge as follows:

> *Resolved*, That when any harbor or other place in the American continents is so situated that the occupation thereof for naval or military purposes might threaten the communications or the safety of the United States, the Government of the United States could not see without grave concern the possession of such harbor or other place by any corporation or association which has such a relation to anoth-

[33] Root, *supra* note 1, at 431–32 (emphasis added).

> er Government, not American, as to give that Government practical power of control for naval or military purposes.[34]

9. President Wilson and Vera Cruz (1914)

In 1914 President Wilson was notified that a German merchantman was approaching Vera Cruz, Mexico, with a large cargo of arms which it was suspected the Huerto Government intended to use against the United States. The President ordered American forces to seize the port; a battle ensued, and the objective of preventing the arms from reaching Huerto's forces was attained.[35] American forces then occupied the city, and a proclamation was issued prohibiting the importation of arms into Mexico.

This armed intervention terminated diplomatic relations between the United States and Mexico. However, Argentina, Brazil and Chile offered to mediate the controversy and President Wilson accepted.

10. Charles Evans Hughes and the Monroe Doctrine (1923)

Mr. Hughes, Secretary of State in the Harding Administration, delivered an address in 1923 on the Monroe Doctrine before the American Bar Association which is often cited as an authoritative statement. He said:

> It is not my purpose to review the historical applications of what is called the Monroe doctrine or to attempt to harmonize the various redactions of it. Properly understood, it is opposed (1) to any non-American action encroaching upon the political independence of American States under any guise and (2) to the acquisition in any manner of the control of additional territory in this hemisphere by any non-American power.
>
> The Monroe doctrine is not a legislative pronouncement; it has been approved by action of Congress, but it does not rest upon any congressional sanction. It has had the implied indorsement of the treaty-making power in the reservations to the two Hague conventions of 1899 and 1907, but it is not defined by treaty and does not draw its force from any international agreement. It is not like a constitutional provision deriving its authority from the fact that it is a part of the organic law transcending and limiting executive and legislative power. It is not a part of international law, maintained by the consent of the civilized powers and alterable only at their will. It is a

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[34] 48 Cong. Rec. 10,045–46 (1912).

[35] Bailey, *supra* note 21, at 555–60.

> policy declared by the Executive of the United States and repeated in one form and another by Presidents and Secretaries of State in the conduct of our foreign relations. Its significance lies in the fact that in its essentials, as set forth by President Monroe and as forcibly and repeatedly asserted by our responsible statesmen, it has been for 100 years, and continues to be, an integral part of our national thought and purpose, expressing a profound conviction which even the upheaval caused by the Great War, and our participation in that struggle upon European soil, has not uprooted or fundamentally changed.[36]

Mr. Hughes summarized the principles of the Doctrine as follows:

> First. The Monroe doctrine is not a policy of aggression; it is a policy of self-defense. It was asserted at a time when the danger of foreign aggression in this hemisphere was very real, when the new American States had not yet established a firm basis of independent national life, and we were menaced by threats of Old World powers directed against republican institutions. But the achievements of the century have not altered the scope of the doctrine or changed its basis. It still remains an assertion of the principle of national security. As such, it is obviously not exclusive. Much time has been wasted in the endeavor to find in the Monroe doctrine either justification, or the lack of it, for every governmental declaration or action in relation to other American States. Appropriate action for our defense may always be taken, and our proper influence to promote peace and good will may always be exerted, with the use of good offices to that end, whether or not the particular exigency comes within the range of the specific declarations which constitute the doctrine.[37]
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> . . . .
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> Second. As the policy embodied in the Monroe doctrine is distinctively the policy of the United States, the Government of the United States reserves to itself its definition, interpretation, and application. This Government has welcomed the recognition by other governments of the fact and soundness of this policy and of the appropriateness of its application from time to time. Great powers have signified their acquiescence in it. But the United States has not been disposed to enter into engagements which would have the effect of

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[36] Charles Evan Hughes, Observations on the Monroe Doctrine, *in* Alvarez, *supra* note 14, at 413, 417–18.

[37] *Id.* at 418–19.

submitting to any other power or to any concert of powers the determination either of the occasions upon which the principles of the Monroe doctrine shall be invoked or of the measures that shall be taken in giving it effect. This Government has not been willing to make the doctrine or the regulation of its enforcement the subject of treaties with European powers; and, while the United States has been gratified at expressions on the part of other American States of their accord with our Government in its declarations with respect to their independence and at their determination to maintain it, this Government in asserting and pursuing its policy has commonly avoided concerted action to maintain the doctrine, even with the American Republics. As President Wilson observed: "The Monroe doctrine was proclaimed by the United States on her own authority. It always has been maintained and always will be maintained upon her own responsibility."[38]

. . . .

Third. The policy of the Monroe doctrine does not infringe upon the independence and sovereignty of other American States. Misconception upon this point is the only disturbing influence in our relations with Latin American States.[39]

This notion springs from a misunderstanding of the doctrine itself and of our national sentiment and purpose . . . .

The Monroe doctrine does not attempt to establish a protectorate over Latin American States. . . .

. . . That ground [of the declaration] is found in the recognized right which every State enjoys, and the United States no less than any other, to object to acts done by other powers which threaten its own safety. The United States has all the rights of sovereignty, as well as any other power; we have lost none of our essential rights because we are strong, and other American States have gained none either because of increasing strength or relative weakness. . . .[40]

. . . .

[38] *Id.* at 419–20.

[39] *Id.* at 421.

[40] *Id.* at 422.

> Fourth. There are, indeed, modern conditions and recent events which can not fail to engage our attention. We have grown rich and powerful, but we have not outgrown the necessity, in justice to ourselves and without injustice to others, of safeguarding our future peace and security. . . .[41]
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> . . . .
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> Fifth. It is apparent that the Monroe doctrine does not stand in the way of Pan American cooperation; rather it affords the necessary foundation for that cooperation in the independence and security of American States.[42]

11. The Clark Memorandum and President Hoover (1928)

In 1928, a *Memorandum on the Monroe Doctrine* was prepared by J. Reuben Clark, then Undersecretary of State, for use by the Secretary of State. It repudiated the (Theodore) "Roosevelt Corollary" that "in case of financial or other difficulties in weak Latin American countries, the United States should attempt an adjustment thereof lest European Governments should intervene, and intervening should occupy territory."[43] Clark's thesis was that this was not "justified by the terms of the Monroe Doctrine, however much it may be justified by the application of the doctrine of self-preservation."[44] Clark's conclusions about the Doctrine were as follows:

> The Doctrine does not concern itself with purely inter-American relations; it has nothing to do with the relationship between the United States and other American nations, except where other American nations shall become involved with European governments in arrangements which threaten the security of the United States, and even in such cases, the Doctrine runs against the European country, not the American nation, and the United States would primarily deal thereunder with the European country and with the American nation concerned. The Doctrine states a case of the United States vs. Europe, and not of the United States vs. Latin America. Furthermore, the fact should never be lost to view that in applying this Doctrine during the period of one hundred years since it was announced, our Government has over and over again driven it in as a shield between

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[41] *Id.* at 424.

[42] *Id.* at 431.

[43] J. Reuben Clark, Undersecretary of State, *Memorandum on the Monroe Doctrine*, Dep't of State Publication No. 37, at xxiii (Dec. 17, 1928).

[44] *Id.* at xxiii–xxiv.

> Europe and the Americas to protect Latin America from the political and territorial thrusts of Europe; and this was done at times when the American nations were weak and struggling for the establishment of stable, permanent governments; when the political morality of Europe sanctioned, indeed encouraged, the acquisition of territory by force; and when many of the great powers of Europe looked with eager, covetous eyes to the rich, undeveloped areas of the American Hemisphere. Nor should another equally vital fact be lost sight of, that the United States has only been able to give this protection against designing European powers because of its known willingness and determination, if and whenever necessary, to expend its treasure and to sacrifice American life to maintain the principles of the Doctrine. So far as Latin America is concerned, the Doctrine is now, and always has been, not an instrument of violence and oppression, but an unbought, freely bestowed, and wholly effective guaranty of their freedom, independence, and territorial integrity against the imperialistic designs of Europe.[45]

In embarking on a "Good Neighbor" policy, it has been said that President Hoover gave his support to the views expressed by Clark.[46]

12. President Franklin D. Roosevelt—Abrogation of the Platt Amendment—the Inter-American Conference—Canada (1934–38)

The Good Neighbor Policy was followed and implemented by President Franklin D. Roosevelt in an attempt to make the policy of non-intervention acceptable in both hemispheres. As an integral part of the new policy, the United States decided to release Cuba from the provisions of the Platt Amendment. This was accomplished by a treaty between the United States and Cuba signed in May 1934.[47] Article III of this treaty, which continued the right of the United States to maintain a naval base at Guantanamo, provided as follows:

> Until the two contracting parties agree to the modification or abrogation of the stipulations of the agreement in regard to the lease to the United States of America of lands in Cuba for coaling and naval stations signed by the President of the Republic of Cuba on February 16, 1903, and by the President of the United States of America on the 23d day of the same month and year, the stipulations of that agreement with regard to the naval station of Guantanamo shall con-

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[45] *Id.* at xxiv–xxv.

[46] Bailey, *supra* at note 21, at 681.

[47] Dep't of State, Treaty Info. Bull. No. 56 (May 31, 1934).

> tinue in effect. The supplementary agreement in regard to naval or coaling stations signed between the Governments on July 2, 1903, also shall continue in effect in the same form and on the same conditions with respect to the naval station of Guantanamo. So long as the United States of America shall not abandon the said naval station of Guantanamo or the two Governments shall not agree to a modification of its present limits, this station shall continue to have the territorial area that it now has, with the limits that it has on the date of the signature of the present Treaty.[48]

In 1936 President Roosevelt proposed a special Inter-American peace conference. At this conference, held at Buenos Aires, he invited all American states to resort to the principles of the Monroe Doctrine in dealing with aggressive threats by non-American totalitarian states and declared that such states seeking "to commit acts of aggression against us will find a Hemisphere wholly prepared to consult together for our mutual safety and our mutual good."[49]

In 1938 Canada supported President Roosevelt's statement in a speech at Kingston, Canada, that "the people of the United States will not stand idly by if dominion of Canadian soil is threatened by any other empire."[50]

13. Congressional Resolution of 1940 on Transfers of Territory in the Western Hemisphere

The collapse of the Low Countries, France, and Denmark in 1940 aroused serious concern in the Americas. Seizure by Hitler of the American possessions of these countries, it was felt, would pose not only a grave threat to the Panama Canal and the Caribbean trade routes but also to the mainland of the United States. Congress promptly passed a resolution expressing opposition to the transfer of territory in the Western hemisphere from one non-American power to another. The resolution, which had been drafted by the Department of State with the President's approval, declared:

> That the United States would not recognize any transfer, and would not acquiesce in any attempt to transfer, any geographic region of this hemisphere from one non-American power to another non-American power; and
>
> That if such transfer or attempt to transfer should appear likely, the United States shall, in addition to other measures, immediately

[48] *Id.* at 30–31.

[49] Bailey, *supra* note 21, at 684.

[50] *Id.* at 686.

> consult with the other American republics to determine upon the steps which should be taken to safeguard their common interests.[51]

14. The Greenland Action (1941)

In April 1941, United States forces occupied the Danish possession of Greenland. This action was taken pursuant to an agreement signed by Secretary of State Hull, acting on behalf of the United States, and the Danish Minister in Washington.[52] The agreement noted the danger that Greenland might be converted into a base of aggression against American states and recognized the responsibility of the United States to assist in the maintenance of the existing status of Greenland. Article I of the Agreement provided:

> The Government of the United States of America reiterates its recognition of and respect for the sovereignty of the Kingdom of Denmark over Greenland. Recognizing that as a result of the present European war there is danger that Greenland may be converted into a point of aggression against nations of the American Continent, the Government of the United States of America, having in mind its obligations under the Act of Habana signed on July 30, 1940, accepts the responsibility of assisting Greenland in the maintenance of its present status.[53]

The Hitler-dominated government in Denmark disapproved the agreement as contrary to its constitution. Mr. Hull replied that the Denmark government was acting under duress and refused to acknowledge that the agreement was invalid.

15. Act of Havana of 1940—Implementing Treaty of 1942

After the defeat of France, representatives of the American states, convening in Havana in July 1940, adopted the Act of Havana, by which they agreed to prevent by collective action, or by unilateral action if necessary, changes in the control of territory in the Western Hemisphere as a result of the European hostilities. The Act was adopted in connection with the negotiation of a treaty thereafter ratified by fourteen states—the necessary two-thirds—in 1942.[54] It provided that if it appeared that American possessions of European powers might fall into the hands of any Axis power, they could be taken over and administered jointly by the American republics as trustees. In the event that the situation called for it, an individual state, such as the United States, could assume temporary control.

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[51] Logan, *supra* note 11, at 327.

[52] Agreement Relating to the Defense of Greenland, 4 Dep't of State Bull. 443, 445–47 (1941).

[53] *Id.* at 445.

[54] Samuel Flagg Bemis, *The Latin American Policy of the United States* 367–73 (1943).

Proposal That the President Accept Honorary Irish Citizenship

Acceptance by the President of honorary Irish citizenship would fall within the spirit, if not the letter, of the Emoluments Clause of the Constitution.

The procedure which has developed under the constitutional provision and its implementing statute would permit the President to participate in the formal ceremonies, accept the written evidence of the award and have it deposited with the Department of State, subject to the subsequent consent of Congress.

Even if Congress does not enact consenting legislation, the President could probably have the document conferring honorary Irish citizenship delivered to him by the Department of State after he leaves the White House.

May 10, 1963

MEMORANDUM OPINION FOR THE SPECIAL ASSISTANT TO THE PRESIDENT*

The Attorney General has asked me to respond to your memorandum of April 17, 1963, with respect to the legal aspects of the proposal that the President accept "honorary Irish citizenship." For the reasons set forth hereafter, I believe that acceptance by the President of honorary Irish citizenship would fall within the spirit, if not the letter, of Article I, Section 9, Clause 8, of the Constitution which requires that an individual who holds an office of profit or trust under the United States must obtain the consent of Congress in order to accept "any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State." Nevertheless, the procedure which has developed under the constitutional provision and under section 3 of the Act of January 3, 1881 (ch. 32, 21 Stat. 603, 604 (codified at 5 U.S.C. § 115)), a statute which implements the provision, would permit the President to participate in the formal ceremonies, accept the written evidence of the award and have it deposited with the Department of State, subject to the subsequent consent of Congress. Moreover, even if Congress should thereafter fail to enact consenting legislation, the President could probably have the document conferring honorary Irish citizenship delivered to him by the Department of State after he leaves the White House.

At the outset, it should be emphasized that what would be conferred upon the President would not be Irish citizenship but merely honorary Irish citizenship. Your memorandum of April 17, 1963 indicated that it was originally the intention that the grant be conferred pursuant to section 12 of the Irish Nationality and Citizenship Act, 1956. That act provides that "Irish citizenship" may be granted to individuals or the children or grandchildren of individuals who have "done signal

* Editor's Note: The Special Assistant to whom this memorandum was addressed was McGeorge Bundy, National Security Adviser to the President.

honour or rendered distinguished service to" Ireland, but it makes it clear that once the grant is made the individual "shall . . . be an Irish citizen." *Id.* § 12. Accordingly, action pursuant to this statute would impose upon the President whatever duties and obligations are ordinarily attached to Irish citizenship and would raise the serious problems attendant upon an undertaking by a President of fealty to another nation.

As a result of discussion of this problem with the Irish Ambassador, the Government of Ireland has drafted a special act, a copy of which is attached. The act would provide that "[t]he President [of Ireland] may by warrant confer on John Fitzgerald Kennedy, President of the United States of America, the title of honour of Honorary Citizen of Ireland." In an Aide-Mémoire of April 30, 1963, which is also attached, the Irish ambassador states:

> The Attorney General of Ireland has given opinion that the Bill as drafted would not confer citizenship with its attendant duties and obligations but only a title of honor.

I agree. In fact, the Department of Justice took a similar position when honorary United States citizenship was conferred upon Sir Winston Churchill. H.R. Rep. No. 88-57 (1963). Consequently, the problems which might have arisen as a result of dual citizenship are no longer presented.

However, the question still remains whether acceptance comes within the letter or spirit of Article I, Section 9, Clause 8, which 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.

This clause was adopted unanimously at the constitutional convention as a means of preserving the independence of foreign ministers and other officers of the United States from external influences. 3 *Papers of James Madison* 1408 (1841). It is virtually copied from a similar provision in Article VI of the Article of Confederation. The constitutional provision has been interpreted as being "particularly directed against every kind of influence by foreign *governments* upon officers of the United States, based on our historic policies as a nation." *Gifts from Foreign Prince*, 24 Op. Att'y Gen. 116, 117 (1902) (emphasis in original); *see also* 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1352 (Thomas M. Cooley ed., 4th ed. 1873).

It will be noted that the proposed Irish statute describes what would be conferred upon the President as a "title of honour." As such, it could be argued that what would be conferred falls within the literal language of the constitutional provision. Ambassador Kiernan has advised us that the bill could be redrafted to

omit the reference to a "title of honour." However, I do not believe that the legal problem would be significantly modified if this should be done. The spirit of the provision clearly extends to any type of obligation to foreign countries, and the designation of what is conferred appears to be of little relevance.

Moreover, in analyzing Public Law 88-6 and Proclamation 3525 of April 9, 1963, which operated to confer honorary citizenship of the United States upon Sir Winston Churchill, this Department took the view that what would be conferred upon him would be "similar in effect to . . . a medal or decoration." H.R. Rep. No. 88-57, at 4 (letter of Deputy Attorney General Katzenbach). The House Committee on the Judiciary stated that it "subscribes to the interpretation of the import of this legislation as outlined in the report rendered by the Department of Justice." *Id*. at 5. And medals and decorations have always been regarded as coming within the constitutional provision,[1] although it has never been precisely articulated whether one of these constitutes a "present, Emolument, Office, or Title." Thus, section 3 of the Act of January 31, 1881 provides:

> [A]ny present, decoration, or other thing, which shall be conferred or presented by any foreign government to any officer of the United States, civil, naval, or military, shall be tendered through the Department of State, and not to the individual in person, but such present, decoration, or other thing shall not be delivered by the Department of State unless so authorized by act of Congress.

5 U.S.C. § 115. The constitutional provision requires the consent of Congress to the acceptance of the enumerated honors and presents "of any kind whatever." Since the statute is intended to implement this provision, the phrase "other thing" should probably be construed in a similarly inclusive manner. Accordingly, it could be reasonably contended that a warrant or other documentary evidence of honorary Irish citizenship that may be presented to the President is an "other thing" within the meaning of the statute.

Literally read, the statute precludes direct tender of a present or mark of honor to an officer of the United States; the tender is to be through the Department of State. However, on the ground that it avoids offense to other countries, a custom has developed under which officers of the United States may accept foreign honors tendered to them and subsequently have them deposited in the Department

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[1] *See, e.g.*, Message of President Andrew Jackson to the Senate and House of Representatives, dated January 19, 1830, *in* 3 *Compilation of the Messages and Papers of the Presidents* 1029, 1030 (James D. Richardson ed., 1897), stating that the Constitution prevented him from accepting a medal tendered to him by the Republic of Colombia, and that he was placing it at the disposal of Congress. Congress did not grant its consent to acceptance. The House Committee on Foreign Affairs merely recommended that the medal be deposited with the Department of State. H.R. Rep. No. 21-170 (Feb. 9, 1830). *See also* 5 U.S.C. § 114 (prohibiting an officer of the United States from wearing a decoration without the consent of Congress).

of State. This procedure has been treated as substantial compliance with the statute. If Congress subsequently enacts legislation consenting to acceptance (*see, e.g.*, Act of Aug. 3, 1956, Priv. L. No. 84-850, 70 Stat. A171), delivery is made to the recipient.[2] Therefore, if the President should accept the tender of honorary Irish citizenship, it would be appropriate for him to include in his acceptance remarks a statement that he is thereupon placing the warrant in the hands of the United States Ambassador to Ireland in accordance with United States law. If the President handled the matter in this way, it would be difficult for anyone to contend that his action was inconsistent with the constitutional provision or the statute.[3] In order to minimize possible congressional criticism in that regard, it might also be appropriate to advise the Chairmen of the House and Senate Foreign Relations Committees in advance that this procedure will be followed.

Two final points might be made. First, some Presidents have treated presents which they have received as gifts to the United States, rather than as personal gifts. They have therefore taken the view that acceptance is not subject to the constitutional provision. This view was apparently followed by President Lincoln, who received a "Diploma" from the Republic of San Marino declaring that "the President pro tempore of the United States of America" was a citizen of that Republic. Although Lincoln wrote the Regent Captains of San Marino thanking its Council for the honor that it had "conferred upon me" (4 *The Collected Works of Abraham Lincoln* 360 (Roy P. Basler ed., 1953)), he had the document deposited with the Department of State and it is now in the National Archives. The "Diploma" was conferred on the President of the United States "pro tempore," and it indicates that the action to authorize its issuance was taken while Buchanan was still President. The circumstances thus appear to have differed markedly from those here involved. It seems clear that Ireland proposes to confer honorary citizenship on President Kennedy personally, not on him as the President of the United States for the time being.

Second, we are informed that it is the practice of the Protocol Office of the State Department, the custodian of gifts and other marks of honor deposited

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[2] Under 5 U.S.C. § 115a, the Secretary of State is directed to submit to each alternate Congress a list of retired personnel for whom the Department of State is holding decorations, medals or other marks of honor pursuant to 5 U.S.C. § 115. In a memorandum to department and agency heads, dated April 13, 1954, President Eisenhower directed that lists submitted to Congress pursuant to 5 U.S.C. § 115a be limited to retired personnel. Of course this direction has not prevented Congress from granting the required consent to incumbent officers. 70 Stat. A171.

[3] As a legal matter, the consent of Congress can be obtained either in advance or following receipt of anything covered by Article I, Section 9, Clause 8. We have, however, been able to locate only one statute in which it was clear that the consent had been granted in advance, Pub. Res. 34-3, 11 Stat. 152 (Aug. 30, 1856), and this did not involve a President. On the other hand, in the only instance in which we have been able to discover a grant of consent to a President, it followed receipt. Pub. Res. 54-39, 29 Stat. 759 (Apr. 2, 1896) (authorizing delivery to Benjamin Harrison of medals presented to him by Brazil and Spain during his term as President). The Harrison precedent would strengthen the view that the procedure suggested above is consistent with constitutional practice.

pursuant to the 1881 Act, to deliver to a former officer who has severed any official relationship with the United States, upon his request and without referral to Congress, a gift or other mark of honor tendered to him during his incumbency and deposited under the Act. Accordingly, even if Congress should not act in this matter, the President could probably obtain the warrant when he no longer holds office.[4]

I assume that the President will independently appraise the policy considerations involved in acceptance of the foreign honor here involved. In this regard, he may wish to know that President Wilson refused all foreign decorations while in office.[5] On the other hand, it is clear that this attitude does not represent an established policy of the presidency, as evidenced by the incidents, referred to above, involving Presidents Jackson, Lincoln and Benjamin Harrison.

NORBERT A. SCHLEI
Assistant Attorney General
Office of Legal Counsel

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[4] While a former President is entitled to a monetary allowance of $25,000 per year (Pub. L. No. 85-745, 72 Stat. 838 (codified at 3 U.S.C. § 102 note (1958)), he could hardly be considered to hold an "Office" within the meaning of the constitutional prohibition.

[5] Edith Bolling Wilson, *My Memoir* 343 (1st ed. 1938).

ATTACHMENT 1

President Kennedy Bill, 1963

Arrangement of Sections

Section

1. Conferring of title of honour on President Kennedy.

2. Short title.

Draft of Bill

An Act to enable the title of honour of Honorary Citizen of Ireland to be conferred on John Fitzgerald Kennedy, President of the United States of America.

BE IT ENACTED by the Oireachtas as follows:

Conferring of title of honour on President Kennedy.	1. The President may by warrant confer on John Fitzgerald Kennedy, President of the United States of America, the title of honour of Honorary Citizen of Ireland.
Short title.	2. This Act may be cited as the President Kennedy Act, 1963.

ATTACHMENT 2

Aide-Mémoire

The Government of Ireland is prepared to promote special legislation to enable the title of Honorary Citizen of Ireland to be conferred on President Kennedy, instead of pursuing the idea of offering citizenship as a token of honor under Section 12 of the Irish Nationality and Citizenship Act, 1956. A draft bill has been prepared with this objective in mind. The text of the bill is conveyed herewith.

The Attorney General of Ireland has given opinion that the Bill as drafted would not confer citizenship with its attendant duties and obligations but only a title of honor.

An informal intimation is requested as to whether the title of honor of Honorary Citizen of Ireland, as contemplated in the draft bill, would be acceptable to President Kennedy.

April 10, 1963

Providing Government Films to the Democratic National Committee or Congressmen

Government motion picture films may be made available to the Democratic National Committee or congressmen when public release is authorized by statute.

In the absence of statutory authority, government films may be made available to the Committee or congressmen on a revocable loan basis if a public interest can be shown to justify such loan and if the films are available equally to other private organizations.

It would be improper for any government agency to produce a film for the specific purpose of making it available to the Democratic National Committee or to congressmen.

December 26, 1963

MEMORANDUM OPINION FOR THE ASSISTANT SPECIAL COUNSEL TO THE PRESIDENT

This is in response to your memorandum of June 15, 1963, requesting my views upon the use for non-governmental purposes of motion picture films produced by federal departments and agencies. Your request has reference to a memorandum from Paul Southwick, dated June 3, 1963, in which he outlines a proposed use of government motion picture films documenting activities of the Kennedy administration. His memorandum states in part:

> I am requesting Federal agencies wherever possible to obtain both still and motion picture films to document activities of the Kennedy Administrative, with particular emphasis on human interest. Example: films showing men being put to work on Accelerated Public Work Projects.
>
> The intended uses of movies include two basic ones: by Congressmen and Senators on their local "public service" TV programs, and later, in a documentary or series of documentaries, depicting progress under the Kennedy Administration.
>
> The latter would have a partisan use[1] and will probably be produced, directly or indirectly, in coordination with the Democratic National Committee. It is hoped that professional help would be donated for editing, arranging and narrating.
>
> Question: Are there any legal pitfalls in regard to such use of government films? I don't see any problem in regard to stills—they

[1] I assume from this statement that the inquiry has no relationship to any films which might be made or released for historical rather than partisan purposes.

> are public property, publicly released, for use by anyone. Still pictures are already being used regularly in the 'Democrat' and I assume this is proper. With movies, we would want to excerpt, rearrange and edit. Could government movies be made available to DNC for such purpose? If not, could they be made available to some other non-government group for essentially the same purpose?

With respect to still pictures, it appears that there is no legal problem since Mr. Southwick indicates that he refers only to pictures "publicly released, for use by anyone." Consequently, this memorandum is confined to a discussion of the use of government motion picture films.

I. Summary

Government motion picture films may be made available to the Democratic National Committee or congressmen in circumstances in which public release is authorized by statute. In the absence of statutory authority, government films may be made available to the Committee on a revocable loan basis if a public interest can be shown to justify such loan and if the films are available equally to other private organizations. However, it would be improper for any government agency to produce a film for the specific purpose of making it available to the Democratic National Committee or to congressmen, and, as a matter of policy, an arrangement which creates the suspicion that the films were produced for such a purpose should be avoided.

II. Discussion

Some federal agencies have specific statutory authority to release government films for public use. However, specific statutory authorization for general public release of government films appears to be limited to a few agencies. For example, the Agriculture Department is authorized to loan, rent or sell copies of films. 5 U.S.C. § 554 (1958). Also, the Secretary of the Interior is authorized to prepare for free distribution or exhibit or to offer for sale films pertaining to the National Fisheries Center and Aquarium. 16 U.S.C. § 1052(b)(2) (Supp. IV 1958).

Statutory permission for the public release of films may be restricted. For example, under the United States Information and Educational Exchange Act of 1948, the United States Information Agency ("USIA") is authorized to produce films for "dissemination abroad." Pub. L. No. 80-402, § 501, 62 Stat. 6, 9 (1948) (codified at 22 U.S.C. § 1461 (1958)).[2] In addition, provisions of some appropria-

[2] During the visit of Mrs. John F. Kennedy to India and Pakistan, the USIA produced two films for "dissemination abroad," one of the First Lady's visit to Pakistan and one of her visit to India. Pursuant to authority contained in 22 U.S.C. § 1437, the USIA contracted with United Artists for the production of a third film of Mrs. Kennedy's trip. This film, utilizing in part government footage, was produced at

tion acts forbid use of appropriations for publicity or propaganda purposes. For example, the Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriation Act for 1963, Pub. L. No. 87-843, 76 Stat. 1080, contains in title VII the following provision:

> No part of any appropriation contained in this Act shall be used for publicity or propaganda purposes not authorized by Congress.

Id. § 701.

A systematic practice of a government agency to produce or obtain films and turn them over to a political organization might well raise questions as to the use of appropriated funds under such a provision.

Absent specific statutory authority, the right of the head of a department or agency to give, lend, sell, or otherwise dispose of government film to a private organization would appear to be limited by constitutional and statutory prohibitions and by the necessity for a determination as to whether the proposed disposition would be in the public interest. Article 4, Section 3, Clause 2 of the Constitution gives to the Congress the power "to dispose of . . . Property belonging to the United States."

Under Article 4, Section 3, Clause 2 of the Constitution, "property once acquired by the Government may not be sold, or title otherwise disposed of, except under the authority of Congress." *Grant of Revocable Licenses Under Government-Owned Patents*, 34 Op. Att'y Gen. 320, 322 (1924). Attorney General Stone stated that "this prohibition extends to any attempt to alienate a part of the property, or in general, in any manner to limit or restrict the full and exclusive ownership of the United States therein." *Id.* As a consequence of this constitutional prohibition, a government agency was held not to have authority to sell maps to individuals or private companies without statutory authorization. *Puerto Rico Reconstruction Company—Sale of Prints of Survey Map*, 39 Op. Att'y Gen. 324, 325 (1939).

Congressional authority appears to be unnecessary, however, to permit the head of a department or agency[3] to grant to individuals or organizations revocable licenses to use government property for a purpose beneficial to the government or in the public interest. The distinction between alienation of government property and the granting of a revocable use license in the public interest was discussed by Attorney General Stone:

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the expense of United Artists and was commercially released through the Selzer Company. The government benefited from this arrangement by obtaining a third film of Mrs. Kennedy's trip produced at the expense of a private company and by use of United Artists' distribution facilities in countries in which USIA has no facilities. The government footage was loaned to United Artists, which returned the original to the government after making copies. Dissemination of one of the films in the United States was admitted by USIA not to be authorized.

[3] *See infra* note 4.

> . . . And it has been uniformly held that revocable licenses, in the public interest, for the use of Government property, could be given by the head of the appropriate Department. [*Revocable Licenses*, 22 Op. Att'y Gen. 240, 245 (1898); *Government-Owned Site at Aqueduct Bridge*, 30 Op. 470, 482 (1915); *Transfer of Property from One Government Department to Another*, 32 Op. 511, 513 (1921); *Use of a Portion of Camp Lewis Military Reservation by the Veterans' Bureau*, 33 Op. 325, 327 (1922).] The power has been frequently exercised by such Departments in accordance with these opinions.
>
> When the law has been so construed by Government Departments during a long period as to permit a certain course of action, and Congress has not seen fit to intervene, the interpretation so given is strongly persuasive of the existence of the power. . . . In [*United States v. MacDaniel*, 32 U.S. (7 Pet.) 1, 14 (1833)], it is made clear that the head of a Government Department does not have to show statutory authority for everything he does. Reasonable latitude in the exercise of discretion is implied. "Usages have been established in every Department of the Government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits . . . . Usage can not alter the law, but it is evidence of the construction given to it." . . .
>
> . . . .
>
> Under section 161 of the Revised Statutes, the Head of each Department regulates the custody, use, and preservation of property pertaining to it. So that it may be said that while the Constitution prohibits the alienation of the title, ownership or control of Government property without Congressional sanction, Congress has given the Head of a Department authority and control over the "use" and preservation of such property in his charge.

Grant of Revocable Licenses, 34 Op. Att'y Gen. at 326–27. *See also Government Research Facilities—Use by Graduate and Faculty Scientists—National Bureau of Standards Cooperative Program*, 36 Comp. Gen. 561, 563–64 (1957).

It would seem to follow from the foregoing that, subject to appropriate conditions, the head of a department or agency[4] may permit the use of government films

[4] Undoubtedly, the head of an agency, as well as the head of a department, possesses authority to permit non-governmental use of official property. Although in *Grant of Revocable Licenses*, 34 Op. Att'y Gen. 320, Attorney General Stone relied in part upon Rev. Stat. § 161 (5 U.S.C. § 22), which authorizes the head of an executive department to regulate the custody, use and preservation of property belonging to that department, it does not appear that the Attorney General's opinion would have been different if Rev. Stat. § 161 had not been in force. Consequently, the opinion seems to be

by private organizations if a public interest can be demonstrated. If a government decision should be made that public dissemination of any film is in the public interest, the Democratic National Committee or congressmen would be entitled to access to the film equally with any other private organization.

This conclusion does not, however, dispose of all of the questions raised by Mr. Southwick's memorandum. He states that the films are intended to be used by congressmen in their "public service" broadcasts and for a series of documentaries to be a produced in coordination with the Democratic National Committee which would probably have a "partisan use." Nothing in the conclusion stated above would justify a government agency in producing or collecting films for such purposes. Statutory or other authority to make or collect films and to distribute them to the public does not, as I have stated, preclude distribution to persons or organizations which may use them for partisan political purposes. However, it can hardly be contended that such authority extends to production or collection of films in order to foster such purposes.[5] As a realistic matter, films made or collected for use either by a political committee or for a congressman's "public service" broadcasts would in effect be produced or assembled for partisan political purposes.

I might add that a systematic practice of government agencies' supplying films to be used for private political purposes raises some questions which should be seriously considered. I think that no question at all is presented when it is the mission of a government organization, such as the Library of Congress, to maintain a film or picture library, with prints available to the general public. Those who wish to make use of its facilities for their private political purposes are as entitled to do so as anyone is. But where the collection or production and distribution of films is incidental to the basic mission of any agency, a close working relationship with persons or organizations who use the films for political purposes is apt to create the suspicion that, in the first instance, they were made or collected for those purposes. Obviously this should be avoided.

NORBERT A. SCHLEI
Assistant Attorney General
Office of Legal Counsel

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broad enough to support the right of the head of an agency to allow private use of government property subject to appropriate conditions. In this connection, it is of interest that the Comptroller General has expressed the opinion that the Federal Communications Commission, an independent agency, may issue a revocable license for the use of government property. *Public Property—Administrative Authority to Dispose Of*, 22 Comp. Gen. 563 (1942).

[5] With respect to agencies subject to statutory limitations on the use of appropriated funds for publicity or propaganda purposes, such activity might also violate the provisions of the relevant appropriation act.

Carriage of Firearms by the Marshal, Deputy Marshals, and Judges of the Customs Court

The Marshal and Deputy Marshals of the Customs Court are not authorized by 18 U.S.C. § 3053 to carry firearms.

Neither the official duties of the Marshal, as described by 28 U.S.C. § 872 and Rule 19 of the Rules of the Customs Court, nor the official duties of the Judges of the Customs Court would appear to necessitate the carriage of firearms.

If the Customs Court finds it necessary to rely solely on its Marshal to police its quarters, it would probably have inherent authority to authorize the Marshal and Deputies to carry arms; however, there would be no basis for assuming inherent authority in the Court to authorize possession of arms by its Judges.

A state could not constitutionally require a federal official whose duties necessitate carrying firearms to obtain a firearms license.

October 3, 1967

MEMORANDUM OPINION FOR THE
ACTING ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

This is in response to your request for an informal opinion concerning three questions on the carriage of firearms by Judges and Marshals of the Customs Court, forwarded to you by Mr. Vance, the chief of the Customs Section. The questions, which we understand were raised by the Customs Court itself, are as follows:

> 1. Are the Marshal and Deputy Marshals of the Customs Court within the authorization of 18 U.S.C. § 3053 to carry firearms?
>
> 2. Would possession of firearms by the Judges, Marshal, and Deputy Marshals of the Customs Court be deemed to be in pursuit of their official duties?
>
> 3. Does the Customs Court have power to issue orders authorizing the possession of firearms by its Judges, Marshal, or Deputy Marshals?

In addition, a related question has been raised indirectly concerning the propriety of subjecting federal officials to state or local licensing requirements involving firearms.

In general, our responses to the three questions posed directly are:

> 1. Section 3053 does not apply to the Marshal and Deputy Marshals of the Customs Court.

2. The duties of the Marshal, as described by 28 U.S.C. § 872 and Rule 19 of the Rules of the Customs Court, would not appear to necessitate carrying firearms as part of official duties. However, if responsibility for the physical protection of the Court is, in fact, part of their duties, the Marshal and Deputies might be considered inherently authorized to carry arms, despite the absence of express statutory authorization. On the other hand, we see no reasonable basis for concluding that carriage of firearms is necessary to carry out the official duties of Judges of the Customs Court.

3. If the Court finds it necessary to rely solely on its Marshal to police its quarters, it would probably have authority to authorize the Marshal and Deputies to carry arms. But, in our view, there would be no basis for assuming inherent authority in the Court to authorize possession of arms by its Judges.

The question of the applicability of state firearms licensing laws to federal officials involves both issues of constitutional law and policy considerations. Where federal law expressly authorizes the carrying of arms or where carrying arms is essential to the performance of a federal function, any attempt to require officials to obtain state licenses would almost certainly be unconstitutional. On the other hand, the Administration has, for several years, proposed legislation to reinforce local firearms restrictions and encourage further limitations on traffic in firearms. As a matter of policy, it would seem inappropriate to demand exemption from state firearms restrictions in any but the obviously necessary circumstances or to encourage noncompliance on the part of federal officials with such state laws.

A detailed discussion of these points follows.

I. Application of 18 U.S.C. § 3053

The language of 18 U.S.C. § 3053 expressly authorizes "United States marshals and their deputies" to carry firearms. It would appear that the quoted words refer to the United States Marshals appointed by the President with the advice and consent of the Senate pursuant to 28 U.S.C. § 561 and the Deputies appointed pursuant to 28 U.S.C. § 562. These are the officers ordinarily referred to as United States Marshals and Deputies. Other special marshals appointed by, and solely responsible to, the Judicial Branch are normally designated by the court which they serve, e.g., the Marshal of the Supreme Court, the Marshal of the United States Court of Appeals for the District of Columbia, the Marshal of the Customs Court. Indeed, Rule 19 of the Rules of the Customs Court refers to its Marshal and United States Marshals in terms which reflect the distinction between them.

The United States Marshals, while serving as officers of the courts to which they are assigned, are likewise law enforcement officers of the Executive Branch. They are regularly responsible for delivering convicted persons to prison and have been called upon to protect individuals against armed attack. They are authorized to arrest persons violating the laws of the United States and it is in connection with this authorization that the permission to carry firearms is granted by 18 U.S.C. § 3053. Accordingly, it would appear that 18 U.S.C. § 3053 is intended to apply only to the United States Marshals and Deputies who serve as law enforcement officers of the executive branch and would not cover the Marshal of the Customs Court, who is solely an officer of that court.

II. Relationship of Firearms to the Official Duties of the Court and Its Marshal

As outlined in 28 U.S.C. § 872 and Rule 19 of the Customs Court, the duties of the Marshal are to attend the Court, serve and execute its process and orders, disburse funds, take charge of transportation requests, notify the appropriate United States Marshal of the time and place of sessions when the Court is on circuit, and perform such other duties as may be assigned by the Court. These would not appear to be law enforcement duties of the type which would necessarily require the carrying of firearms. It is true that process serving may, at times, become hazardous. Yet federal law does not authorize the carrying of firearms by every person authorized to serve process under Rules 4 and 45 of the Federal Rules of Civil Procedure or to serve summons or subpoenas under Rules 4 and 17 of the Federal Rules of Criminal Procedure. Carrying firearms would not appear to a necessary element of process serving or of any of the other specific duties of the Marshal of the Customs Court.

On the other hand, if the Marshal and his Deputies are assigned official duties of a protective or law enforcement nature, carrying firearms could be a necessary element of those duties. For example, the special police assigned by the General Services Administration ("GSA") to protect public buildings pursuant to 40 U.S.C. § 318 carry firearms, and GSA is expressly authorized to furnish the arms and ammunition to them (40 U.S.C. § 490(a)(2)). The White House Police (3 U.S.C. § 202), the Capitol Police (40 U.S.C. § 210), and the Smithsonian Guards (40 U.S.C. § 193t) are authorized, either directly or indirectly, to carry arms. The Supreme Court Police, although not expressly authorized to carry arms by statue (*see* 40 U.S.C. §§ 13f, 13n), do in fact carry firearms while engaged in the duty of protecting the Court and court building. Policing duties of this type ordinarily involve carrying firearms and if the Marshal of the Customs Court is required to perform such functions, then, we believe carrying firearms might be said to be a part of his official duties.

In general terms, the official duty of the Judges of the Customs Court is to hear and determine matters involving the customs laws. This is, of course, a judicial

function. It does not involve policing or law enforcement in the commonly understood meaning of those terms. In our view, there would be little, if any, basis for asserting that the carrying of firearms is a necessary or normal element in the performance of the official duty of the Judges of the Customs Court. Federal laws do not specifically authorize the carrying of firearms by any federal judges and, in modern times at least, we know of no proposal that the carriage of arms be considered a normal element of federal judicial office.

Undoubtedly there may be instances in which a federal judge requires the protection of arms and these instances may be directly related to the performances of his official duties. However, it seems to us that the need for such protection, while perhaps incidental to the judicial office, is not a basic element of the office itself. Carrying a gun, even for self-protection, is not, it seems to us, part of the official duties of a federal judge. Accordingly, unless there are some special duties of the Customs Court necessitating firearms of which we are unaware, carrying a gun would not appear to involve the performance of an official duty on the part of a judge of that court.

III. Power of the Customs Court to Authorize Firearms

The statutes relating to the Customs Court authorize it to assign the powers and duties of its Marshal (28 U.S.C. § 872), and to exercise the same powers as a district court with respect to preserving order (28 U.S.C. § 1581). Taken together, these provisions might be used as a basis for authorizing the Marshal and his Deputies to carry firearms, if it could be established that carrying arms is reasonably related to the protection of the Court in the performance of its duties. Moreover, a good argument could be made to support the view that a court has inherent power to take any necessary and proper action to police and protect its quarters and need not have any statutory basis for taking such action.

It must be noted that the authority to carry arms has ordinarily been granted expressly by statute, even with respect to those whose need to carry guns seems obvious: e.g., FBI agents (18 U.S.C. § 3052), and prison employees (18 U.S.C. § 3050). Where express statutory authority is lacking, however, regulations have authorized the carrying of firearms, *see, e.g.*, 19 C.F.R. § 23.33(c) (1967), which authorizes customs officers to carry firearms and cites 19 U.S.C. § 1581, which imposes law enforcement duties on customs officers. The validity of such a regulation does not appear to have been questioned.

It is our view that if the Marshal and Deputy Marshals of the Customs Court are assigned policing or law enforcement duties, the Court would probably have authority to authorize them to carry arms. As a practical matter, however, we see no need for policing duties to be imposed on the Marshal or his Deputies. In general, the obligation to provide guard service and armed protection for federal agencies, including courts, throughout the country is imposed on the General Services Administration. 40 U.S.C. §§ 285, 318. Of course, where the federal

agency is quartered in a building under state, municipal or private ownership it is sometimes necessary to make other arrangements. But it seems to us that arrangements for policing the present or the future quarters of the Customs Court should be handled through GSA rather than by the Court itself.

Enforcement of the orders and contempt authority of the Court might, of course, require arms depending upon the circumstances. However we do not have sufficient facts to indicate whether this presents a real problem and necessitates an order or regulation authorizing the carriage of firearms by the Marshal and his Deputies.

With respect to the Judges of the Customs Court, we are not aware of any reasonable basis for the court to authorize by regulation the carrying of firearms. As noted above, this does not appear to be related to the performance of the judicial office.

IV. Compliance with State Law

It may be stated as a general principle that a state may not impose restrictions on the federal government or its officers in connection with official government business. In *Johnson v. Maryland*, 254 U.S. 51 (1920), the Supreme Court held that the state could not impose license requirements on federal employees driving Post Office trucks. The Court concluded that the licensing requirement would be an impermissible burden on the performance of a federal function. *Id.* at 57. Similarly, it has been held that an internal revenue officer on his way to make an arrest could not be convicted of speeding in violation of local laws when speed was necessary to the performance of his duty. *City of Norfolk v. McFarland*, 145 F. Supp. 258 (E.D. Va. 1956).

On the other hand, the Court noted in *Johnson* that federal officers and employees are not immune from all state laws and that state law must be complied with unless there is a superseding federal law or the state law interferes with the performance of a federal function. 254 U.S. at 56–57.

With respect to the carriage of firearms, it seems clear, although there appear to be no federal court decisions directly in point, that a state could not constitutionally require a license of a person authorized by federal law to carry a firearm. Nor, in our opinion, could a license be required of a federal official whose duties necessitate carrying arms, even if there is no express federal statute authorizing arms. It seems equally clear, however, that employment by the federal government, in and of itself, does not automatically exempt a federal officer or employee from state licensing requirements respecting firearms.

As a matter of policy, it is our view that the federal government should not insist upon or request exemption from state firearms laws except in those instances where it is obviously necessary. The Administration, and particularly the Departments of Treasury and Justice, have urged stricter controls on interstate traffic in firearms, federal support and assistance in the enforcement of state laws on

firearms, and stronger state laws on the subject. It would be inconsistent with the publicly announced policy on gun controls to urge any broader exemption from state law with respect to federal officers and employees than is necessary to carry out the functions of the federal government.

FRANK M. WOZENCRAFT
Assistant Attorney General
Office of Legal Counsel

Constitutionality of "No Appropriation" Clause in the Watershed Protection and Flood Prevention Act

A "no appropriation" clause in the Watershed Protection and Flood Prevention Act, requiring approval of a construction project by the appropriate committees of the Senate and House of Representatives before Congress may enact appropriations legislation for the project, is constitutional.

February 27, 1969

MEMORANDUM OPINION FOR THE STAFF ASSISTANT TO THE COUNSEL TO THE PRESIDENT

The immediate question facing the President is what position he should take with respect to the Watershed Protection and Flood Prevention Act enacted in 1954 (Pub. L. No. 83-566, 68 Stat. 666). Between 1954 and 1966 several hundred watershed projects were processed under this law. In 1966 the Johnson Administration objected on constitutional grounds to a provision of the Act requiring committee approval of project plans before appropriations are made. The section provides:

> No appropriation shall be made for any plan involving an estimated Federal contribution to construction costs in excess of $250,000, or which includes any structure which provides more than twenty-five hundred acre-feet of total capacity unless such plan has been approved by resolutions adopted by the appropriate committees of the Senate and House of Representatives . . . .

Id. § 2 (as amended, codified at 16 U.S.C. § 1002(2)). President Johnson submitted a bill to Congress to repeal this section and to substitute a provision requiring the Executive to report projects to the committees 30 days before work could be begun. This legislation was not enacted.

It is our understanding that, pursuant to President Johnson's instruction, numerous proposed watershed projects have been held in abeyance despite the fact that the congressional committees approved the projects and that non-itemized funds were appropriated by Congress. Several other watershed projects are being examined within the Executive Branch but have not been submitted to Congress due to the present impasse.

The immediate question involving the watershed projects cannot be fully understood without reference to the broader encroachment problem presented by so-called "committee veto" provisions. There are two types of provisions through which Congress has sought to give its committees oversight of projects authorized under broadly worded enabling legislation. The earlier form, generally referred to as a "come into agreement" clause, sought to authorize committees to approve or disapprove Executive action. The typical "come into agreement" clause provided

that after enabling legislation authorizing projects had been enacted, and after a general appropriation bill had been passed, the Executive still had to receive the approval of the substantive congressional committees having jurisdiction over that type of project before the appropriated money could be spent. The second and later type provides that no appropriation shall be made for projects which do not have committee approval. The language in the Watershed Act is an example of the latter type.

I. Conclusions

In our opinion, this "no appropriation" clause is not subject to constitutional infirmities. It is unnecessary to decide, in order to reach an opinion on this question, whether the quite different provisions of the "come into agreement" clause are likewise constitutional.

As to the Watershed Act, once it is determined that the "no appropriation" clause is constitutional, the President can resolve the present impasse by simply advising Secretary Hardin to proceed in compliance with the existing statute. Since the law is on the books, the only question for executive determination at this time is whether executive compliance with the act is constitutional. An affirmative instruction to Secretary Hardin will not preclude the President from later taking the position that the related, but in our opinion dissimilar, "come into agreement" clauses are unconstitutional.

As to future bills containing a "no appropriation" clause, the President will have available to him the additional option of vetoing those which he feels are unwise and not in the public interest, even though he may not be of the opinion that the bills are unconstitutional. In making that determination, the President might wish to consider the manner in which similar provisions of other acts have been administered in the past, both with regard to fairness in allocation of projects and with respect to the actual practice followed by Congress under the "no appropriation" clause.

II. Discussion

Problems with respect to claimed congressional encroachment of this type arose at least as early as the administration of President Woodrow Wilson when Congress incorporated in an appropriation bill the following language:

> [N]o journal, magazine, periodical, or similar Government publication shall be printed, issued, or discontinued by any branch or officer of the Government service unless the same shall have been authorized under such regulations as shall be prescribed by the Joint Committee on Printing . . . .

H.R. 12610, 66th Cong. § 8 ("An act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June 30, 1921, and for other purposes").

President Wilson vetoed the bill and stated in his veto message:

> The Congress has the power and the right to grant or deny an appropriation, or to enact or refuse to enact a law; but once an appropriation is made or a law is passed, the appropriation should be administered or the law executed by the executive branch of the Government.

H.R. Doc. No. 66-764, at 2 (1920).

Congress re-passed the appropriation act without the section to which President Wilson had objected. Pub. L. No. 66-231, 41 Stat. 631 (1920). Similar positions were taken by Presidents Hoover, Roosevelt, Truman, Eisenhower, and Kennedy. *See Separation of Powers: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 90th Cong., pt. 1, at 215–28 (1967) ("SOP Hearings").

There are two principal arguments against the constitutionality of "come into agreement" provisions. The first is the basic separation of powers argument: the President is charged in Article II of the Constitution with the faithful execution of the laws, and once a project is authorized, and money finally appropriated for it, the carrying out of these congressional mandates is placed by the Constitution in the Executive Branch of the government. The second argument is that giving congressional committees power to veto projects proposed by the Executive grants to the Committees final legislative authority which the Constitution, in Article I, granted only to the Congress acting as a whole and subject to the veto power of the President. Thus, this argument runs, "come into agreement" provisions are an unconstitutional delegation of legislative power to congressional committees.

In light of the long line of Presidents and Attorneys General who have adhered to the view that such provisions are unconstitutional, such a view must be deemed to have considerable weight. There was apparently recognition among leaders of Congress that the "come into agreement" clause had serious constitutional infirmities. Representative Patman in 1951, 97 Cong. Rec. 5443, and Senator Dirksen in 1954, 100 Cong. Rec. 5095, both espoused the position that the "come into agreement" clause was unconstitutional.

It appears that Congress then sought some device which would avoid the constitutional infirmity of this type of clause, and yet permit a degree of legislative oversight in public works authorizations. In this area, Congress had at one time enacted itemized enabling legislation, but more and more of the detailed decisions had necessarily been delegated to the Executive Branch because of the magnitude of the task. The result was the "no appropriation shall be made" clause, which was first used in 1954. *See* 100 Cong. Rec. 10016 (remarks of Sen. Holland).

A "no appropriation" clause is, by its terms, not a restriction on the Executive, but rather a directive to the Congress itself that there shall be a condition precedent for the enactment of appropriation legislation for a particular project or group of projects. That condition is the approval, by resolution of the appropriate substantive committees of each House, of any plan involving expenditure of federal funds beyond a minimum amount. Sponsors of the measure have stated that such a requirement could, if desired, be enforced by a point of order in any floor debate of an appropriation bill containing funds for projects which have not been so approved by committee resolution.

This is the kind of provision which appears in the Watershed Act with which President Nixon must now deal. President Johnson faced the question whether to approve legislation containing this type of provision in several instances. In the Water Resources Research Act of 1964, Pub. L. No. 88-379, 78 Stat. 329, for example, President Johnson approved the Act but stated:

> Although this legislation is so phrased that it is not technically subject to constitutional objection, it violates the spirit of the constitutional requirement of separation of power between the executive and legislative branches.

Statement by the President Upon Signing the Water Resources Research Act, 2 *Pub. Papers of Pres. Lyndon B. Johnson* 861, 862 (July 17, 1964).

However, as the clause was used with greater frequency by Congress during the succeeding years of the Johnson Administration, the President adopted the position that "no appropriation" provisions were subject to the same constitutional infirmity as the older "come into agreement" provisions. *Pacific Northwest Disaster Relief Act of 1965—Veto Message: Message from the President Returning Without Approval, the Bill (S. 327) Entitled "An Act to Provide Assistance to the States of California, Oregon, Washington, Nevada, and Idaho for the Reconstruction of Areas Damaged by Recent Floods and High Waters,"* S. Doc. No. 89-34 (1965); *Construction at Military Installations: Message from the President of the United States Returning Without Approval the Bill (H.R. 8439) to Authorize Certain Construction at Military Installations, and for Other Purposes*, H.R. Doc. No. 89-272 (1965). In signing into law a number of bills containing such provisions, President Johnson indicated in the signing statements that he did not recede from his position that the "no appropriation" clauses were unconstitutional.

The arguments that a "no appropriation" clause is vulnerable to the same constitutional attack as the older "come into agreement" clause are ably stated in the testimony of my predecessor, Assistant Attorney General Frank M. Wozencraft, given before the Subcommittee on Separation of Powers of the Senate Judiciary Committee, September 15, 1967. The thread of these arguments is that the "net result" of the former is the same as the latter—before appropriated money may be spent by the Executive, the approval of committees of Congress is required. If this

is bad under the separation of powers arguments in the case of the "come into agreement" clause, it must be equally bad under the "no appropriation" clause since the Constitution looks to substance, rather than form.

These arguments are fully developed, pro and con, in the transcript of the hearings at which Assistant Attorney General Wozencraft testified. SOP Hearings at 201–34. With all deference, I am unable to concur in his conclusion with respect to "no appropriation" clauses. In taking this position, I feel supported to some extent by the fact that Acting Deputy Attorney General Minor, during the Eisenhower Administration, likewise saw no constitutional infirmity in such a clause. He stated:

> It is clear that the purpose of the new provision is designed to place in the Senate and House Committees on Public Works the same practical control over the administration of the lease-purchase program as did the provisions of the Senate version of the bill to which the Department objected on constitutional grounds. However, the new provision in the enrolled bill may be said to constitute an exercise of the rule-making power of the respective Houses in specifying the procedure to be followed by the Senate and House Appropriations Committees in determining appropriations for lease-purchase purposes. Thus viewed, there can hardly be objection on constitutional grounds to Congress directing its appropriations committees not to recommend funds to carry out lease-purchase agreements which have not been approved by the committees on Public Works . . . .

D.J. File 145-100-01-1, § 3.

Sweeping generalizations which assume a distinct line between "legislative" functions and "executive" functions and which assume that in every instance "form" must give way to "substance" are particularly suspect in the area of constitutional law. There is undoubtedly a line beyond which Congress may not go in seeking to control the administration of a law after that law has gone through the legislative process, but the "no appropriation" clause by its terms does not seek to reach out beyond the legislative preserve in such a manner. Because it confines its operative effect to the Legislative Branch, whereas the "come into agreement" clause did not, the change is one of substance as well as form. Congress may ultimately achieve the same degree of oversight with the "no appropriation" clause as with the "come into agreement" clause, but since the former accomplishes that result without invading the executive domain, the distinction is of constitutional significance.

I have given weight, in formulating my opinion as to constitutionality, to the fact that the particular application of the clause in the act in question now before the President is one which seeks only to exercise legislative oversight in an area

where Congress has traditionally performed this function by enacting itemized public works authorizations. Since the basic argument for unconstitutionality is based on the idea of separation of powers, it cannot be irrelevant that the effect of the "no appropriation" clause in this particular act is to retain for congressional committees a share in the decision about individual projects of a type which were once within the sole domain of Congress and its committees. Different constitutional considerations might be presented if the function which Congress sought to oversee were one which had traditionally been associated with the Executive, rather than with the Legislative Branch. Examples are the closing down of military bases and the devising of weapons systems.

It is enough in this particular situation that Congress has sought to extend its legislative oversight into an area which has traditionally been the prerogative of the Legislative Branch, rather than that of the Executive, and that it has done so with a provision which by its terms binds only the Congress and not the Executive. This being the case, in my opinion, the Act which the President is presently called upon to administer does not encroach upon any reasonable view of the executive function and therefore suffers from no constitutional infirmity.

A corollary of the interpretation that the "no appropriation" language is merely an internal rule of Congress is that it does not bind the Executive. Thus, if Congress passes general, unspecified watershed appropriations, as it has in the past, the Executive is entitled to treat this money as finally appropriated and allocable to projects which have not received committee approval.

This is not to suggest that the Secretary ought not, as a matter of policy in cases where funds have already been appropriated, consult with the affected congressional committees about particular projects. But such consultation would be a matter of comity rather than a requirement of law. Indeed, it appears that the previous administration interpreted the clause to mean no expenditure should be made without the approval of the committees, and accordingly consultation with the committees was considered required by law.

The Executive thus has the power to insure that the "no appropriation" clause is administered according to its terms, if it desires to proceed in that direction. If in fact Congress wishes to require the Executive as a matter of law to present projects to its committees for approval, it would seem a reasonable prediction that appropriations will not be made in future years until projects have in fact been approved by the committees.

III. Policy Matters

The fact that a provision in an act is not unconstitutional does not, of course, mean that it is either wise or, from the point of view of the Executive, desirable. The President might feel that he wishes to exert continuing pressure upon Congress to adopt the "report and wait" provisions which President Johnson felt were a desirable substitute for the "no appropriation" provisions. The former

would require the Executive, before spending appropriated money, to notify the appropriate committees of the specific projects upon which the money was to be spent, and to thereafter wait a given period of time—preferably 30 or 60 days—before actually making the expenditure. During the waiting period, Congress (if it were in session) would have the power to override the proposed executive action by a legislative act subject to the President's veto. Likewise, if the President felt that the administration of the "no appropriation" clause was defective, either in overall fairness of project allocation, or in degree of conformity to the terms of the clause, he could use the veto as a matter of policy, without entangling himself in the constitutional imbroglio in which his predecessor found himself.

WILLIAM H. REHNQUIST
Assistant Attorney General
Office of Legal Counsel

Presidential Authority to Impound Funds Appropriated for Assistance to Federally Impacted Schools

Public Law 81-874 does not provide statutory authority for the Commissioner of Education in the exercise of his discretion to avoid applying the full sum appropriated to the entitlements of local educational agencies for financial assistance to federally impacted schools.

The President does not have the constitutional authority to direct the Commissioner of Education or the Bureau of the Budget to impound or otherwise prevent the expenditure of funds appropriated by Congress to carry out the legislation for financial assistance to federally impacted schools, Public Law 81-874.

December 1, 1969

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
BUREAU OF THE BUDGET

You have asked us to consider whether the President may, by direction to the Commissioner of Education or to the Bureau of the Budget, impound or otherwise prevent the expenditure of funds appropriated by Congress to carry out the legislation for financial assistance to federally impacted schools, Public Law 81-874, 64 Stat. 1100 (1950) (codified as amended at 20 U.S.C. §§ 236 *et seq.* (1964 & Supp. IV 1965–1968), and Public Law 81-815, 64 Stat. 967 (Sept. 23, 1950) (codified as amended at 20 U.S.C. §§ 631 *et seq.* (1964 & Supp. IV 1965–1968)).

I.

In July, the House of Representatives, in adopting the Joelson Amendment to the appropriations bill for the Departments of Labor and Health, Education, and Welfare ("HEW") (H.R. 13111, 91st Cong. (1969)), added approximately one billion dollars to the sum to be appropriated for various programs administered by the Office of Education. 115 Cong. Rec. 21,688–89 (1969). One of the largest increases was in the appropriation to carry out Public Law 81-874, which was raised to $585 million, nearly $400 million over the figure requested by the Administration and reported by the House Appropriations Committee. The appropriation for Public Law 81-815, on the other hand, is only $15,167,000, the same as that requested by the Administration.

The question arises whether, assuming that the appropriations carried in the Joelson Amendment are not significantly reduced by the Senate, the Administration is bound to spend the money appropriated. This memorandum considers the situation with respect to Public Law 81-874 and Public Law 81-815, particularly

the former. In a subsequent memorandum we shall consider the situation with respect to certain of the other items in the Joelson Amendment.[1]

Public Law 81-874 authorizes financial assistance for the maintenance and operation of local school districts in areas where school enrollments are affected by federal activities. Payments are made to eligible school districts which provide free public education to children who live on federal property with a parent employed on federal property (section 3(a) (codified as amended at 20 U.S.C. § 238)) and to children who either live on federal property or live with a parent employed on federal property (section 3(b)); to those school districts having a substantial increase in school enrollment resulting from federal contract activities with private companies (section 4 (codified as amended at 20 U.S.C. § 239)); and to school districts when there has been a loss of tax base as a result of the acquisition of real property by the federal government (section 2 (codified as amended at 20 U.S.C. § 237)). Where the state or local educational agency is unable to provide suitable free public education to children who live on federal property, the Commissioner of Education is required to make arrangements for such education (section 6 (codified as amended at 20 U.S.C. § 241)). Major disaster assistance is authorized for local educational agencies under section 7 of Public Law 81-874 (codified as amended at 20 U.S.C. § 241-1). It should be noted that the $585 million provided by the Joelson Amendment is for assistance "as authorized by sections 3, 6, and 7" of Public Law 81-874. 115 Cong. Rec. 21,689 (1969). Consequently, no funding is provided for sections 2 and 4, and these sections need not concern us further.

Section 3 of Public Law 81-874 (as amended and codified) requires the Commissioner to compute the "entitlement" of a local educational agency under a formula, whereby, simply stated, the number of Category A children and one-half the Category B children[2] is multiplied by the local contribution rate for the school district as determined under section 3(d). The determination of entitlement is not entirely mechanical, for within fairly narrow limits the Commissioner has discretion in selecting the basis for his determination of the local contribution rate, and other provisions permit him to make favorable adjustments in entitlements under narrowly defined circumstances (section 3(c)(2), (c)(4), (e); section 5(d)(1) (codified as amended at 20 U.S.C. § 240)).

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[1] This memorandum does not consider title I of the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified as amended at 20 U.S.C. §§ 241a–241m (Supp. IV 1965–1968)), which, although enacted as title II of Public Law 81-874, is usually cited as a separate statute and is listed as a separate appropriation item in the Joelson Amendment. 115 Cong. Rec. 21,689 (1969).

[2] The terms "Category A" and "Category B" refer to the standards for eligibility under sections 3(a) and 3(b), respectively.

Once a district's section 3 entitlement has been determined, however, the process of making payments becomes mechanical. Section 5(b) of Public Law 81-874 (as amended and codified) provides:

> The Commissioner shall . . . from time to time pay to each local educational agency, in advance or otherwise, the amount which he estimates such agency is entitled to receive under this subchapter. . . . Sums appropriated pursuant to this subchapter for any fiscal year shall remain available, for obligation and payments with respect to amounts due local educational agencies under this subchapter for such year, until the close of the following fiscal year.

20 U.S.C. § 240(b).[3]

However, Public Law 81-874 does not constitute a promise by the United States to pay the full entitlement, for the statute contemplates that Congress may choose not to appropriate sufficient money to fund the program at 100% of entitlement. In such a circumstance section 5(c) provides that the Commissioner after deducting the amount necessary to fund section 6, shall, subject to any limitation in the appropriation act, apply the amount appropriated pro rata to the entitlements.[4] (Since the Joelson Amendment provides no funding for sections 2 and 4, this would mean that after deducting the amount necessary to fund section 6 and, perhaps, constituting a reserve for possible application to section 7,[5] the appropriation would be applied to the payment of section 3 entitlements.)

In sum, whatever limited discretionary authority the Commissioner may have with respect to determining entitlements, section 5 does not appear to permit any exercise of discretion in the application of appropriated funds to the payment of entitlements. Since the $585 million carried in the Joelson Amendment is only 90% of the total estimated entitlements, *Departments of Labor and Health, Education, and Welfare Appropriations for 1970: Hearings Before the Subcomm.*

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[3] This provision for continued availability beyond the close of the fiscal year conflicts with section 405 of the appropriation bill, H.R. 13111, 91st Cong. (as reported by H. Comm. on Appropriations, July 24, 1969). However, we understand that HEW regards the obligation of the funds as occurring within the fiscal year, even though the precise amount due may not be ascertained until after the close of the fiscal year.

[4] Thus, he would have no authority to vary this formula in order to provide fuller funding for Category A entitlements at the expense of Category B entitlements unless Congress were so to provide in the appropriation act.

[5] It is arguable that since the Joelson Amendment appropriates funds to carry out sections 3, 6, and 7, the Commissioner could set up a reserve for contingencies under section 7, disaster assistance. On the other hand, section 7(c) of Public Law 81-874 permits the Commissioner, notwithstanding the Anti-Deficiency Act, to grant assistance under section 7 out of moneys appropriated for the other sections, such funds to be reimbursed out of subsequent appropriations for carrying out section 7. Since the statute permits such application of funds allocated to carrying out section 3, it would be hard for the Commissioner to justify withholding funds from allocation on the basis of the possibility that they might be needed for disaster assistance.

on Departments of Labor and Health, Education, and Welfare and Related Agencies of the H. Comm. on Appropriations, 91st Cong., pt. 5, at 229 (1969), discretionary cutbacks on entitlements would have to exceed 10% of the total before there would be any impact on the total funding of the program.

We do not, in short, find within Public Law 81-874 any statutory authority for the Commissioner in the exercise of his discretion to avoid applying to the entitlements the full sum appropriated, and we conclude that the provisions of section 5 are mandatory in this respect.[6] We understand that this conclusion is consistent with the position taken over the years by the General Counsel of the Department of Health, Education, and Welfare.[7]

Public Law 81-815 authorizes payments to assist local school districts in the construction of school facilities in areas where enrollments are increased by federal activities. The entitlement for assistance is computed under a statutory formula, and in addition there is provision for judicial review of a commissioner's determination refusing to approve part or all of any application for assistance under the Act. *Id.* § 11(b) (codified as amended at 20 U.S.C. § 641(b)). On the other hand, the mechanics of administration of Public Law 81-815 differ significantly from those of Public Law 81-874. First, the commissioner is not required to apply appropriations pro rata among the eligible districts, but in accordance with priorities which he establishes by regulation (section 3 (codified as amended at 20 U.S.C. § 633)). Second, entitlement for assistance is not computed on an annual basis, but as a share of the cost of a particular project. Thus, if funds are held up in one fiscal year, the project may be funded the next year. Finally, the commissioner is apparently free to allot, in his discretion, an indefinite share of the appropriation to section 14 purposes, school construction on Indian reservations.

While we hesitate to conclude, on this fairly summary consideration, that the Commissioner has discretionary authority under Public Law 81-815 to delay indefinitely the obligation and expenditure of funds appropriated to carry out the statute, it does appear to us that there are enough discretionary powers throughout the statute to permit him to postpone the obligation of funds during fiscal 1970. Indeed, the Joelson Amendment provides that the appropriation for Public Law 81-815 shall remain available until expended, 115 Cong. Rec. 21,689, which would seem to confirm the conclusion that there is no legal requirement that the

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[6] Mandatory, that is, provided that the school district is in compliance with applicable federal statutes and regulations. Where a district is not in compliance, the Commissioner may have authority to withhold or terminate assistance, *see, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VI, 78 Stat. 241, 252 (codified at 42 U.S.C. §§ 2000d *et seq*. (1964 & Supp. IV 1965–1968)); 45 C.F.R. pt. 80 (1968). Whether in the event of such a withholding or termination the Commissioner would be required to apply the funds to the unfunded entitlements of other districts is a point we need not decide at this time.

[7] Memorandum for Assistant Secretary Huitt from General Counsel Willcox (Mar. 29, 1966); Memorandum for the Secretary from General Counsel Banta (Aug. 6, 1958) (HEW files do not indicate whether this memo was actually sent).

funds be obligated in the year for which the appropriation is made. However, inasmuch as the appropriation in question is relatively small and is consistent with the Administration's budget request, we see no need to discuss in greater detail the legal arguments which could be used to support a deferral of action to obligate the funds.

II.

Notwithstanding the apparently mandatory provisions of Public Law 81-874, it has been suggested that the President has a constitutional right to refuse to spend funds which Congress has appropriated. In particular, there have been a number of statements by congressmen with respect to the very programs of the Office of Education presently under consideration that Congress could not force the President to spend money which he did not want to spend.

Section 406 of the Elementary and Secondary Education Amendments of 1967, Pub. L. No. 90-247, 81 Stat. 783 (1968) (as added by the Vocational Education Amendments of 1968, Pub. L. No. 90-576, § 301, 82 Stat. 1064, 1094), provides that notwithstanding any other provision of law, unless expressly in limitation of this provision, funds appropriated to carry out any Office of Education program shall remain available for obligation until the end of the fiscal year. The purpose of this provision was to deny to the President authority which he would otherwise have had under the Revenue and Expenditure Control Act of 1968, Pub. L. No. 90-364, §§ 202–203, 82 Stat. 251, 271–72, to reduce obligations and expenditures on Office of Education programs, and, in particular, the impacted area programs and title III of the National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580, 1588 (codified at 20 U.S.C. §§ 441 *et seq*. (1964 & Supp. IV 1965–1968)). *See* 114 Cong. Rec. 29,155 (1968). During the debate in both Houses on this provision several members stated that section 406 would not interfere with the President's constitutional authority to reduce expenditures in the area of education. *See* 114 Cong. Rec. 29,159 (1968) (remarks of Sens. Dominick and Yarborough); 114 Cong. Rec. 29,481 (1968) (remarks of Congressmen Perkins and Quie).

Similar views were expressed almost contemporaneously in connection with the House of Representatives' consideration of a Senate amendment to the Labor-HEW appropriations bill, 1969 (H.R. 18037, 91st Cong.), which would exempt from both the Antideficiency Act and the Revenue and Expenditure Control Act an appropriation of $91 million for impacted area school assistance for fiscal 1968. In advising the House to accept the Senate amendment, Congressman Flood stated:

> Section 406 of the Vocational Education Act amendments seems to many and, I must say, not to others, to cover what the language in disagreement seeks to do; but in any event there are many instances in which it has been made clear that the President has the constitu-

> tional powers to refuse to spend money which the Congress appropriates.

114 Cong. Rec. 30,588 (Oct. 10, 1968). Congressman Laird agreed:

> The language will not be interpreted as a requirement to spend because of the constitutional question which is involved. The Congress cannot compel the President of the United States to spend money that he does not want to spend.

Id. at 30,588–89. More recently, in the hearing on HEW's appropriation bill for fiscal 1970 (H.R. 13111, 91st Cong.), Congressman Smith stated his belief that HEW was not compelled to spend the funds appropriated for the impact aid program. *Hearings Before a Subcommittee of the House Appropriations Committee*, 91st Cong., pt. 3, at 263 (1969). Subcommittee Chairman Flood appeared to agree. *Id.* at 264.

Taken together these statements evidence broad congressional support for the proposition that the President has some residual constitutional authority to refuse to expend those funds to which section 406 applies. What is not clear is the nature or the precise source of the authority the speakers had in mind.

For the reasons discussed below we conclude that the President does not have a constitutional right to impound Public Law 81-874 funds notwithstanding a congressional direction that they be spent. However, before proceeding with discussion of the constitutional question we might note that the congressional statements cited above might be used in support of another argument for presidential authority, based on statutory interpretation. It might be argued that although these statements cannot affect the interpretation of Public Law 81-874, since they were not made in the course of enacting or amending that statute, nevertheless Public Law 81-874 is not self-executing, and its operation is expressly conditioned on the enactment of subsequent appropriations legislation. Therefore, in determining the duties of the Commissioner of Education one must construe the intent of both the substantive legislation, Public Law 81-874, and the appropriations legislation, and the present understanding of Congress, as evidenced by the statements above, is that the enactment of the appropriation does not create a duty to spend.

Up to a point this argument has a certain amount of validity. We do not doubt, for example, that notwithstanding the terms of Public Law 81-874, Congress could provide in its appropriation that the money need not be spent. Or it could enact an appropriation, and then provide in contemporaneous or subsequent legislation that the money need not be spent, as was done in title II of the Revenue and Expenditure Control Act of 1968, Pub. L. No. 90-364. However, the congressional statements cited above refer to the President's constitutional powers and not to congressional intent. It seems doubtful that one can infer from those statements,

most of them made in 1968, that Congress, in enacting the appropriations legislation in 1968, intended to exert less than its full authority to require the expenditure of funds appropriated to Public Law 81-874. Still, since at this writing the appropriations legislation has not yet been passed, it may be that legislative history may still be made which would support the argument that Congress does not intend to require the expenditure of the entire sum appropriated.

With respect to the suggestion that the President has a constitutional power to decline to spend appropriated funds, we must conclude that existence of such a broad power is supported by neither reason nor precedent. There is, of course, no question that an appropriation act permits but does not require the Executive Branch to spend funds. *See Federal-Aid Highway Act of 1956—Power of President to Impound Funds*, 42 Op. Att'y Gen. 347, 350 (1967). But this is basically a rule of construction, and does not meet the question whether the President has authority to refuse to spend where the appropriation act or the substantive legislation, fairly construed, requires such action.

In 1967, Attorney General Clark issued an opinion upholding the power of the President to impound funds which had been apportioned among the States pursuant to the Federal-Aid Highway Act of 1956, 23 U.S.C. §§ 101 *et seq*. (1964 & Supp. IV 1965–1968), but had not been obligated through the approval by the Secretary of Transportation of particular projects. *Federal-Aid Highway Act*, 42 Op. Att'y Gen. 347. This opinion appears to us to have been based on the construction of the particular statute, rather than on the assertion of a broad constitutional principle of executive authority. While the reasoning of the opinion might lend support to executive action deferring the obligation of funds under Public Law 81-815, we think the case of Public Law 81-874 is clearly distinguishable, because, among other reasons, impounding the Public Law 81-874 funds would result not in a deferral of expenditures but in permanent loss to the recipient school districts of the funds in question and defeat the congressional intent that the operations of these districts be funded at a particular level for the fiscal year.

While there have been instances in the past in which the President has refused to spend funds appropriated by Congress for a particular purpose, we know of no such instance involving a statute which by its terms sought to require such expenditure.

Although there is no judicial precedent squarely in point, *Kendall v. United States*, 37 U.S. (12 Pet.) 524 (1838), appears to us to be authority against the asserted presidential power. In that case it was held that mandamus lay to compel the Postmaster General to pay to a contractor an award which had been arrived at in accordance with a procedure directed by Congress for settling the case. The Court said:

> There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that Con-

> gress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President. And this is emphatically the case, where the duty enjoined is of a mere ministerial character.

Id. at 610.

It might be argued that *Kendall* is not applicable to the instant situation because the Commissioner of Education's duties are not merely ministerial. *Cf. Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 515 (1840). On the other hand, while discretion is involved in the computation of the entitlement of the recipient districts, as we have pointed out, the application of the appropriation to the payment of entitlements pursuant to section 5(c) of Public Law 81-874 might reasonably be regarded as a ministerial duty. In any event, the former distinction between discretionary and ministerial duties has lost much of its significance in view of the broad availability of judicial review of agency actions and of a remedy in the Court of Claims for financial claims against the government. 28 U.S.C. § 1491 (1964). Thus, the mere fact that a duty may be described as discretionary does not, in our view, make the principle of the *Kendall* case inapplicable, if the action of the federal officer is beyond the bounds of discretion permitted him by the law.

In an opinion letter of May 27, 1937 to the President,[*] Attorney General Cummings answered in the negative the question whether the President could legally require the heads of departments and agencies to withhold expenditures from appropriations made. Insofar as the opinion concludes that a presidential directive may not bind a department head in the exercise of discretionary power vested in him by statute, this opinion appears inconsistent with the views expressed in the opinion of Attorney General Clark previously cited and with constitutional practice in recent years.[8] However, the Cummings opinion also rejects any idea that the President has any power to refuse to spend appropriations other than such power as may be found or implied in the legislation itself.

It is in our view extremely difficult to formulate a constitutional theory to justify a refusal by the President to comply with a congressional directive to spend. It may be argued that the spending of money is inherently an executive function, but the execution of any law is, by definition, an executive function, and it seems an anomalous proposition that because the Executive Branch is bound to execute the laws, it is free to decline to execute them. Of course, if a congressional directive to spend were to interfere with the President's authority in an area

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[*] Editor's Note: That opinion letter is also included in this volume (*Presidential Authority to Direct Departments and Agencies to Withhold Expenditures From Appropriations Made*, 1 Op. O.L.C. Supp. 12 (May 27, 1937)).

[8] *See also The Jewels of the Princess of Orange*, 2 Op. Att'y Gen. 482 (1831) (Taney, A.G.).

confided by the Constitution to his substantive direction and control, such as his authority as Commander in Chief of the Armed Forces and his authority over foreign affairs, *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–22 (1936), a situation would be presented very different from the one before us. But the President has no mandate under the Constitution to determine national policy on assistance to education independent from his duty to execute such laws on the subject as Congress chooses to pass.

It has been suggested that the President's duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, might justify his refusal to spend, in the interest of preserving the fiscal integrity of the government or the stability of the economy. This argument carries weight in a situation in which the President is faced with conflicting statutory demands, as, for example, where to comply with a direction to spend might result in exceeding the debt limit or a limit imposed on total obligations or expenditures. *See, e.g.*, Pub. L. No. 91-47, tit. IV, 83 Stat. 49, 82 (1969). But it appears to us that the conflict must be real and imminent for this argument to have validity; it would not be enough that the President disagreed with spending priorities established by Congress. Thus, if the President may comply with the statutory budget limitation by controlling expenditures which Congress has permitted but not required, he would, in our view, probably be bound to do so, even though he regarded such expenditures as more necessary to the national interest than those he was compelled to make.[9]

If Congress should direct the expenditure of funds in the carrying out of a particular program or undertaking, say, construction of a public building, but without limiting the Executive's discretion in such a way as to designate the recipient of the appropriated funds, a better argument might perhaps be made for a constitutional power to refuse to spend than is available in the formula grant

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[9] We understand that the operation of the expenditure limitation imposed by title IV of Public Law 91-47 may require curtailment of certain controllable expenditures. Paradoxically, title IV would not conflict with the increase over budgeted amounts in appropriations provided by the Joelson Amendment, because the expenditure limitation would automatically be adjusted upward. Nevertheless, we are informed that it might prove difficult to comply with title IV without cutting back on expenditure of budgeted funds for Public Law 81-874 and other Office of Education programs. Whether in such a situation title IV could be viewed as conflicting with and thus superseding the requirements of Public Law 81-874 depends to a large extent on the Executive's spending options at that time. Two considerations cause us to hesitate to infer from title IV a grant of authority to the President to impound appropriations for formula grants for education. First, title IV, as passed by the Senate, contained specific language permitting the impounding of funds appropriated for formula grants and other mandatory programs, but exempting from this authority education programs. The conference report contained neither the grant of authority nor the exception. H.R. Rep. No. 91-356 (1969) (Conf. Rep.). Second, section 406 of the Elementary and Secondary Education Amendments (as added by the Vocational Education Amendments of 1968) would conflict with such a grant of authority, and there is legislative history to the effect that title IV of Public Law 91-47 was not intended to alter the effect of section 406 of the Elementary and Secondary Education Amendments. *See* 115 Cong. Rec. 18,928–29 (1969). Nevertheless, we do not rule out at this time the possibility that in appropriate circumstances title IV might permit the impounding of such funds.

situation presented by Public Law 81-874. Or this might be viewed simply as a situation in which the duty to spend exists but there is no constitutional means to compel its performance.

III.

As to the availability of a remedy, if our conclusion that section 5 of Public Law 81-874 requires expenditure of the appropriation is correct, we believe that the recipient school districts will probably have a judicial remedy. It is true that unlike Public Law 81-815, Public Law 81-874 has no specific provision for judicial review of a refusal to make a grant. However, absence of such a provision does not imply that no judicial review was intended. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 139–46 (1967). It may be that a suit to compel the Commissioner to apply the appropriation would be inappropriate, *see Land v. Dollar*, 330 U.S. 731, 738 (1947), but if the school districts are legally entitled to payment under the statute, they can sue the government in the Court of Claims. 28 U.S.C. § 1491. Such a suit would raise interesting legal problems, for it is clear that "entitlement" under Public Law 81-874 is not itself equivalent to a legal obligation to pay, and it is doubtful that even entitlement plus appropriation creates a vested right which may not be destroyed by subsequent congressional action. Accordingly, technical defenses might prevent recovery by a school district even if the court concluded that the Executive Branch had a statutory duty to spend the appropriation.

WILLIAM H. REHNQUIST
Assistant Attorney General
Office of Legal Counsel

Presidential Authority to Permit Incursion Into Communist Sanctuaries in the Cambodia-Vietnam Border Area

Congress has clearly affirmed the President's authority to take all necessary measures to protect U.S. troops in Southeast Asia. Having determined that the incursion into the Cambodia-Vietnam border area is such a necessary measure, the President has clear authority to order it.

The President's action with respect to the Cambodian border area, limited in time and in geography, is consistent with the purposes which the Executive and the Congress have pursued since 1964. Whatever theoretical arguments might be raised with respect to the authority of the Commander in Chief to act alone had there been no congressional sanction for our involvement in Southeast Asia, there is no doubt as to the constitutionality of the action in light of the prior affirmance of Congress that the Commander in Chief take all necessary measures to protect U.S. forces in Vietnam. Having determined the necessity, the Commander in Chief has the constitutional authority to act.

May 14, 1970

MEMORANDUM OPINION FOR THE SPECIAL COUNSEL TO THE PRESIDENT[*]

Although the authority to declare war is vested in the Congress, the President as Commander in Chief and sole organ of foreign affairs has constitutional authority to engage U.S. forces in limited conflict. International law has long recognized a distinction between formal declared wars and undeclared armed conflicts. While the precise division of constitutional authority between President and Congress in conflicts short of all-out war has never been formally delimited, there is no doubt that the President with the affirmance of Congress may engage in such conflicts.

Congress has clearly affirmed the President's authority to take all necessary measures to protect U.S. troops in Southeast Asia. Having determined that the incursion into the Cambodian border area is such a necessary measure, the President has clear authority to order it.

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[*] Editor's Note: This memorandum was addressed to Charles W. Colson, Special Counsel to the President. The cover memorandum explained as follows: "Attached is a memorandum regarding the authority of the President to permit incursion into Communist sanctuaries in the Cambodia-Vietnam border area." As a postscript, the cover memorandum noted: "(Copy of 'The Legality of U.S. Participation in the Defense of Vietnam,' reprinted from the Department of State Bulletin, and 'The Legality of the United States Position in Vietnam' by Eberhard P. Deutsch, Chairman of the American Bar Association Committee on Peace and Law Through United Nations, also sent.)" On April 30, 1970, two weeks before the completion of this opinion, President Nixon had announced that "a combined American and South Vietnamese operation" would target North Vietnamese "sanctuaries on the Cambodian-Vietnam border." Address to the Nation on the Situation in Southeast Asia, *Pub. Papers of Pres. Richard M. Nixon* 405, 407 (1970).

I. The Commander in Chief Has Constitutional Authority to Engage U.S. Forces in Limited Conflicts, Which Is Unquestioned When He Has the Affirmance of Congress

A. Constitutional Authority

The constitutional provisions which relate to the use of armed force divide authority between the Congress and the President. Congress has the authority to provide for the common defense (art. I, § 8, cl. 1), to declare war (art. I, § 8, cl. 11), to raise and support armies (art. I, § 8, cl. 12), to provide and maintain a navy (art. I, § 8, cl. 13), and to make rules for governing the armed forces (art. I, § 8, cl. 14). The President is designated Commander in Chief of the armed forces (art. II, § 2, cl. 1). He is vested with the "executive Power" (art. II, § 1, cl. 1) and is charged with the duty to take care that the laws be faithfully executed (art. II, § 3). The nature of the executive power, as emphasized in the express authority to make treaties, appoint ambassadors (art. II, § 2, cl. 2), and receive ambassadors (art. II, § 3), includes the authority to conduct the nation's foreign affairs. "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (internal quotation omitted).

This division of authority, lacking precise delimitations, was clearly intended by the original draftsmen of the Constitution. They rejected the power of kings to commit unwilling nations to war to further their own international political objectives. At the same time, they recognized the need for quick executive response to rapidly developing international situations. The accommodation of these two interests—the prohibition of one-man commitment of a nation to war and the need for prompt executive response to international situations—was reflected in the Constitutional Convention's decision to change the original wording from the power of Congress to *make* war to the power to Congress to *declare* war. The Founding Fathers intended to distinguish between the initiation of armed conflict, which is for Congress to determine, and armed response to conflict situations, which the Executive may undertake. *See* 3 *The Papers of James Madison* 1351–53 (Henry D. Gilpin ed., 1841); 2 *The Records of the Federal Convention of 1787* 318–19 (Max Farrand ed., 1966).

B. Distinction Between War and Limited Conflict

International Law has long recognized that countries engage in many forms of armed conflict short of all-out war. These include pacific blockades or quarantines, retaliatory bombardments and even sustained but limited combat. 2 Charles Cheney Hyde, *International Law: Chiefly as Interpreted and Applied by the United States* §§ 586–592 (2d rev. ed. 1945); 2 L. Oppenheim, *International Law: A Treatise* §§ 26–56 (H. Lauterpacht ed., 7th ed. 1952). Early in our history, the

Supreme Court described these differences between war and armed conflict using the terms "solemn war" and "imperfect war":

> If it be declared in form, it is called *solemn*, and is of the perfect kind; because one whole nation is at war with another whole nation; and *all* the members of the nation declaring war, are authorised to commit hostilities against all the members of the other, in every place, and under every circumstance. In such a war all the members act under a general authority, and all the rights and consequences of war attach to their condition.
>
> But hostilities may subsist between two nations more confined in its nature and extent; being limited as to places, persons, and things; and this is more properly termed *imperfect war*; because not solemn, and because those who are authorized to commit hostilities, act under special authority, and can go no farther than to the extent of their commission.

Bas v. Tingy (The Eliza), 4 U.S. (4 Dall.) 37, 40 (1800) (opinion of Washington, J.).

While the Court termed both forms of military action "war," it marked the clear distinction between declared war, as we have seen in this century in the two World Wars, and undeclared armed conflicts, such as we have seen in Korea and in Southeast Asia.

C. Historic Recognition of Distinction

As has been chronicled many times, the United States throughout its history has been involved in armed conflicts short of all-out or declared war, from the Undeclared War with France in 1798–1800 to Vietnam. *See, e.g.*, H.R. Rep. No. 82-127 (1951); H.R. Doc. No. 84-443 (1956); James Grafton Rogers, *World Policing and the Constitution* 92–123 (1945). The precise number of involvements is a matter of some dispute, as is the legitimacy of them. Nevertheless they did occur and throw considerable light on the constitutional division of powers between the President and the Congress.

On some occasions in our history, such as the Undeclared War with France and the Cuban Missile Crisis, Congress has, in advance, authorized military action by the President without declaring war. Act of July 9, 1798, ch. 68, 1 Stat. 578; Pub. L. No. 87-733, 76 Stat. 697 (1962). Chief Justice Marshall, however, raised the question whether such authorization was necessary for the President to act with regard to the early conflict with France:

> It is by no means clear that the president of the *United States* whose high duty it is to "take care that the laws be faithfully execut-

> ed," and who is commander in chief of the armies and navies of the *United States*, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the *United States*, to seize and send into port for adjudication, *American* vessels which were forfeited by being engaged in this illicit commerce.

Little v. Barreme, 6 U.S. (2 Cranch) 170, 177 (1804). He held, however, where Congress has prescribed one course of action, the President is not free to choose another. *Id.* at 177–78.

There have been other times in history, such as the Mexican and Civil Wars, where Congress has ratified armed actions, previously undertaken by the President. The Supreme Court has upheld the authority of the President to act prior to the action of Congress. Citing the Mexican War as an example, Justice Grier upheld Lincoln's imposition of a blockade prior to the convening of Congress. *The Prize Cases*, 67 U.S. (2 Black) 635, 659–60 (1863).

Frequently, Presidents have committed our armed forces to limited conflicts without any prior approval or direct ratification by Congress. President McKinley's action in committing 5,000 troops to an international force during the Boxer rebellion is a notable example. While Congress recognized the existence of the conflict, as evidenced by provision for combat pay (Act of Mar. 2, 1901, ch. 803, 31 Stat. 895, 903), it did not declare war nor formally endorse the action. A federal court, however, reiterated the early recognition of limited or undeclared war:

> In the present case, at no time was there any formal declaration of war by the political department of this government against either the government of China or the "Boxer" element of that government. A formal declaration of war, however, is unnecessary to constitute a condition of war.

Hamilton v. McClaughry, 136 F. 445, 449 (C.C.D. Kan. 1905).

President Taft more than once committed American troops abroad to protect American interests. In his annual report to Congress in 1912, he reported the sending of some 2,000 Marines to Nicaragua and the use of warships and troops in Cuba. H.R. Doc. No. 62-927, at 8–9, 21 (1912). He merely advised Congress of these actions without requesting any statutory authorization. President Wilson ordered General Pershing and more than 10,000 troops into Mexico in 1917 and committed approximately 12,000 troops to allied actions in Russia in 1918 to 1920. No congressional action was requested or taken.

The authority of the President to commit troops in limited conflict is not, of course, unquestioned. There are Presidents who have doubted such authority and Congress has challenged it more than once. President Truman's commitment of troops in Korea in response to a United Nations ("U.N.") resolution (S.C. Res. 83,

U.N. Doc. S/RES/83 (June 27, 1950)) without prior approval of, or subsequent ratification by, Congress led to the Great Debate of 1951.

President Truman had relied upon his authority as Commander in Chief and upon resolutions of the U.N. Security Council declaring that armed aggression existed in Korea and calling upon U.N. members to assist in halting that aggression. He cited the history of actions by the Commander in Chief to protect American interests abroad. He characterized the U.N. Charter as the cornerstone or our foreign relations and singled out Article 39 which authorizes the Security Council to recommend action to members to meet armed aggression.

The President's opponents noted that all treaties are not self-executing and that, until implemented by Congress, non-self-executing treaties confer no new authority on the President. Article 39, it was said, was not self-executing. Article 43, which provides expressly for the commitment of troops by members in accordance with their constitutional processes, had been implemented to the extent of Congress authorizing troop agreements (United Nations Participation Act of 1945, Pub. L. No. 79-264, § 6, 59 Stat. 619, 621) but since no agreements had been entered into it was inoperative. Without any added treaty authorization, the President's action must be viewed solely in terms of his basic constitutional authority, it was said, and this authority does not extend to long-term commitment of troops in numbers ranging up to 250,000.

While various scholarly views were quoted on both sides of the issue (H.R. Rep. No. 82-127 (1951)) and the congressional debate raged from January to April, there was no legal resolution of the President's authority in light of the U.N. Charter or independent of it. Nevertheless it is clear that Congress acquiesced in the President's action. *See* David Rees, *Korea: The Limited War* (1964); Merlo J. Pusey, *The Way We Go To War* (1969).

Since judicial precedents are virtually non-existent on this point, the question is one which must of necessity be decided by historical practice. Viewed in this light, congressional acquiescence in President Truman's action furnishes strong evidence that this use of his power as Commander in Chief was a proper one. This is particularly true because, while a treaty may override a state statute under the supremacy clause, *Missouri v. Holland*, 252 U.S. 416 (1920), it may not override a specific limitation on the power of the President or of Congress, *Reid v. Covert*, 354 U.S. 1 (1957).

D. The Constitutional Posture Today

Under our Constitution it is clear that Congress has the sole authority to declare formal, all-out war. It is equally clear that the President has the authority to respond immediately to attack both at home and abroad. Between these two lies the grey area of commitment of troops in armed conflict abroad under either American or international auspices. In this area, both the Congress and the President have acted in the past. There has been dispute, often bitter, as to how far the

President may go alone on his constitutional authority. To date, however, it has always been resolved in the political arena without final constitutional determination by the courts, and without a head-on clash between the Congress and the President. Whatever and wherever the line may be between congressional and presidential authority a House committee accurately observes: "'Acting together, there can be no doubt that all the constitutional powers necessary to meet the situation are present.'" H.R. Rep. No. 88-1708, at 4 (1964) (committee report on Gulf of Tonkin resolution, quoting committee report on Formosa resolution).

II. Congress Has Affirmed the President's Authority to Take Necessary Action to Protect U.S. Troops in Southeast Asia

Although U.S. concern with the security of Southeast Asia dates from our involvement there during World War II, it was formalized in the signing and ratification of the Southeast Asia Collective Defense Treaty. The area covered by the treaty includes not only the territory of the Asian signatories but also the States designated in the protocol which was signed and ratified at the same time as the treaty. These are Cambodia, Laos and the free territory under the jurisdiction of the State of Vietnam. Pursuant to its treaty obligation, the United States for some years maintained military advisers in Vietnam and provided other military assistance to the Republic of Vietnam.

When U.S. naval forces in the Gulf of Tonkin were attacked in August 1964, the President took direct air action against the North Vietnamese. He also requested Congress "to join in affirming the national determination that all such attacks will be met" and asked for "a resolution expressing the support of the Congress for all necessary action to protect our Armed Forces and to assist nations covered by the SEATO [Southeast Asia Treaty Organization]Treaty." H.R. Doc. No. 88-333, at 2 (1964).

On August 10, 1964, Congress responded with a resolution which "approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression." Pub. L. No. 88-408, § 1, 78 Stat. 384, 384. It was in connection with this resolution that Congress noted that whatever the limits of the President acting alone might be, whenever Congress and the President act together "'there can be no doubt'" of the constitutional authority. H.R. Rep. No. 88-1708, at 4 (1964) (committee report on Gulf of Tonkin resolution, quoting committee report on Formosa resolution).

In the debates in the Senate on this resolution it is clear that the Commander in Chief was supported in taking whatever steps were necessary in his judgment to protect American forces. The floor leader, Senator Fulbright, noted on August 6, 1964 that the resolution "would authorize whatever the Commander in Chief feels is necessary." 110 Cong. Rec. 18,403. He observed: "In a broad sense, the joint resolution states that we approve of the action taken with regard to the attack on

our own ships, and that we also approve of our country's effort to maintain the independence of South Vietnam." *Id.* at 18,407. When Senator Cooper inquired: "In other words we are now giving the President advance authority to take whatever action he may deem necessary respecting South Vietnam and its defense, or with respect to the defense of any other country included in the treaty?," Senator Fulbright replied: "I think that is correct." *Id.* at 18,409.

The Gulf of Tonkin Resolution expresses broad support for the Commander in Chief and recognizes the need for broad latitude to respond to situations which may develop. Pub. L. No. 88-408, 78 Stat. 384 (1964). Of particular concern to the Congress, as well as to the President, was the protection of American forces and the security of South Vietnam.

While the Gulf of Tonkin Resolution was the first major congressional affirmation of the President's actions in responding to the situation in Southeast Asia, it is not the only such affirmation. When bombing of military targets in North Vietnam was undertaken in 1965, the President requested a supplemental appropriation for the military. In his message of May 4, 1965, he emphasized:

> This is not a routine appropriation. For each Member of Congress who supports this request is also voting to persist in our effort to halt Communist aggression in South Vietnam. Each is saying that the Congress and the President stand united before the world in joint determination that the independence of South Vietnam shall be preserved and Communist attack will not succeed.

H.R. Doc. No. 89-157, at 1 (1965).

The requested resolution was adopted on May 7, 1965. Pub. L. No. 89-18, 79 Stat. 109.

Since that time Congress has repeatedly adopted legislation recognizing the situation in Southeast Asia, providing funds to carry on U.S. commitments and providing special benefits for troops stationed there. There is long-standing congressional recognition of the U.S. commitment in Southeast Asia.

III. The President's Action With Respect to Cambodia Is Consistent With His Obligations as Commander in Chief and With Congressional Policy Regarding Southeast Asia

Recognizing that Communist troops have been occupying territory on the Vietnam-Cambodian border and using it as a sanctuary from which to launch their attacks into Vietnam and against American forces there, the Commander in Chief has ordered limited incursions into this border area in order to destroy the sanctuaries. He has made a tactical judgment consonant with his responsibility as Commander in Chief, and consistent with the announced congressional policy of

taking "all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression."

As noted in Part I above, from the time of the drafting of the Constitution it has been clear that the Commander in Chief has the authority to take prompt action to protect American lives in situations of armed conflict. Whether it be a formal war declared by Congress or an undeclared war, it is the Commander in Chief who determines how war will be made and what tactics are necessary to protect American lives.

In ratifying the SEATO Treaty and accompanying protocol, Congress has recognized the close security link among the various nations in the area. In adopting the Gulf of Tonkin Resolution, it affirmed its determination to protect U.S. forces in the area. In supporting the supplemental appropriation in 1965, it recognized that the protection of U.S. troops and the prevention of infiltration might necessitate going beyond the boundaries of South Vietnam.

The President's action with respect to the Cambodian border area, limited in time and in geography, is consistent with the purposes which the Executive and the Congress have pursued since 1964. Whatever theoretical arguments might be raised with respect to the authority of the Commander in Chief to act alone had there been no congressional sanction for our involvement in Southeast Asia, there is no doubt as to the constitutionality of the action in light of the prior affirmance of Congress that the Commander in Chief take all necessary measures to protect U.S. forces in Vietnam. Having determined the necessity, the Commander in Chief has the constitutional authority to act.

WILLIAM H. REHNQUIST
Assistant Attorney General
Office of Legal Counsel

The President and the War Power: South Vietnam and the Cambodian Sanctuaries

Recognizing congressional sanction for the Vietnam conflict by the Gulf of Tonkin resolution, even though it was not in name or by its terms a formal declaration of war, the President's determination to authorize incursion into the Cambodian border area by United States forces in order to destroy sanctuaries utilized by the enemy is the sort of tactical decision traditionally confided to the Commander in Chief in the conduct of armed conflict.

Only if the constitutional designation of the President as Commander in Chief conferred no substantive authority whatever could it be said that prior congressional authorization for such a tactical decision was required. Since even those authorities least inclined to a broad construction of the executive power concede that the Commander in Chief provision does confer substantive authority over the manner in which hostilities are conducted, the President's decision to invade and destroy the border sanctuaries in Cambodia was authorized under even a narrow reading of his power as Commander in Chief.

May 22, 1970

MEMORANDUM OPINION FOR THE SPECIAL COUNSEL TO THE PRESIDENT*

The recent decision by President Nixon to use United States armed forces to attack sanctuaries employed by the North Vietnamese and the Viet Cong which were located across the Cambodian border from South Vietnam has raised the issue of the scope for the President's power to conduct military operations such as those now underway in Southeast Asia. This memorandum addresses itself to that issue.

I. Division of the War Power by the Framers of the Constitution

The draftsmen of the Constitution clearly intended to divide the war power inhering in any sovereign nation between the President and Congress, and just as clearly did not intend to precisely delimit the boundary between the power of the Executive Branch and that of the Legislative Branch. They rejected the traditional power of kings to commit unwilling nations to war to further the king's international political objectives. At the same time, they recognized the need for quick executive response to rapidly developing international situations.

The accommodation of these two interests took place in the session of the Constitutional Convention on Friday, August 17, 1787. The enumeration of the powers of Congress was in the process of being submitted to the delegates, and discussion occurred following the submission to vote of the draft language empowering Congress "to make war."

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* Editor's Note: This memorandum was addressed to Charles W. Colson, Special Counsel to the President. The cover memorandum explained as follows: "Enclosed is an expanded version of the memorandum on Presidential power entitled *The President and the War Power: South Vietnam and the Cambodian Sanctuaries*. I am sending copies to Jack Stevenson and John Lehman."

The full text of the discussion, as reflected in Madison's notes of the proceedings, is set forth as an appendix to this memorandum.* The upshot was that the authority conferred upon Congress was changed from the power "to make war" to the power "to declare war." 3 *The Papers of James Madison* 1351–53 (Henry D. Gilpin ed., 1841) ("Madison Notes"). Charles Pinckney urged that the war-making power be confided to the Senate alone, *id.* at 1351, while Pierce Butler urged that the power be vested in the President, *id.* at 1352. James Madison and Elbridge Gerry then jointly moved to substitute the word "declare" for the word "make," "leaving to the Executive the power to repel sudden attacks." *Id.* John Sherman expressed a preference for "make" as opposed to "declare," because the latter was too narrow a grant of power. However, he expressed the view that the grant of power to Congress to "make" war would nonetheless permit the Executive to repel attack, although not to commence war. *Id.* Gerry and George Mason opposed the giving of the power to declare war to the Executive. *Id.* Rufus King supported the substitution of the word "declare," urging that the word "make" might be understood to mean "conduct" war, which latter was an executive function. *Id.* at 1353 n.*.

With only New Hampshire dissenting, it was agreed that the grant to Congress should be of the power to *declare* war. Pinckney's motion to strike out the whole clause, and thereby presumably to leave the way open to vest the entire war-making power in the Executive, was then defeated by a voice vote. *Id.* at 1353.

The framers of the Constitution, in making this division of authority between the Executive and the Legislative Branches, were painting with a broad brush on a constitutional fabric, and not endeavoring to accomplish a detailed allocation of authority between the two branches. Nearly 200 years of practice under the constitutional system has given rise to a number of precedents and usages, although it cannot be confidently said that any sharp line of demarcation exists as a result of this history.

II. Recognition of Armed Conflict Short of "War"

Before turning to historical practice for the light which it throws upon the proper interpretation of the President's power, it is well to first dispel any notion that the United States may lawfully engage in armed hostilities with a foreign power only if Congress has declared war. From the earliest days of the republic, all three branches of the federal government have recognized that this is not so, and that not every armed conflict between forces of two sovereigns is "war." This fact affords no final answer to the constitutional question of the division of authority between the President and Congress in exercising the war power, but it

* Editor's Note: That appendix was not preserved in the OLC daybooks and so it is not included here. Instead we have inserted citations to the appropriate parts of Madison's notes on the Constitutional Convention.

does suggest that the effort to find an answer is not advanced by a mechanical application of labels to various fact situations.

Congress, during the so-called "undeclared war" with France which lasted from 1798 to 1800, authorized limited use of this nation's armed forces against those of France. The Fifth Congress authorized President Adams to take the following measures:

> That the President of the United States shall be, and is hereby authorized to instruct the commanders of the public armed vessels which are, or which shall be employed in the service of the United States, to subdue, seize and take any armed French vessel, which shall be found within the jurisdictional limits of the United States, or elsewhere, on the high seas, and such captured vessel, with her apparel, guns and appurtenances, and the goods or effects which shall be found on board the same, being French property shall be brought within some port of the United States, and shall be duly proceeded against and condemned as forfeited . . . .

Act of July 9, 1798, ch. 68, § 1, 1 Stat. 578, 578.

The Supreme Court in a case arising out of this "undeclared war" described these differences between war and other armed conflicts as being differences between "solemn war" and "imperfect war":

> If it be declared in form, it is called *solemn*, and is of the perfect kind; because one whole nation is at war with another whole nation; and *all* the members of the nation declaring war, are authorized to commit hostilities against all the members of the other, in every place, and under every circumstance. In such a war all the members act under a general authority, and all the rights and consequences of war attach to their condition.
>
> But hostilities may subsist between two nations more confined in its nature and extent; being limited as to places, persons, and things; and this is more properly termed *imperfect war*; because not solemn, and because those who are authorized to commit hostilities, act under special authority, and can go no farther than to the extent of their commission.

Bas v. Tingy (The Eliza), 4 U.S. (4 Dall.) 37, 40 (1800) (opinion of Washington, J.).

While the Court termed both forms of military action "war," the distinction which it drew likewise separates the declared wars of the Twentieth Century, such as the two World Wars, and the undeclared armed conflicts such as have more recently occurred in Korea and in Southeast Asia. In both of the two World Wars, the declarations of war were viewed by the Executive Branch to authorize

complete subjugation of the enemy, and some form of "unconditional surrender" on the part of the enemy was the announced goal of the allied nations. In Korea and Vietnam, on the other hand, the goals have been the far more limited ones of the maintenance of territorial integrity and of the right of self-determination.

As has been chronicled many times, the United States throughout its history has been involved in armed conflicts short of declared war, from the undeclared war with France in 1798–1800 to Vietnam. *See, e.g.*, H.R. Rep. No. 82-127 (1951); H.R. Doc. No. 84-443 (1956); James Grafton Rogers, *World Policing and the Constitution* 92–123 (1945). The more significant of these involvements are separately discussed in a following section of this memorandum.

III. Designation of the President as Commander in Chief Is a Grant of Substantive Power

Because of the nature of the President's power as Commander in Chief and because of the fact that it is frequently exercised in external affairs, there are few judicial precedents dealing with the subject. Such judicial learning as there is on the subject, however, makes it reasonably clear that the designation of the President as Commander in Chief of the Armed Forces is a substantive grant of power, and not merely a commission which entitles him to precedence in a reviewing stand.[1]

Chief Justice Marshall, writing for the Supreme Court in *Little v. Barreme*, concluded that the seizure of a ship on the high seas had not been authorized by an act of Congress. In the course of the opinion, he stated:

> It is by no means clear that the President of the *United States* whose high duty it is to "take care that the laws be faithfully executed," and who is Commander in Chief of the armies and navies of the *United States*, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the *United States*, to seize and

[1] A statement of Alexander Hamilton in *The Federalist* 69 has been quoted in support of the notion that the designation of the President as Commander in Chief does nothing more than place him at the head of the military establishment. The full text of Hamilton's comment does not support such a narrow construction:

> The President is to be Commander-in-Chief of the army and navy of the United States. In this respect his authority would be nominally the same as that of the King of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the Confederacy; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies—all which, by the Constitution under consideration, would appertain to the Legislature.

The Federalist No. 69, at 417–18 (Clinton Rossiter ed., 1961).

> send into port for adjudication, *American* vessels which were forfeited by being engaged in this illicit commerce.

6 U.S. (2 Cranch) 170, 177 (1804).

Justice Grier, speaking for the Supreme Court in its famous decision in the *Prize Cases*, likewise viewed the President's designation as Commander in Chief as being a substantive source of authority on which he might rely in putting down rebellion:

> Whether the President in fulfilling his duties, as Commander in Chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. "He must determine what degree of force the crisis demands." The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case.

67 U.S. (2 Black) 635, 670 (1862).

More recently, Justice Jackson, concurring in *Youngstown Sheet & Tube Co. v. Sawyer*, said:

> We should not use this occasion to circumscribe, much less to contract, the lawful role of the President as Commander in Chief. I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society.

343 U.S. 579, 646 (1952).

The limits of the President's power as Commander in Chief are nowhere defined in the Constitution, except by way of negative implication from the fact that the power to declare war is committed to Congress. However, as a result of numerous occurrences in the history of the Republic, more light has been thrown on the scope of this power.

IV. Scope of President's Power as Commander in Chief

The questions of how far the Chief Executive may go without congressional authorization in committing American military forces to armed conflict, or in deploying them outside of the United States and in conducting armed conflict already authorized by Congress, have arisen repeatedly throughout the Nation's

history. The Executive has asserted and exercised at least three different varieties of authority under his power as Commander in Chief:

> (a) Authority to commit military forces of the United States to armed conflict, at least in response to enemy attack or to protect the lives of American troops in the field;
>
> (b) Authority of deploy United States troops throughout the world, both to fulfill United States treaty obligations and to protect American interests; and
>
> (c) Authority to conduct or carry on armed conflict once it is instituted, by making and carrying out the necessary strategic and tactical decisions in connection with such conflict.

Congress has on some of these occasions acquiesced in the President's action without formal ratification; on others it has ratified the President's action; and on still others it has taken no action at all. On several of the occasions, individual members of Congress, and, at the close of the Mexican War, one house of Congress on a preliminary vote, have protested executive use of the armed forces. While a particular course of executive conduct to which there was no opportunity for the Legislative Branch to effectively object cannot establish a constitutional precedent in the same manner as it would be established by an authoritative judicial decision, a long continued practice on the part of the Executive, acquiesced in by the Congress, is itself some evidence of the existence of constitutional authority to support such a practice. *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915). As stated by Justice Frankfurter in his concurring opinion in *Youngstown Sheet & Tube*:

> The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them.

343 U.S. at 610.

A. Commitment of Military Forces to Armed Conflict Without Congressional Authorization

President Jefferson, in 1801, sent a small squadron of American naval vessels into the Mediterranean to protect United States commerce against threatened attack by the Barbary pirates of Tripoli. In his message to Congress discussing his

action, Jefferson took the view that it would require congressional authorization for this squadron to assume an offensive, rather than a defensive, stance.

In May 1845, President Polk ordered military forces to the coasts of Mexico and to the western frontier of Texas (still at that time an independent republic) in order to prevent any interference by Mexico with the proposed annexation of Texas to the United States. Following annexation, Polk ordered General Zachary Taylor to march from the Nueces River, which Mexico claimed was the southern border of Texas, to the Rio Grande River, which Texas claimed was the southern boundary of Texas. While so engaged, Taylor's forces encountered Mexican troops, and hostilities between the two nations commenced on April 25, 1846. While Polk two and a half weeks later requested a declaration of war from Congress, there had been no prior authorization for Taylor's march south of the Nueces.

Justice Grier, in his opinion for the Supreme Court in the *Prize Cases*, commented on this fact, stating:

> The battles of Palo Alto and Rasaca de la Palma had been fought before the passage of the act of Congress of May 13, 1846, which recognized *"a state of war as existing by the act of the Republic of Mexico."*

67 U.S. at 668.

In 1854, President Pierce approved the action of a naval officer who bombarded Greytown, Nicaragua, in retaliation against a revolutionary government that refused to make reparations for damage and violence to United States citizens. This action was upheld by Samuel Nelson, then a judge of the Southern District of New York and later a Justice of the Supreme Court of the United States, in *Durand v. Hollins*, 8 F. Case. 111 (C.C.D.N.Y. 1860) (No. 4186). In his opinion in that case, Judge Nelson said:

> As the executive head of the nation, the president is made the only legitimate organ of the general government, to open and carry on correspondence of negotiations with foreign nations, in matters concerning the interests of the country or of its citizens. It is to him, also, the citizens abroad must look for protection of person and of property, and for the faithful execution of the laws existing and intended for their protection. For this purpose, the whole executive power of the country is placed in his hands, under the constitution, and the laws passed in pursuance thereof. . . .
>
> . . . Acts of lawless violence, or of threatened violence to the citizen or his property, cannot be anticipated and provided for; and for the protection, to be effectual or of any avail, may, not unfrequently, require the most prompt and decided action. . . .

> . . . The question whether it was the duty of the president to interpose for the protection of the citizens at Greytown against an irresponsible and marauding community that had established itself there, was a public political question, in which the government, as well as the citizens whose interests were involved, was concerned, and which belonged to the executive to determine; and his decision is final and conclusive, and justified the defendant in the execution of his orders given through the Secretary of the Navy.

Id. at 112.

In April 1861, President Lincoln called for 75,000 volunteers to suppress the rebellion by the southern states, and proclaimed a blockade of the Confederacy. The Supreme Court in the *Prize Cases* upheld the acts taken by President Lincoln prior to their later ratification by Congress in July 1861, saying:

> If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority.

67 U.S. at 668.

In 1900 President McKinley sent an expedition of 5,000 United States troops as a component of an international force during the Boxer Rebellion of China. While Congress recognized the existence of the conflict by providing for combat pay, Act of Mar. 2, 1901, ch. 803, 31 Stat. 895, 903, it neither declared war nor formally ratified the President's action. A federal court, however, reiterated the early recognition of limited or undeclared war:

> In the present case, at no time was there any formal declaration of war by the political department of this government against either the government of China or the 'Boxer' element of that government. A formal declaration of war, however, is unnecessary to constitute a condition of war.

Hamilton v. McClaughry, 136 F. 445, 449 (C.C.D. Kan. 1905).

Presidents Theodore Roosevelt, Taft, and Wilson on more than one occasion committed American troops abroad to protect American interests. In November 1903, President Roosevelt ordered the United States Navy to guard the Panama area and prevent Colombian troops from being landed in Panama in order to suppress the Panamanian insurrection against Colombia. In his annual report to Congress in 1912, President Taft reported the sending of some 2,000 Marines to Nicaragua (at the request of the President of Nicaragua) and the use of warships and troops in Cuba. H.R. Doc. No. 62-927, at 8–9, 21 (1912). He merely advised Congress of these actions without requesting any statutory authorization.

President Wilson on two separate occasions committed American armed forces to hostile actions in Mexican territory. In April 1914, he directed a force of sailors and Marines to occupy the City of Vera Cruz, during the revolution in that country. The city was seized and occupied for seven months without congressional authorization. In 1916, Wilson ordered General Pershing and more than 10,000 troops to pursue Pancho Villa, the Mexican outlaw, into Mexican territory following the latter's raid on Columbus, New Mexico.

The most recent example of presidential combat use of American armed forces without congressional declaration of war, prior to the Vietnam conflict, was President Truman's intervention in the Korean conflict. Following invasion of South Korea by North Koreans on June 25, 1950, and a request for aid by the United Nations ("UN") Security Council (S.C. Res. 83, U.N. Doc. S/RES/83 (June 27, 1950)), President Truman ordered the United States air and sea forces to give South Korean troops cover and support. He ordered the Seventh Fleet to guard Formosa. On June 30, the President announced that he had authorized the use of United States ground forces in the Korean War, following the collapse of the South Korean Army. Ultimately, the number of troops engaged in the Korean conflict reached 250,000, and the conflict lasted more than three years. President Truman's action without congressional authorization precipitated the "Great Debate" in Congress which raged from January to April 1951.

While the President relied upon the UN Charter as a basis for his action, as well as his power as Commander in Chief, his action stands as a precedent for executive action in committing United States armed forces to extensive hostilities without any formal declaration of war by Congress.

The UN Charter as a result of its ratification by the Senate has the status of a treaty, but it does not by virtue of this fact override any constitutional provision. Though treaties made in pursuance of the Constitution under the Supremacy Clause may override a state statute, *Missouri v. Holland*, 252 U.S. 416 (1920), they may not override specific constitutional limitations, *Geofroy v. Riggs*, 133 U.S. 258 (1890); *Reid v. Covert*, 354 U.S. 1 (1957). If a congressional declaration of war would be required in other circumstances to commit United States forces to hostilities of the extent and nature of those undertaken in Korea, the ratification of the UN Charter would not obviate a like requirement in the case of the Korean conflict. While the issue of presidential power which was the subject of the great debate in Congress was never authoritatively resolved, it is clear that Congress acquiesced in President Truman's intervention in Korea. *See* David Rees, *Korea: The Limited War* (1964); Merlo J. Pusey, *The Way We Go to War* (1969).

B. Deployment of United States Troops Throughout the World[2]

In February 1917, President Wilson requested from Congress authority to arm American merchant vessels. When that authority failed of passage in Congress as a result of a filibuster, Wilson proceeded to arm them without congressional authority, stating that he was relying on his authority as Commander in Chief.

Near the close of the First World War, President Wilson announced a decision to send American troops to Siberia. The troops so sent remained for over a year, with their withdrawal beginning in January, 1920. There was no congressional authorization for such disposition of troops, and the United States had not declared war on Russia.

In 1941, prior to Pearl Harbor, President Roosevelt utilized his power as Commander in Chief to undertake a series of actions short of war designed to aid the allied forces in the Second World War. On April 9, 1941, he made an agreement with the Danish Minister for the occupation of Greenland by American forces. In May 1941, Roosevelt issued a proclamation declaring an unlimited national emergency, and he ordered American naval craft to "sink on sight" foreign submarines found in the "defensive waters" of the United States. In July 1941, the President announced that United States forces would occupy Iceland in order to relieve British forces there, and that the Navy would perform convoy duty for supplies being sent to Great Britain under Lend-Lease. In September 1941, Roosevelt stated that he had given orders to the United States Army and Navy to strike first at any German or Italian vessels of war in American "defensive waters"; the following month, he decided to carry 20,000 British troops from Halifax to the Middle East in American transports.

President Truman's decision in 1951 to send four United States divisions to Europe in discharge of the nation's NATO commitment occasioned prolonged debate in Congress over his powers to take such action without congressional approval. Congress ultimately acquiesced in the President's action without actually resolving the question, and all of President Truman's successors have asserted and exercised similar authority.

C. Authority to Conduct or Carry on Armed Conflict Once It Has Been Lawfully Instituted

It has never been doubted that the President's power as Commander in Chief authorizes him, and him alone, to conduct armed hostilities which have been lawfully instituted. Chief Justice Chase, concurring in *Ex parte Milligan*, said:

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[2] The line between "deploying" forces and "committing them to combat" may be razor thin. Had Zachary Taylor not encountered Mexican resistance below the Nueces, that example could be classified as a "deployment," while if under the orders of President Franklin Roosevelt, discussed *infra*, American naval vessels had sunk on sight a German submarine in the mid-Atlantic, that example could be treated as a "commitment to armed conflict."

> Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, *except such as interferes with the command of the forces and conduct of campaigns. That power and duty belong to the President as commander-in-chief.*

71 U.S. (4 Wall.) 2, 139 (1866) (emphasis supplied).

In the First World War, it was necessary to decide whether United States troops in France would fight as a separate command under General Pershing, or whether United States divisions should be incorporated in existing groups or armies commanded by French or British generals. President Wilson and his military advisers decided that United States forces would fight as a separate command.

In the Second World War, not only similar military decisions on a global scale were required, but also decisions that partook as much of political strategy as they did of military strategy: Should the United States concentrate its military and materiel resources on either the Atlantic or Pacific fronts to the exclusion of the other, or should it pursue the war on both fronts simultaneously? Where should the reconquest of allied territories in Europe and Africa which had been captured by the Axis powers begin? What should be the goal of the allied powers? Those who lived through the Second World War will recall without difficulty, and without the necessity of consulting works of history, that this sort of decision was reached by the allied commanders in chief, and chief executive officers of the allied nations, without (on the part of the United States) any formal congressional participation. The series of conferences attended by President Roosevelt around the world—at Quebec, Cairo, Casablanca, Teheran, Yalta, and by President Truman at Potsdam, ultimately established the allied goals in fighting the Second World War, including the demand for unconditional surrender on the part of the Axis nations.

Similar strategic and tactical decisions were involved in the undeclared Korean War under President Truman. Questions such as whether United States forces should not merely defend South Korean territory, but pursue North Korean forces by invading North Korea, and as to whether American Air Force planes should pursue North Korean and Chinese Communist planes north of the Yalu River, separating Red China from North Korea, were of course made by the President as Commander in Chief without any formal congressional participation.

V. Constitutional Practice Requires Executive to Obtain Sanction of Congress for Conduct of Major Hostilities

It is too plain from the foregoing discussion to admit of denial that the Executive, under his power as Commander in Chief, is authorized to commit American forces in such a way as to seriously risk hostilities, and also to actually commit them to such hostilities, without prior congressional approval. However, if the

contours of the divided war power contemplated by the framers of the Constitution are to remain, constitutional practice must include executive resort to Congress in order to obtain its sanction for the conduct of hostilities which reach a certain scale. Constitutional practice also indicates, however, that congressional sanction need not be in the form of a declaration of war.

In the case of the Mexican War which was brought about, if not initiated, by the Executive, the President requested and obtained a declaration of war. Congress, meeting in 1861 pursuant to the call of President Lincoln, ratified all of the actions he had taken on his own initiative, and apparently refrained from declaring war on the Confederate States only because it did not wish to recognize them as a sovereign nation.

However, as previously noted, the Fifth Congress authorized President Adams to take certain military action against France without going so far as to declare war. More recently, in connection with President Eisenhower's landing of troops in Lebanon and with the Cuban missile crisis in 1962, Congress has given advance authorization for military action by the President without declaring war. Pub. L. No. 85-7, 71 Stat. 5 (1957); Pub. L. No. 87-733, 76 Stat. 697 (1962).

The notion that such advance authorization by Congress for military operations constitutes some sort of an invalid delegation of congressional war power simply will not stand analysis. A declaration of war by Congress is in effect a blank check to the Executive to conduct military operations to bring about subjugation of the nation against whom war has been declared. The idea that while Congress may do this, it may not delegate a lesser amount of authority to conduct military operations, as was done in the instances referred to above, is both utterly illogical and unsupported by precedent. While cases such as *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), hold that Congress in delegating powers to deal with domestic affairs must establish standards for administrative guidance, no such principle obtains in the field of external affairs. The Supreme Court in *United States v. Curtiss-Wright Exp. Corp.* made this distinction clear:

> Whether, if the Joint Resolution had related solely to internal affairs it would be open to the challenge that it constituted an unlawful delegation of legislative power to the Executive, we find it unnecessary to determine. The whole aim of the resolution is to affect a situation entirely external to the United States, and falling within the category of foreign affairs. . . .
>
> It will contribute to the elucidation of the question if we first consider the differences between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs. That there are differences between them, and that these differences are fundamental, may not be doubted.
>
> . . . .

> It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality. . . .
>
> . . . .
>
> In the light of the foregoing observations, it is evident that this court should not be in haste to apply a general rule which will have the effect of condemning legislation like that under review as constituting an unlawful delegation of legislative power. The principles which justify such legislation find overwhelming support in the unbroken legislative practice which has prevailed almost from the inception of the national government to the present day.

299 U.S. 304, 315, 318, 322 (1936).

What must be regarded as the high water mark of executive action without express congressional approval is, of course, the Korean War. Although Congress never expressly sanctioned the President's action in committing United States forces in the hundreds of thousands to the Korean conflict, it repeatedly voted authorizations and appropriations to arm and equip the American troops. This is not to say that such appropriations are invariably the equivalent of express congressional approval; the decision as to whether limited hostilities, commenced by the Executive, should be sanctioned by Congress may be one quite different from the decision as to whether American troops already committed and engaged in such hostilities shall be equipped and supplied.

VI. Extent to Which Congress May Restrict by Legislation the Substantive Power Granted the President by Virtue of His Being Designated as Commander in Chief

While the President may commit armed forces of the United States to hostile conflict without congressional authorization under his constitutional power as Commander in Chief, his authority exercised in conformity with congressional authority or ratification of his acts is obviously broader than if it stood alone. By the same token, Congress undoubtedly has the power in certain situations to restrict the President's power as Commander in Chief to a narrower scope than it would have had in the absence of legislation. Chief Justice Marshall strongly intimates in his opinion in *Little v. Barreme* that the executive action directing the seizure of a ship on the high seas would have been valid had not Congress enacted legislation restricting the circumstances under which such a seizure was author-

ized. Congress, exercising its constitutional authority to "make rules concerning captures on land and water," may thus constrict the President's power to direct the manner of proceeding with such captures.

Congress has similarly sought to restrain the authority of the President in the exercise of its power to "raise and support Armies." U.S. Const. art. I, § 8, cl. 12. In the Selective Service and Training Act of 1940, it was provided that:

> Persons inducted into the land forces of the United States under this Act shall not be employed beyond the limits of the Western Hemisphere except in the Territories and possessions of the United States, including the Philippine Islands.

Pub. L. No. 76-783, § 3(e), 54 Stat. 885, 886 (1940).

In the year following enactment of this law, President Roosevelt determined to send United States troops, including draftees, to Iceland in order to relieve British troops garrisoned there. He chose to strain geography, rather than the law, and obtained the opinion of what was apparently a minority-view geographer that Iceland was actually in the Western Hemisphere.

Very recently, Congress has enacted legislation providing that United States forces shall not be dispatched to Laos or Thailand in connection with the Vietnam conflict. This proviso was accepted by the Executive.

This is not to say, however, that every conceivable condition or restriction which Congress may by legislation seek to impose on the use of American military forces would be free of constitutional doubt. Even in the area of domestic affairs, where the relationship between Congress and the President is balanced differently than it is in the field of external affairs, virtually every President since Woodrow Wilson has had occasion to object to certain conditions in authorization legislation as being violative of the separation of powers between the Executive and the Legislative Branch.[3] The problem would be met in exacerbated form should Congress attempt by detailed instructions as to the use of American forces already in the field to supersede the President as Commander in Chief of the armed forces. Surely this is the thrust of Chief Justice Chase's concurring opinion in *Ex parte Milligan*, quoted earlier in this text:

> [Congressional] power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and conduct of campaigns. That power and duty belong to the President as commander-in-chief.

71 U.S. at 139.

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[3] All of those Presidents have stated in one way or another that just because Congress concededly may refrain from appropriating any money at all, it does not necessarily follow that it may attach whatever condition it desires to an appropriation which it does make.

Nor is the manner in which armed hostilities may be terminated altogether free from doubt. All declared wars in our history have been customarily concluded by treaties negotiated by the President and ratified by the Senate. An effort in the Constitutional Convention to give Congress the power to declare "peace" as well as "war" was unanimously turned down at the session of August 17, 1787. 3 Madison Notes at 1353.

VII. The Vietnam Conflict: Relation Between the Power of the President and the Power of Congress

The duration of the Vietnam conflict, and its requirements in terms of both men and materiel, have long since become sufficiently large so as to raise the most serious sort of constitutional question had there been no congressional sanction of that conflict. However, as is well known, the conflict in its present form began following an attack on U.S. naval forces in the Gulf of Tonkin in August 1964. At that time President Johnson took direct air action against the North Vietnamese, and he also requested Congress "to join in affirming the national determination that all such attacks will be met" and asked for "a resolution expressing the support of the Congress for all necessary action to protect our Armed Forces and to assist nations covered by the SEATO [Southeast Asia Treaty Organization] Treaty." H.R. Doc. No. 88-333, at 2 (1964).

On August 10, 1964, Congress passed the following resolution:

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.
>
> Sec. 2. The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in southeast Asia. Consonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.
>
> Sec. 3. The resolution shall expire when the President shall determine that the peace and security of the area is reasonably assured by international conditions created by action of the United Nations

> or otherwise, except that it may be terminated earlier by concurrent resolution of the Congress.

Pub. L. No. 88-408, 78 Stat. 384, 384 (1964).

In connection with this resolution, Congress noted that whatever the limits of the President's authority acting alone might be, whenever Congress and the President act together "'there can be no doubt'" of the constitutional authority. H.R. Rep. 88-1708, at 4 (1964) (committee report on Gulf of Tonkin resolution, quoting committee report on Formosa resolution).

Since that time, Congress has repeatedly adopted legislation recognizing the situation in Southeast Asia, providing the funds to carry out United States commitments there, and providing special benefits for troops stationed there. By virtue of these acts, and by virtue of the provision in the Gulf of Tonkin resolution as to the manner in which it may be terminated, there is long-standing congressional recognition of a continuing United States commitment in Southeast Asia.[4]

President Nixon has continued to maintain United States troops in the field in South Vietnam, in pursuance of his policy to seek a negotiated peace which will protect the right of the South Vietnamese people to self-determination. The legality of the maintenance of these troops in South Vietnam, and their use to render assistance to the South Vietnamese troops in repelling aggression from the Viet Cong and the North Vietnamese, would admit of reasonable doubt only if congressional sanction of hostilities commenced on the initiative of the Executive could be manifested solely by a formal declaration of war. But the numerous historical precedents previously cited militate against such a formal type of reasoning.

A requirement that congressional approval of executive action in this field can come only through a declaration of war is not only contrary to historic constitutional usage, but as a practical matter could not help but curtail effective congressional participation in the exercise of the shared war power. If Congress may sanction armed engagement of United States forces only by declaring war, the possibility of its retaining a larger degree of control through a more limited approval is foreclosed. While in terms of men and materiel the Vietnam conflict is one of large scale, the objectives for which the conflict may be carried on, as set forth in the Gulf of Tonkin resolution, are by no means as extensive or all-inclusive as would have resulted from a declaration of war by Congress. Con-

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[4] "Legislative history" surrounding the Gulf of Tonkin resolution may be cited for a number of varying interpretations of exactly what Congress was authorizing. In view of the very plain text of the resolution, which authorizes the use of military force "as the President determines" to assist Southeast Asian countries, including South Vietnam, in defense of their freedom, Pub. L. No. 88-408, § 2, 78 Stat. at 384, it is all but impossible to argue that substantial military operations in support of the South Vietnamese against North Vietnam and the Viet Cong were not thereby authorized. The fact that Congress did not by adopting this resolution intend to declare war does not detract from this conclusion; the authority conferred by the resolution is a good deal short of that which would be conferred by a declaration of war.

versely, however, there cannot be the slightest doubt from an examination of the language of the Gulf of Tonkin resolution that Congress expressly authorized extensive military involvement by the United States, on no less a scale than that now existing, by virtue of its adoption of this resolution. To reason that if the caption "Declaration of War" had appeared at the top of the resolution, this involvement would be permissible, but that the identical language without such a caption does not give effective congressional sanction to it at all, would be to treat this most nebulous and ill defined of all areas of the law as if it were a problem in common law pleading. Justice Grier, more than a century ago, in the *Prize Cases* said:

> This greatest of civil wars was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of *war*. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact.

67 U.S. at 668–69. If substance prevailed over form in establishing the right of the federal government to fight the Civil War in 1861, substance should equally prevail over form in recognizing congressional sanction for the Vietnam conflict by the Gulf of Tonkin resolution, even though it was not in name or by its terms a formal declaration of war.

Viewed in this context, the President's determination to authorize incursion into the Cambodian border area by United States forces in order to destroy sanctuaries utilized by the enemy is the sort of tactical decision traditionally confided to the Commander in Chief in the conduct of armed conflict. From the time of the drafting of the Constitution it has been clear that the Commander in Chief has authority to take prompt action to protect American lives in situations involving hostilities. Faced with a substantial troop commitment to such hostilities made by the previous Chief Executive, and approved by successive Congresses, President Nixon has an obligation as Commander in Chief of the country's armed forces to take what steps he deems necessary to assure their safety in the field. A decision to cross the Cambodian border, with at least the tacit consent of the Cambodian government, in order to destroy sanctuaries being utilized by North Vietnamese in violation of Cambodia's neutrality, is wholly consistent with that obligation. It is a decision made during the course of an armed conflict as to how that conflict shall be conducted, rather than a determination that some new and previously unauthorized military venture shall be undertaken.

By crossing the Cambodian border to attack sanctuaries used by the enemy, the United States has in no sense gone to "war" with Cambodia. United States forces are fighting with or in support of Cambodian troops, and not against them.

Whatever protest may have been uttered by the Cambodian government was obviously the most perfunctory, formal sort of declaration. The Cambodian incursion has not resulted in a previously uncommitted nation joining the ranks of our enemies, but instead has enabled us to more effectively deter enemy aggression heretofore conducted from the Cambodian sanctuaries.

Only if the constitutional designation of the President as Commander in Chief conferred no substantive authority whatever could it be said that prior congressional authorization for such a tactical decision was required. Since even those authorities least inclined to a broad construction of the executive power concede that the Commander in Chief provision does confer substantive authority over the manner in which hostilities are conducted, the President's decision to invade and destroy the border sanctuaries in Cambodia was authorized under even a narrow reading of his power as Commander in Chief.

WILLIAM H. REHNQUIST
Assistant Attorney General
Office of Legal Counsel

Constitutionality of the McGovern-Hatfield Amendment

Although it is difficult to resolve with confidence the substantial arguments that can be made for and against a proposed amendment seeking to employ Congress's power of the purse to end hostilities in Vietnam, the Administration should oppose the amendment as a matter of policy, if not as one of constitutional law.

June 2, 1970

MEMORANDUM OPINION FOR A MEMBER OF THE STAFF
NATIONAL SECURITY COUNCIL

By memorandum of May 27 you requested the views of the Department of Justice on the McGovern-Hatfield Amendment.* The Amendment consists of several separate sections, but the principal one is subsection (a), to which I will devote primary attention.

I. Subsection (a)

This subsection provides that after December 31, 1970, any funds appropriated for use in Vietnam may be expended only

> as required for the safe and systematic withdrawal of all United States military personnel, the termination of United States military operations, the provision of assistance to South Vietnam in amounts and for purposes specifically authorized by the Congress, the exchange of prisoners, and the arrangement of asylum for Vietnamese who might be physically endangered by the withdrawal of United States forces.

The subsection further provides

> that the withdrawal of all United States military personnel from Vietnam shall be completed no later than June 30, 1971, unless the Congress, by joint resolution, approves a finding by the President that an additional stated period of time is required to insure the safety of such personnel during the withdrawal process.

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* Editor's Note: The McGovern-Hatfield Amendment was offered as an amendment (No. 605) to H.R. 11,723, 91st Cong., a military procurement authorization bill. 116 Cong. Rec. 13,547 (Apr. 30, 1970). The amendment underwent multiple revisions during the course of consideration of H.R. 11,723. The version addressed in this memorandum opinion appears to have been Amendment 609, submitted and referred to the Senate Committee on Armed Services on May 5, 1970. 116 Cong. Rec. 14,111. Another version (Amendment No. 862) was ultimately rejected on the floor of the Senate by a roll-call vote of 55–39. 116 Cong. Rec. 30,683 (Sept. 1, 1970).

Congress by this subsection is attempting to employ its power of the purse to end hostilities in Vietnam, on presumably whatever terms can be negotiated, if any can, before the deadline set in the Amendment for final withdrawal of American troops.

The constitutional question raised by this proposed amendment is both fundamental and novel: Does Congress have, in addition to the power to declare war, the power to terminate hostilities and in effect "make peace" on its initiative rather than that of the President? Fundamental as the constitutional question is, it is one that has neither been authoritatively resolved nor indeed fully discussed or debated up until this time. Within the time limits specified in your memorandum, I can do no more than sketch the arguments on both sides, which suggest that an answer either way on the question is not free from difficulty.

On the one hand, supporters of the constitutionality of the McGovern-Hatfield Amendment point to the fact that Congress alone is given power to appropriate money, and that therefore Congress may attach to its appropriations such conditions as it sees fit. They also point to the fact that the war power is shared between the President and Congress, with Congress alone having the power to declare war. They conclude that the existence of these two powers is sufficient to validate, as a matter of constitutional law, the principal provision of the Hatfield-McGovern Amendment.

Opponents point to the fact that all of the wars in our history have been concluded by some form of executive initiative—a surrender in the field, an armistice, or a treaty of peace, negotiated by the President and submitted to the Senate for ratification in accordance with the constitutional provisions governing treaties. In this connection, they note that in the debates in the Constitutional Convention, on the same day as Congress was granted the power "to declare war," Pierce Butler of South Carolina moved "to give the Legislature power of peace, as they were to have that of war." 2 *The Records of the Federal Convention of 1787* 319 (Max Farrand ed., 1966). This motion was defeated by vote of the delegates, ten states to none. *Id.* Oliver Ellsworth of Connecticut, during the debate, made the comment that "War also is a simple and overt declaration. [P]eace attended with intricate & secret negociations." *Id.*

Opponents of the constitutionality of the measure also contend that while Congress may unquestionably refuse to make any appropriation at all for the support of the armed forces, it may not condition the appropriations it does make in such a manner as to violate some other provision of the Constitution. *Lovett v. United States*, 328 U.S. 303 (1946).[1]

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[1] "It would hardly be maintained that Congress could end a foreign war by declaring peace in the midst of a campaign while the war is being actively waged on both sides." John M. Mathews, *The Termination of War*, 19 Mich. L. Rev. 819, 828 (1921).

A satisfactory resolution of these constitutional arguments cannot be made in the time available, and very likely could not be made with any confidence even were a good deal more time available. Questions of the distribution of power in the field of external affairs are not traditionally justiciable, and their settlement is frequently accomplished in the political arena, rather than in the judicial forum.

I venture to point out, however, that the same arguments which suggest that this measure may have constitutional difficulties likewise suggest that the Administration ought to oppose it as a matter of policy, if not as one of constitutional law. The chances for any sort of "peace with honor" which the President has indicated to be his goal must depend both on secret negotiations, and upon reasonably flexible availability of military force as a method to compel concessions by the enemy. The adoption of a fixed calendar date for withdrawal of our forces from the field may well be a prescription for peace, but it is virtually certain that it will be a prescription for peace on the enemy's terms. The framers of the Constitution were men of affairs, and the debates make it rather clear that they saw the ultimate fallacy of congressional initiative as a means for ending the war—it requires the exposure of our country's "hole card" without the enemy having to expose his.

Only if the Administration is prepared to say at this moment that the policy of Vietnamization is sufficiently advanced so that American troops may begin in the near future an inflexible schedule of withdrawal could this Amendment be said to do anything other than guarantee the failure of the Vietnamization program. If the other nations involved know in advance that the President, Cinderella-like, will turn into a pumpkin on a date fixed by Congress, his proposals cannot be expected to receive serious attention at the negotiating table.

Since the constitutional and policy issues involved in this section of the Amendment seem to me to be inextricably intertwined, it is not possible to state that the Department's recommendation is based wholly on constitutional grounds. Having said that, I recommend that the Administration oppose this subsection of the Hatfield-McGovern Amendment in Congress, and that the President veto the Amendment if it be adopted by both houses of Congress. To do less means, I think, surrender of presidential initiative to Congress in a manner that cannot but have the most serious adverse consequences to our efforts in Southeast Asia.

II. Subsection (b)

This subsection would expand the prohibition adopted last year against military operations in Laos. Since the President agreed to the earlier provision, since Laos is neither a theater in which American troops are presently engaged in combat nor a staging area for enemy attack, and since his constitutional power to repel attack and protect the safety of United States troops in the field is not affected by such a provision, it appears relatively unobjectionable.

III. Subsection (c)

This subsection is a rough equivalent of the Cooper-Church Amendment,[*] which the Department has previously advised you is, in its opinion, of very doubtful constitutionality, and should be opposed for that reason.

WILLIAM H. REHNQUIST
Assistant Attorney General
Office of Legal Counsel

[*] Editor's Note: The Cooper-Church Amendment prohibited the use of funds to put ground combat troops or U.S. advisers in Cambodia. It was introduced as an amendment to H.R. 19,911, 91st Cong., and ultimately became law as section 7 of the Special Foreign Assistance Act of 1971, Pub. L. No. 91-652, 84 Stat. 1942, 1943.

Authority to Use Troops to Prevent Interference With Federal Employees by Mayday Demonstrations and Consequent Impairment of Government Functions

The President has inherent constitutional authority to use federal troops to ensure that Mayday Movement demonstrations do not prevent federal employees from getting to their posts and carrying out their assigned government functions.

This use of troops is not prohibited by the Posse Comitatus Act.

April 29, 1971

MEMORANDUM OPINION FOR THE ACTING GENERAL COUNSEL
DEPARTMENT OF THE ARMY

In light of the announced purpose of the "Mayday Movement" to halt the functioning of the federal government by preventing federal employees from reaching their agencies, the question has arisen as to whether there is authority to use federal troops to insure access by federal employees to their agencies. The question involves the relationship between the inherent authority of the President to use troops to protect federal functions and the Posse Comitatus Act, 18 U.S.C. § 1385, which prohibits the use of troops for law enforcement purposes "except in cases and under circumstances expressly authorized by the Constitution or Act of Congress."

It is the opinion of this Office that the Posse Comitatus Act does not prevent the use of troops to protect the functioning of the government by assuring the availability of federal employees to carry out their assigned duties and that troops may therefore be utilized to prevent traffic obstructions designed to prevent the access of employees to their agencies.

In a series of memoranda, this Office has taken the position that the Posse Comitatus Act applies to the use of troops to perform essentially law enforcement duties and does not impair the President's inherent authority to use troops for the protection of federal property and federal functions.[1]

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[1] *See* Memorandum for the General Counsel, Department of the Army, from the Office of Legal Counsel, *Re: Use of Federal Troops to Protect Government Property and Functions at the Pentagon Against Anti-War Demonstrators* (Oct. 4, 1967); Memorandum for Robert E. Jordan, III, General Counsel, Department of the Army, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Statutory Authority to Use Federal Troops to Assist in the Protection of the President* (Nov. 12, 1969); Memorandum for the General Counsel, Department of the Army, from the Office of Legal Counsel, *Re: Authority to Use Troops to Execute the Laws of the United States* (Mar. 27, 1970); Memorandum for Robert E. Jordan III, General Counsel, Department of the Army, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Authority to Use Troops to Protect Federal Functions, Including the Safeguarding of Foreign Embassies in the United States* (May 11, 1970).

These conclusions are based on the history of the Posse Comitatus Act, which was originally enacted in 1878 for the purpose of preventing United States Marshals, on their own initiative, from calling upon troops to assist them in performing their duties. *See* 7 Cong. Rec. 3718, 3727, 3845–49, 4240–47 (1878). That Act was designed to prevent use of troops in direct law enforcement under command of minor civilian officials and does not reach essentially protective duties. The conclusions are likewise supported by the historic and judicial recognition of the President's inherent powers to use troops to protect federal property and functions as a necessary adjunct of his constitutional duties under Article II, Section 3 of the Constitution. Edward S. Corwin, *The President: Office and Powers (1787–1957)* 130–39 (4th ed. 1957).

The Supreme Court has recognized this authority. Although *In re Neagle*, 135 U.S. 1 (1890), involved the use of a marshal to protect a federal officer, the Court indicated that troops might have been used when necessary. Citing the example of obstruction to the mails, it noted that troops could be used to prevent such obstruction to a vital federal function pursuant to the inherent authority of the President. *Id.* at 65. When the mails were obstructed during a railway strike, President Cleveland ordered out the troops for the purpose of protecting federal property and "removing obstructions to the United States mails."[2] The Court upheld this action:

> The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the Nation, and all its militia, are at the service of the Nation to compel obedience to its laws.

In re Debs, 158 U.S. 564, 582 (1895).

The intended obstruction of the Mayday Movement, as publicly announced, extends beyond a single federal function such as the carriage of the mails, although the mails could certainly be affected. The objective is to obstruct all federal functioning in the nation's capital. It is the President's constitutional duty to protect this functioning and prevent its obstruction, and he has the inherent authority to use troops, if necessary, to carry out this duty.

While this authority rests on inherent power, rather than specific statutes, it should be noted that if serious violence occurs beyond the control of police, the

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[2] Proclamation No. 366 (July 8, 1894), *reprinted in* 13 *A Compilation of the Messages and Papers of the Presidents* 5931 (James D. Richardson ed., 1909). While President Cleveland issued a proclamation in this instance, it should be noted that no formal proclamation is necessary to utilize troops in a protective, as distinguished from law enforcement, capacity. The requirement of a proclamation stems from the express language of 10 U.S.C. § 334, which specifies that the use of the military under chapter 15 of that title shall be accompanied by a presidential proclamation. Since the proposed use of the military to protect the federal functions is based on the President's constitutional authority, rather than on that chapter, no proclamation is necessary here.

President could also, upon proper request, invoke his authority to use troops pursuant to 10 U.S.C. §§ 331–334. Likewise, if a federal court order should be defied, the President on his own initiative could formally call out troops pursuant to 10 U.S.C. § 333. It is our view, however, that where federal functions are obstructed, invocation of these statutory provisions is not essential to the use of troops in a protective capacity.

WILLIAM H. REHNQUIST
Assistant Attorney General
Office of Legal Counsel

Implementation of Standstill Agreement Pending Approval of ABM Treaty and ICBM Interim Agreement

The Standstill Agreement, made by the President with the Soviet Union pending congressional approval of the ABM Treaty and the ICBM Interim Agreement, would not violate section 33 of the Arms Control and Disarmament Act, forbidding disarmament except by treaty or act of Congress.

The President is not precluded by contract law or authorization and appropriations legislation passed by Congress from directing the appropriate Executive Branch agencies to abide by the provisions of the arms control agreements pending their coming into force.

June 12, 1972

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

This is in response to your oral request for our views concerning certain legal aspects of the Standstill Agreement made with the Soviet Union pending approval by the Congress and the Senate respectively of the Interim Agreement with the USSR on Certain Measures with Respect to the Limitation of Strategic Offensive Arms ("Interim Agreement") and the Treaty with the USSR on the Limitation of Anti-Ballistic Missile Systems ("ABM Treaty").

Although we have not seen the text of the Standstill Agreement, we understand that it is embodied in three documents which have been summarized in the proposed transmittal papers to Congress as follows:

> Both signatories understand that, pending ratification and acceptance, neither will take any action that would be prohibited by the ABM Treaty and the Interim Agreement, in the absence of notification by either signatory of its intention not to proceed with ratification or acceptance.

The ABM Treaty is an agreement not to deploy Anti-Ballistic Missile Systems except for the two described in Article III of the Treaty. The Interim Agreement provides that the United States and the USSR undertake not to start construction of additional fixed land-based intercontinental ballistic missile launchers after July 1, 1972; not to convert land-based launchers for light ICBMs into launchers for heavy types; and to limit the number of missile launching submarines.

I.

The first question presented is whether the Standstill Agreement would violate the proviso to section 33 of the Arms Control and Disarmament Act. Pub. L. No. 87-297, § 33, 75 Stat. 631, 634 (1961), *codified at* 22 U.S.C. § 2573 (1970). That proviso states:

> That no action shall be taken under this or any other law that will obligate the United States to disarm or to reduce or to limit the Armed Forces or armaments of the United States, except pursuant to the treaty making power of the President under the Constitution or unless authorized by further affirmative legislation by the Congress of the United States.

We believe it reasonable to conclude that the Standstill Agreement does not violate this proviso. A technical argument to the contrary could be made since it might be said to be an obligation to limit the arms of the United States not implemented by treaty or statute.

As indicated in our memorandum to you of June 7, 1972, the proviso to section 33 was intended to prevent the President from acting on his own in making arms limitation agreements. *See, e.g.*, 107 Cong. Rec. 20,308–09 (1961). Here the President is acting closely with the Congress and asking for its approval. On his return after signing the ABM Treaty and the Interim Agreement, he stated to Congress: "[W]e can undertake agreements as important as these only on a basis of full partnership between the executive and legislative branches of our Government." *Transcript of President Nixon's Address to Congress on Meetings in Moscow*, N.Y. Times, June 2, 1972, at 12.

All that the Standstill Agreement seeks to do is to ensure that both the United States and the USSR refrain from acts which would defeat the object and purpose of the Treaty and the Interim Agreement, thus allowing them to be successfully implemented. In doing so the parties are following a generally recognized principle of international law—international agreements should be negotiated in good faith and nothing should be done to undermine them pending their final conclusion. This principle is codified in Article 18 of the Vienna Convention on the Law of Treaties (which the United States has signed but has not yet ratified) as follows:

> A State is obligated to refrain from acts which would defeat the object and purpose of a treaty when:
>
> (a) It has signed the treaty . . . ; or
>
> (b) It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

Vienna Convention on the Law of Treaties art. 18, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 336 (entered into force Jan. 27, 1980).

This custom reflects certain eminently practical considerations. It would be difficult to conclude a successful treaty or interim agreement in the arms control area without an understanding as to what the relationship of the parties should be

pending ratification or acceptance as the case may be; as a result, such understandings, as here, are often reduced to writing. *See* George Bunn, *Missile Limitation: By Treaty or Otherwise?*, 70 Colum. L. Rev. 1, 16 (1970).

It should be noted that the proviso does not state that all arms limitation agreements must be made by treaty or statute. The phrase used in section 33 is "pursuant to the treaty making power of the *President* under the Constitution" (emphasis added). Although treaties can be made only by and with the advice and consent of the Senate, it is the President alone who negotiates. The Treaty Clause therefore confers on him certain independent powers. *See Congressional Oversight of Executive Agreements: Hearing Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 92d Cong. at 248–69 (May 18, 1972) (statement of John R. Stevenson, Legal Adviser, Department of State). Under the treaty making power of the President, certain "time-honored diplomatic devices [such] as the 'protocol' which marks a stage in the negotiation of a treaty, and the *modus vivendi*, which is designed to serve as a temporary substitute for one," are recognized. *The Constitution of the United States of America: Analysis and Interpretation*, S. Doc. No. 88-39, at 485 (Edward S. Corwin et al. eds., 1964); *see United States v. Belmont*, 301 U.S. 324, 330 (1937). It is the President's duty in negotiating international agreements to preserve the effectiveness of the treaty making power and to take care that our international obligations are met by arrangements which are designed to preserve the integrity of more lasting arrangements. *Cf. United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936).

The Standstill Agreement is such a stage in negotiations seeking to preserve the status quo and to meet our international obligations pending eventual congressional approval. The Supreme Court has said on a number of occasions that "'an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.'" *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963) (quoting *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)). We conclude that the proviso to section 33 should not be read to preclude such an arrangement.

II.

The second question put to us is whether, apart from the matter discussed above, the President is legally precluded from directing the appropriate Executive Branch agencies to abide by the provisions of the ABM Treaty and the Interim Agreement pending their coming into force.

Specifically, this question involves the President's authority to direct executive agencies to take initial steps to terminate current contracts for construction and procurement in projects covered by the ABM Treaty and the Interim Agreement.

We perceive two potential legal objections to this proposal. First, private contractors may object to termination of their construction or procurement contracts with the government for these projects as a matter of contract law. However, since

we understand that all defense contracts are supposed to have termination-for-convenience clauses, the government can simply terminate these contracts as provided in the contracts. Even if this clause were omitted from a contract, the government could still terminate and pay appropriate damages for breach of contract. Thus, there is no insurmountable contractual hurdle in issuing a presidential suspension directive.

A second question involves the constitutional power of the President to terminate projects provided for by authorization and appropriations legislation passed by the Congress. This question in turn raises two subsidiary issues: (1) whether this legislation grants discretion to the President in spending funds or is mandatory in nature; and (2) if mandatory, whether the President possesses constitutional authority to disregard the legislative mandate.

Since the President is under a constitutional obligation to "take Care that the Laws be faithfully executed" (U.S. Const. art. II, § 3), the authorization and appropriations legislation for each of the various projects scheduled for termination must be considered. Although we have not been informed of the specific legislation applicable to the projects involved (except for the ABM installation discussed below), the laws probably will be found to be permissive in nature if they follow the pattern of most spending legislation, particularly defense appropriations in recent years. As a general rule, appropriations acts "are of a fiscal and permissive nature and do not in themselves impose upon the executive branch an affirmative duty to expend the funds." *Federal-Aid Highway Act of 1956—Power of President to Impound Funds*, 42 Op. Att'y Gen. 347, 350 (1967) (Clark, A.G.) (citing cases); *see also McKay v. Cent. Elec. Power Coop.*, 223 F.2d 623, 625 (D.C. Cir. 1955).

One of the projects being considered for immediate termination is presumably the Safeguard ABM installation at Malmstrom Air Force Base at Great Falls, Montana. Secretary Laird recently directed the officials involved to suspend construction at this site. In connection with this directive we have examined the most recent authorization and appropriations legislation governing the Safeguard site.[1] Neither the language of the acts nor the legislative history indicate that Congress intended the spending to be mandatory.

Even if some of the projects in question are, as a matter of statutory construction, interpreted as mandatory in nature, there may be constitutional authority for the President's refusal to expend additional funds. This Office has previously advised that the President has authority to impound funds if their expenditure would conflict with his powers and responsibilities as Commander in Chief and his primary role in international relations. Whether Congress can force the President to spend appropriated funds in these cases is not likely to be tested directly in any

[1] Military Procurement Authorization Act, 1972, Pub. L. No. 92-156, 85 Stat. 423; Department of Defense Appropriation Act, 1972, Pub. L. No. 92-204, 85 Stat. 716.

event. Because this matter involves delicate questions concerning the separation of powers between the two political branches of government, the Supreme Court has not, nor is likely to, pass on this question. We believe, however, that the weight of historical precedent indicates that the President possesses the power to impound funds touching on the national defense and foreign relations.

Precedents for presidential impoundment in this area are numerous. In 1949, for example, Congress voted to increase the Air Force from 48 to 58 groups. President Truman signed the bill but directed the impoundment of the extra $614 million appropriated. President Truman also cancelled the construction of an aircraft carrier designed to carry nuclear bombers by exercising his power as Commander in Chief to direct that strategic nuclear bombing be exclusively an Air Force mission. And in 1956 the Defense Department declined to implement a congressional appropriation earmarked for the construction of 20 superfort bombers.[2]

In this light, the suspension of further work on projects covered by the agreements through the impounding of appropriated funds appears within the President's constitutional powers, even if Congress did intend that a specific appropriation should be mandatory.

RALPH E. ERICKSON
Assistant Attorney General
Office of Legal Counsel

[2] These examples and others are discussed in the following articles: Frank Church, *Impoundment of Appropriated Funds: The Decline of Congressional Control over Executive Discretion*, 22 Stan. L. Rev. 1240, 1242–44 & nn. 21–22 (1970); Harry Kranz, *A 20th Century Emancipation Proclamation: Presidential Power Permits Withholding of Federal Funds from Segregated Institutions*, 11 Am. U. L. Rev. 48, 65 n.122 (1962); Arthur Selwyn Miller, *Presidential Power to Impound Appropriated Funds: An Exercise in Constitutional Decision-Making*, 43 N.C.L. Rev. 502, 513 (1965).

Presidential Authority to Require the Resignations of Members of the Civil Rights Commission

Members of the Civil Rights Commission serve at the pleasure of the President. The President may therefore require their resignations.

November 20, 1972

MEMORANDUM OPINION FOR THE SPECIAL CONSULTANT TO THE PRESIDENT*

This is in response to your request for our opinion whether the President is authorized to require the resignations of members of the United States Commission on Civil Rights. Stated another way, the question is whether these officials serve at the pleasure of the President. For the reasons detailed below, we conclude that Civil Rights Commission members do serve at the pleasure of the President.

I.

The basic rule governing presidentially-appointed officials was stated by James Madison during the first session of the first Congress: "[T]he power of removal result[s] by a natural implication from the power of appoint[ing]." 1 Annals of Cong. 496 (1789). The principal problems in this area concern whether and to what extent Congress may limit the power of removal which flows from the power of appointment. *Myers v. United States* established that Congress may not limit the power of the President to remove purely executive officers appointed with the advice and consent of the Senate, such as cabinet officers. 272 U.S. 52 (1926). On the other hand, Congress can, for example, limit the President's power to remove members of independent regulatory commissions and specially constituted tribunals. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); *Wiener v. United States*, 357 U.S. 349 (1958). The principal theory underlying this congressional authority is that such bodies may need to function independently of executive control in their legislative and adjudicative capacities. The Civil Rights Commission, primarily an investigative and advisory body, does not fall clearly into either of these categories. For purposes of this discussion, however, we will

* Editor's Note: The memorandum was addressed to "the Honorable Leonard Garment, Special Consultant to the President." The reference to Mr. Garment as "Special Consultant," not "Special Counsel," appears to have been accurate and deliberate. Mr. Garment was described in multiple news articles at the time as a "special consultant" to the President on civil rights and cultural issues. *See, e.g.*, *Ex-Law Partner to Join Nixon*, Wash. Post, June 7, 1969, at A4; Carroll Kilpatrick, *Leonard Garment Is Bright, Musical, a Known New York Liberal and a Man Close to Richard Nixon*, Wash. Post, June 7, 1970, at 17. In 1973, Mr. Garment succeeded John Dean as Counsel to the President. Lawrence Meyer, *New Counsel Had Obscure Role at Top*, Wash. Post, May 1, 1973, at A8.

assume that Congress could have insulated its members from removal at the pleasure of the President. The question, then, is whether it has done so.

The statutory descriptions governing the appointment and duties of commissioners are the starting point of analysis. 42 U.S.C. § 1975 (1970). With respect to appointment, commissioners do not serve for a fixed term, and there is no statutory provision governing removal. By contrast, members of independent regulatory bodies usually serve for a fixed term of years, and some may only be removed for "cause" or other specified reason. While neither of these factors is dispositive, absent other strong reasons pointing toward independent tenure, the natural implication to be drawn is that Civil Rights Commission members serve at the President's pleasure.

Perhaps the strongest case for limiting the President's removal power is presented by a body created to adjudicate the rights of private parties. The Civil Rights Commission has no such authority, and this has been established by Supreme Court decision. In *Hannah v. Larche*, certain state officials sought to enjoin a Civil Rights Commission hearing in Louisiana concerning discriminatory voter registration practices on the ground that, as prospective witnesses, they were entitled to a panoply of procedural protections denied by the Commission's rules, including the right to confront and cross-examine other witnesses. 363 U.S. 420 (1960). The Court sustained the Commission's rules, saying that

> As is apparent from this brief sketch of the statutory duties imposed upon the Commission, its function is purely investigative and fact-finding. It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative or executive action.

Id. at 440–41.

There are other indicia of executive control over the Commission. The statute establishes it "in the executive branch of the Government." 42 U.S.C. § 1975(a). Although, standing alone, this phrase has no special significance, it is significant that many of the regulatory commissions whose members clearly do not serve at the President's pleasure—for example, the Federal Trade Commission, the Securities and Exchange Commission, and the Federal Communications Commission—are not similarly established "in the executive branch." The President designates the Chairman and the Vice Chairman. 42 U.S.C. § 1975(c). Employees of the federal government, including, presumably, employees clearly subject to the President's control, are eligible to serve as members. 42 U.S.C. § 1975b(b) (1970).

The staff director, a full-time employee responsible for day-to-day operations, is appointed by the President following consultation with the Commission, and subject to Senate confirmation. 42 U.S.C. § 1975d(a) (1970). The Commission's budget requests are subject to OMB approval.

The legislative history of the Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634, which originally established the Commission, does not speak directly to the matter of the President's removal power. However, an amendment offered by Senator Kefauver in floor debate, and defeated, lends some support to our conclusion. The Kefauver amendment would have established the Commission as an arm of Congress, with most of its members appointed by Congress. 103 Cong. Rec. 13,456 (1957). In support of his amendment, Senator Kefauver argued that such a commission would be more independent than one in the Executive Branch, and warned against the "dangerous degree of Executive control" he foresaw in the Commission as it was later established. *Id.* at 13,458. Senators Javits, Dirksen and Knowland spoke against the Kefauver amendment, urging establishment of an "executive commission," and the amendment was defeated by voice vote. *Id.* at 13,459.

A further argument in support of the President's removal power with respect to members of the Civil Rights Commission rests upon the absence of a stated term of appointment. While this omission may have had its origin in the temporary status of the Commission, its tenure has been extended six times by the Congress and it has had a life of fifteen years. It should not be presumed that Congress intended that members of the Commission would serve indefinitely without any possibility—other than death or voluntary resignation—for change in the membership of the Commission. Lifetime appointments are confined to the judiciary in our political systems and it would be anomalous to view persons exercising purely advisory functions as having permanent status.

II.

In support of an argument that members of the Commission do not serve at the President's pleasure, the following points could be made.

First, among its other statutory duties, the Commission is directed to "appraise the laws and policies of the Federal Government with respect to denials of equal protection of the laws." 42 U.S.C. 1975c(a)(3) (1970). Independent tenure would tend to promote the discharge of that duty.

Second, the Commission is directed to submit reports to both the President and Congress. 42 U.S.C. § 1975c(b). This joint accountability feature may be said to derogate from broad executive control.

Third, unlike most of the independent regulatory commissions in which the President may name a majority of his own party as vacancies arise, the Commission is strictly bipartisan—it has six members, and no more than three may be of the same party. 42 U.S.C. § 1975(b).

Fourth, the Commission has always been a temporary agency. It was originally established for two years, Pub. L. No. 85-315, § 104, 71 Stat. at 635, and has since been extended six times for additional temporary periods, Pub. L. No. 86-383, tit. IV, 73 Stat. 717, 724 (1959); Pub. L. No. 87-264, tit. IV, 75 Stat. 545, 559 (1961); Pub. L. No. 88-152, § 2, 77 Stat. 271, 271 (1963); Pub. L. No. 88-352, § 504(b), 78 Stat. 241, 251 (1964); Pub. L. No. 90-198, § 1, 81 Stat. 582, 582 (1967); Pub. L. No. 92-496, § 4, 86 Stat. 813, 814 (1972). It can be argued, then, that Congress intended for members to serve for the relatively short life of the Commission.

Although each of these points is valid, we do not find them persuasive against the contrary arguments, either singly or in combination. Moreover, most of these points can be answered to some extent. As to the first, as a matter of history, the Commission has in fact been a vigorous critic of administration civil rights policies, Republican and Democratic, through much of its history. As to the second, the requirement of reporting to Congress was added in Senate floor discussion without debate or any indication that the requirement affected the Commission's status in the Executive Branch. 103 Cong. Rec. 13,456 (1957). Moreover, executive officers or agencies are quite frequently required by statute to report to Congress as well as the President. As to the third—bipartisanship—there is no strong answer, but we consider it a relatively minor point. As to the fourth, the Commission, as noted above, has become a more or less permanent agency. Father Theodore M. Hesburgh, for example, served for fifteen years, from the Commission's inception. Although this argument may have had force a decade ago, we do not view it as very substantial now.

Last year, Father Hesburgh wrote an article entitled *Integer Vitae: Independence of the United States Commission on Civil Rights*, 46 Notre Dame Law. 445 (1971), in which he discussed, among other things, the President's removal power vis-à-vis the Commission. He noted several of the arguments discussed in this memorandum, concluding that "the legality of a [presidential] demand for resignation remains in question." *Id*. at 454. Reportedly, Father Hesburgh has now conceded the legality of such a demand. *See* Spencer Rich, *Nixon Confers with Cabinet Aides on Reorganization*, Wash. Post, Nov. 18, 1972, at A15 ("What I did say was that if I were asked to resign by the reelected President, as is his privilege, I would. He did, and I did resign.") (quoting Father Hesburgh). In his article, Father Hesburgh quotes a 1964 letter to the other commissioners from Solicitor General Erwin Griswold, then a commissioner, in which Griswold stated that removal at the pleasure of the President was not, in his view, "either the legal or factual situation." 46 Notre Dame Law. at 454. Apparently, however, the Solicitor General's expressed view was not accompanied by legal argument.

The Hesburgh article also includes a review of the practice of Civil Rights Commissioners with regard to submission of resignations to a new or reelected President. Resignations were tendered in 1961, in November 1963, and again in 1964. *Id.* at 454. In 1968, four commissioners did not tender their resignations, and

two did so for personal reasons. *Id.* On balance, then, the rather brief historical practice favors the President's authority to require resignations.

III.

In conclusion, while there are no directly controlling judicial precedents, we believe that the arguments clearly weigh in favor of the view that members of the Civil Rights Commission serve at the pleasure of the President.

ROGER C. CRAMTON
Assistant Attorney General
Office of Legal Counsel

Constitutionality of Legislation to Establish a Program to Prevent Aircraft Piracy

Congress may establish jurisdiction in United States courts over individuals who commit the offense of hijacking outside the territorial jurisdiction of the United States.

In most cases, state and local law enforcement officers would be authorized to make arrests for violations of the proposed aircraft piracy legislation, either because hijacking airplanes would also violate state law, or because federal law permits federal enforcement officers to delegate arrest authority to state and local law enforcement officers and state law permits state and local law enforcement officers to accept delegated arrest authority.

March 23, 1973

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

This is in response to your request for the views of the Office of Legal Counsel on questions concerning the constitutionality and legality of certain provisions in proposed legislation (S. 39 and H.R. 3858, 93d Cong.) that would establish a program to prevent aircraft piracy. The questions, which were raised during the course of hearings before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, are the following:

I. Federal Jurisdiction

Whether Congress has the power to establish federal jurisdiction over individuals who commit the offense of hijacking outside the territorial jurisdiction of the United States in the event that the government does not choose to extradite the individual?

II. Arrest Authority of Local Law Enforcement Officers and Private Security Personnel

A. Whether local law enforcement officers are authorized to arrest for violations of federal law?

B. Whether the United States may delegate arrest authority to local law enforcement officers or private security personnel?

C. Whether private security personnel are authorized to arrest for violations of federal or local laws?

D. Whether the United States can deputize private personnel as Deputy United States Marshals?

The constitutional aspects and any relevant statutory authority on these questions will be discussed *seriatim*.

I. Constitutionality of Establishing Jurisdiction Over Individuals Who Commit the Offense of Hijacking Outside the Territorial Jurisdiction of the United States

Any determination of the constitutional dimensions of establishing "extraterritorial jurisdiction"—that is, the assertion of jurisdiction over individuals who engage in conduct outside the territorial limits of the United States that violates federal criminal law and therefore subjects the individual to prosecution in domestic federal courts—must begin with a discussion of the nature of criminal jurisdiction under international law. In general, there are five basic principles of international jurisdiction:

> first, the territorial principle, determining jurisdiction by reference to the place where the offense is committed; second, the nationality principle, determining jurisdiction by reference to the nationality or national character of the person committing the offence; third, the protective principle, determining jurisdiction by reference to the national interest injured by the offence; fourth, the universality principle, determining jurisdiction by reference to the custody of the person committing the offence; and fifth, the passive personality principle, determining jurisdiction by reference to the nationality or national character of the person injured by the offence.

Codification of International Law, Part II: Jurisdiction with Respect to Crime, 29 Am. J. Int'l L. Supp. 435, 445 (1935) (Research in International Law, Harvard Law School).

Of these five principles, the territorial basis is the most common. It has often found expression in our case law. One of the first statements of this principle was made in *The Appollon*, in which the Supreme Court spoke in sweeping terms: "The laws of no nation can justly extend beyond its own territories, except so far as it regards its own citizens." 22 U.S. (9 Wheat.) 362, 370 (1824). The Court did not associate this general rule with any provision in the Constitution. The context in which the Court spoke, however, demonstrated that it recognized that the purpose of the general rule was also the touchstone for its limitation: "[The laws of a nation] can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction." *Id*. The underpinning of the territorial concept is that a government, in order to maintain its sovereignty indivisible, must be the only power capable of enforcing peace and order within its own boundaries. Accordingly, "no other nation can enact extraterritorial legislation which would interfere with the operation of such laws." *United States v. Rodriguez*, 182 F. Supp. 479, 488 (S.D. Cal. 1960), *aff'd in part, rev'd in part on other grounds*, *Rocha v. United States*, 288 F.2d 545 (9th Cir. 1961).

The assertion of extraterritorial jurisdiction over aircraft hijackers present within the territorial boundaries of the United States does not contravene this principle. Article 4.2 of the Multilateral Hijacking Convention—approved by a 77-nation diplomatic conference, including the United States, held at The Hague, December 1–16, 1970, and signed by 48 other countries on December 16, 1970—provides that:

> Each Contracting State shall . . . take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him pursuant to article 8 to any of the states mentioned in paragraph 1 of this article.

Convention for the Suppression of Unlawful Seizure of Aircraft, *opened for signature* Dec. 16, 1970, 860 U.N.T.S. 105, 108 (entered into force Oct. 14, 1971).[1] Thus, by the express terms of the Convention the signatory countries countenance the assertion of jurisdiction by one nation over aircraft hijackers who commit in or against another nation the offense of hijacking and related offenses as defined in article 1 of the Convention. The enactment of legislation establishing extraterritorial jurisdiction over aircraft hijackers does not, therefore, offend the dignity or right of sovereignty of the contracting nations or interfere with their laws or rights, the consequences with which the Supreme Court was concerned in *The Appollon* and the principle which the World Court recognizes as "the first and foremost restriction imposed by international law upon a State." *The S.S. Lotus* (Fr./Turk.), Judgment No. 9, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).[2]

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[1] Paragraph 1 of Article 4 requires each Contracting State to establish jurisdiction in the following cases:

> (a) when the offense is committed on board an aircraft registered in that State;
>
> (b) when the aircraft on board which the offense is committed lands in its territory with the alleged offender still on board;
>
> (c) when the offence is committed on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State.

860 U.N.T.S. at 108.

[2] In *The S.S. Lotus*, the World Court drew a distinction between the assertion of jurisdiction over those found within the boundaries of a nation but who committed the offense outside the territorial limits of the nation and the enactment of laws seeking to control physically the actions of those in some sovereign state:

> Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.

Where the assertion of jurisdiction does not conflict with this principle, a sovereign nation may select a different jurisdictional basis from the jurisprudence of international law. Likewise, as the court stated in *Rodriguez*, possessing the power under the Constitution, "[f]rom the body of international law, the Congress may pick and choose whatever recognized principle of international jurisdiction is necessary to accomplish the purpose sought by the legislation." 182 F. Supp. at 491. In this instance, the jurisdictional principle that is apposite and is in fact reflected in the Multilateral Hijacking Convention is the universality principle under which a state establishes jurisdiction "by reference to the custody of the person committing the offense." *Jurisdiction With Respect to Crime*, 29 Am. J. Int'l L. Supp. at 445. Accordingly, because universal jurisdiction exists as a recognized doctrine of international law, it constitutes a jurisdictional basis that Congress can rightfully incorporate into its legislation. *See Rodriguez*, 182 F. Supp. at 491; *see also Blackmer v. United States*, 284 U.S. 421, 436–38 (1932) (nationality principle, i.e., the assertion of jurisdiction on the basis of the nationality of the actor, chosen as the jurisdictional basis to prosecute the offense of contempt against an American citizen who refused to return from France to testify when ordered to do so). As the Supreme Court declared in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936), "as a member of the family of nations, the right and power of the United States are equal to the right and power of the other members of the international family."

Having concluded that universal jurisdiction constitutes a basis for jurisdiction under international law, the question remains whether Congress possesses the power under constitutional law to enact legislation establishing jurisdiction over aircraft hijackers who commit an offense outside the territorial limits of the United States. We perceive two sources of power authorizing the assertion of this

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> It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. . . . Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rule; as regards other cases, every state remains free to adopt the principles which it regards as best and most suitable.
>
> . . . .
>
> In these circumstances, all that can be required of a state is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.
>
> . . . .
>
> . . . The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty.

Id. at 18–20.

extraterritorial jurisdiction: the power to define and punish piracies and offenses against the law of nations (U.S. Const. art. I, § 8, cl. 10), and the power to make all laws necessary and proper to implement the power to make treaties (*id.* art. I, § 8, cl. 18; *id.* art. II, § 2, cl. 2).

Article I, Section 8, Clause 10 of the Constitution provides that "[t]he Congress shall have Power . . . [t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations." Piracies and offenses against the law of nations are international crimes which every nation has a duty to prevent. 1 L. Oppenheim, *International Law: A Treatise* § 151, at 246 (Ronald F. Roxburgh ed., 3d ed. 1920) ("Oppenheim"). In *United States v. Arjona*, the Supreme Court, in upholding under the Define and Punish Clause the constitutionality of a federal statute preventing and punishing counterfeiting within the United States the money of foreign governments, described the nature of the international obligation to enforce laws that define offenses against the law of nations:

> A right secured by the law of nations to a nation, or its people, is one the United States, as the representatives of this nation, are bound to protect. Consequently, a law which is necessary and proper to afford this protection is one that Congress may enact, because it is one that is needed to carry into execution a power by the Constitution on the Government of the United States exclusively . . . . Therefore, the United States must have the power to pass it and enforce it themselves, or be unable to perform a duty which they may owe to another nation, and which the law of nations has imposed on them as part of their international obligations.

120 U.S. 479, 487 (1887). And in *Ex Parte Quirin*, the Supreme Court found that the power to define and punish offenses against the law of nations granted to Congress the authority to establish the jurisdiction of military tribunals to try offenders or offenses against the law of war:

> Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals.

317 U.S. 1, 28 (1942).

Piracy is the best known example of a crime against the law of nations. The jurisdiction to arrest and punish has been regarded as universal, that is, even though the offense of piracy may be committed outside the territorial jurisdiction

of any nation, the offender may be subjected to the municipal jurisdiction of any nation. 1 Oppenheim § 151, at 246.

What constitutes piracy has been a matter of uncertainty in international jurisprudence and consequently in United States municipal law, which explicitly relies on the "law of nations." *See Codification of International Law, Part IV: Piracy*, 26 Am. J. Int'l L. Supp. 739, 749, 768–822 (1932) (Research in International Law, Harvard Law School). The United States Senate, on May 26, 1990, ratified the Convention on the High Seas adopted by the United Nations Conference on the Law of the Sea, which provides that acts of piracy can be committed against ships or "aircraft" if the offense takes place on the high seas or outside the jurisdiction of any state. 106 Cong. Rec. 11,178, 11,192; Convention on the High Seas art. 15, *opened for signature* Apr. 29, 1958, 13 U.S.T. 2312, 2317, T.I.A.S. No. 5200 (entered into force Sept. 30, 1962). To the extent that the word "piracy" in Article I, Section 8, Clause 10 of the Constitution refers only to the traditional concept of piracy—i.e., the overtaking of ships on the high seas and outside the jurisdiction of any nation—the Define and Punish Clause would not afford a basis for legislation establishing *universal* jurisdiction over the offense of *aircraft* hijacking. However, this offense now constitutes "an offense against the law of nations." The Supreme Court in *Arjona* described "an offense against the law of nations as one which the United States are required by their international obligations to use due diligence to prevent." 120 U.S. at 488. By the Multilateral Hijacking Convention, the United States in article 2 undertook the obligation to punish aircraft hijacking and related offenses as defined in article 1. Thus, these offenses now constitute crimes under international law and, accordingly, fall within the power of Congress to define and punish as offenses against the law of nations.

Congress is also empowered to enact a provision establishing jurisdiction to implement article 4.2 of the Multilateral Hijacking Convention as legislation which is necessary and proper for carrying into execution the treaty making power of the United States. In *Neely v. Henkel*, the Supreme Court, in upholding the constitutionality of legislation securing the return to Cuba, to be tried by its constituted authorities, of those who committed crimes within Cuba but escaped to the United States, stated this constitutional principle:

> The power of Congress to make all laws necessary and proper for carrying into execution as well the powers enumerated in Section 8 of article I of the Constitution as all others vested in the government of the United States, or in any department or the officers thereof, includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President by and with the advice and consent of the Senate to insert in a treaty with a foreign power.

180 U.S. 109, 121 (1901).

In *Stutz v. Bureau of Narcotics*, the court found the Opium Control Act of 1942 constitutional because the Act was necessary and proper to carry into execution the treaty resulting from the International Opium Convention of 1912:

> The power of Congress to enact such legislation as is necessary or proper to carry into execution powers vested by the Constitution in the United States, of which the treaty making power is one, includes the right to employ any legislative measures appropriately adapted to the effective exercise of those powers. *Julliard v. Greenman*, 110 U.S. 421 (1884). So long as a rationally sound basis exists for the congressional determination that particular legislation is appropriately related to the discharge of constitutional powers, the validity of such legislation is unassailable.

56 F. Supp. 810, 813 (N.D. Cal. 1944).

Thus, if the United States is empowered to enter into treaty stipulations with foreign powers designed to protect aircraft from unlawful seizure and if the establishment of extraterritorial jurisdiction is a legislative measure appropriately adapted to implement the ends sought in the Multilateral Hijacking Convention, the legislation is constitutional. In our view, both of these predicates are established. We believe that it is clear that the federal government had the authority under the treaty-making power (U.S. Const. art. II, § 2, cl. 2) to enter into the treaty stipulations found in the Convention. While the Supreme Court has never declared a treaty or any provision in it unconstitutional, the Court has stated that the treaty power is not unlimited, *DeGeofrey v. Riggs*, 133 U.S. 258 (1890), although it has not attempted to fix any hard or fast limits to that power. The Court has stated, however, that the test of the treaty power of the government is different from that of the power of Congress to enact domestic legislation: "It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could . . . ." *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

Here the subject of the Multilateral Hijacking Convention—the regulation and protection of foreign commerce—is clearly a matter within the scope of the treaty-making power. As the Supreme Court said in *Arjona*, sovereigns are obliged to protect commerce. 120 U.S. at 484. In this instance, an interest of international magnitude and ramifications is involved—the security of aircraft, passengers and cargo. It can be protected only by the action of one sovereign conducted in concert with that of another. *Cf. Missouri v. Holland*, 252 U.S. 416 (1920). And the means chosen in article 4.2—the assertion of universal jurisdiction over an offender whom the contracting nation does not choose to extradite—does not, in our view, contravene any prohibitory words to be found in the Constitution. Likewise, we believe that it is evident that the legislation implementing article 4.2 is a legitimate

means to accomplish this end and therefore is "appropriately related to the discharge of constitutional powers." *Stutz*, 56 F. Supp. at 813.

II. Arrest Authority of Local Law Enforcement Officers and Private Security Personnel

A. Authority of Local Law Enforcement Officers to Arrest for Violations of Federal Law

At the threshold it is necessary to point out that the question whether a state law enforcement officer has the authority to arrest does not arise where the offender commits an offense that violates state law as well as federal law. For example, the single act of robbery of a state bank whose funds are insured by the Federal Deposit Insurance Corporation constitutes an offense under both state law and the Federal Bank Robbery Statute, 18 U.S.C. § 2113. Because the act violates state law, the state officer is clearly authorized to arrest the offender and subsequently turn him over to federal officials for prosecution under federal law. It is our understanding that in situations involving the offense of hijacking and related offenses, the hijacker often commits offenses which are proscribed under both federal and state law. Thus, there is no question as to the state officer's power to arrest in such situations. The question arises then only in relatively rare instances where the offense is one proscribed under federal law but not under state law.

1. Arrest With a Warrant

Section 3041 of title 18, U.S. Code, provides that:

> For any offense against the United States, the offender may, by any justice or judge of the United States, or by any United States magistrate, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, major of a city, justice of the peace, or other magistrate, of any state where the offender may be found, and at the expense of the United States, be arrested . . . .
>
> . . . Any state judge or magistrate acting hereunder may proceed according to the usual mode of procedure of his state but his acts and orders shall have no effect beyond determining to hold the prisoner for trial or to discharge him from arrest.

The source of this provision is a statute enacted by the first Congress in 1789 (Act of Sept. 24, 1789, ch. 20, § 33, 1 Stat. 91), and it has consistently been interpreted as conferring on state law enforcement officers the authority to arrest when acting pursuant to an arrest warrant. *Harris v. Super. Ct. of Sacramento Cnty.*, 196 P. 895

(Cal. App. 1921); *Goulis v. Stone*, 140 N.E. 294 (Mass. 1923); *Lensku v. O'Brien*, 232 S.W. 235 (Mo. App. 1921).

2. Arrest Without a Warrant

No act of Congress authorizes state officers to arrest for federal offenses when they act without an arrest warrant. However, a number of federal courts have recognized the authority of state officers to arrest those who violate federal laws when state law confers such authority on state law enforcement officers. In *Marsh v. United States*, the Second Circuit held that a New York State trooper had the authority to arrest the defendant without a warrant for a federal offense committed in his presence by virtue of the New York arrest statute which empowered state peace officers to arrest without a warrant a person committing a crime in their presence. 29 F.2d 172 (1928). The court noted that peace officers in New York customarily arrested for federal offenses and considered this practice as evidence of the meaning of the state arrest law:

> Section 2 of article 6 of the Constitution makes all laws of the United States the supreme law of the land, and the National Prohibition Law is as valid a command within the borders of New York as one of its own statutes. True, the state may not have, and has not, passed any legislation in aid of the Eighteenth Amendment, but from that we do not infer that general words used in her statutes must be interpreted as excepting crimes which are equally crimes, though not forbidden by her express will. We are to assume that she is concerned with the apprehension of offenders against laws of the United States, valid within her borders, though they cannot be prosecuted in her own courts.

Id. at 174. In *United States v. Di Re*, the Supreme Court assumed that a state officer may arrest without a warrant for a federal offense when so authorized by state law in ruling that when a state law enforcement officer makes such an arrest, the law of the state "provides the standard by which [the] arrest must stand or fall" where Congress has not enacted a federal rule governing the arrest. 332 U.S. 581, 591 (1948). *See also Miller v. United States*, 357 U.S. 301, 305 (1958). Thus, state law determines whether the law enforcement officers of that state may arrest federal offenders without an arrest warrant.

A survey of United States Attorneys by the General Crimes Section of the Criminal Division indicates that only eleven states have no laws conferring on their law enforcement officers the authority to arrest for federal offenses without a

warrant.[3] In these eleven states, however, the United States Attorneys indicate that in most situations state offenses are committed which thereby empower the officer to arrest the offender.

B. Authority of the Federal Government Under Existing Federal Law to Delegate Arrest Authority to Local Law Enforcement Officers or Private Security Personnel

1. Delegation to Local Law Enforcement Officers

The federal government has "from the time of its establishment . . . been in the habit of using, with the consent of the States, their officers, tribunals, and institutions as its agents" to accomplish national goals. *United States v. Jones*, 109 U.S. 513, 519 (1883). The contention that the United States as a government sui generis cannot delegate authority to state officials because they operate under a different government has always been rejected on the ground that our system is one of federalism and not an alliance of foreign states. *Id.*; *Ex parte Laswell*, 36 P.2d 678, 687 (Cal. App. 1934). In *Arver v. United States*, the Supreme Court, in upholding the placement of administrative authority in the hands of state officials under the Selective Service draft statutes of World War I, overruled the objection that this constituted an invalid delegation of federal legislative power to state officials saying that it was "too wanting in merit to require further notice." 245 U.S. 366, 389 (1918). *See also Dallemagne v. Moisan*, 197 U. S. 169 (1905) (local police officer empowered to arrest crew-member of foreign vessel, under federal treaty authorization); *Robertson v. Baldwin*, 165 U.S. 275 (1897) (arrests of deserting seaman by local justices of the peace).

Having the power to enact a federal law proscribing certain conduct, Congress can under the Supremacy Clause impose upon state law enforcement officials the authority and duty to enforce the federal law. In *Testa v. Katt*, the Supreme Court held that, by virtue of the Supremacy Clause, a state court was not free to refuse to hear a federal cause of action. 330 U.S. 386 (1947). There a suit under the Emergency Price Control Act, which established concurrent jurisdiction in the state and federal courts, was brought in state court but was dismissed by the state supreme court on the ground that a state need not enforce the penal laws of a government which is foreign to it. The Supreme Court reversed and declared that a state does not have a right to deny enforcement to claims arising out of a valid federal statute. In effect, a state official, a judge, was compelled to enforce federal law.

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[3] Those states are Connecticut, Hawaii, Illinois, Indiana, Maine, Massachusetts, Missouri, Montana, Nevada, North Carolina, and Vermont. Of the 39 states conferring such authority on their law enforcement officers, eight do not empower the officers to arrest for misdemeanors not committed within the officers' presence.

In *Henderson v. United States*, the Court of Appeals for the Fifth Circuit applied the *Testa* rationale to the question of delegation of arrest authority by the federal government to state officials:

> It was at an early date questioned whether Congress could constitutionally impose upon state officers the power and duty to enforce federal criminal law . . . ; but that issue has now been settled in the affirmative upon the basis of the supremacy clause and of "the fact that the States of the Union constitute a nation."

237 F.2d 169, 175–76 (5th Cir. 1956) (quoting *Testa*, 330 U.S. at 389). "There [in *Testa*] the Court definitely 'repudiated the assumption that federal laws can be considered by the states as though they were laws emanating from a foreign sovereign.'" *Id.* at 176 (quoting *Testa*, 330 U.S. at 390–91). Accordingly, Congress can authorize state law enforcement officers to arrest for federal offenses in order to assist the federal government in accomplishing the goals of an anti-hijack program. Likewise, where authorized by Congress, an executive department can delegate the authority to arrest to state or local law enforcement officers. For example, a United States Marshal is authorized to appoint state officials as Deputy United States Marshals thereby conferring on them the authority to arrest for federal crimes. *See infra* Part II.D.

2. Delegation to Private Security Personnel

In 1934, it was said that "[t]here is considerable confusion and uncertainty as to what powers may be delegated by the legislature to private individuals, corporations, and associations, and how far the operation of a statute may be made to depend upon the action of such private person." Annotation, *Possible Limits of Delegation of Legislative Power*, 79 L. Ed. 474, 495 (1934). The confusion and uncertainty remains as to this day. *See* Louis L. Jaffe & Nathaniel L. Nathanson, *Administrative Law: Cases and Materials* 78–81 (3d ed. 1968).

In *St. Louis, I.M. & S.R. Co. v. Taylor*, the Supreme Court held that a provision of the Federal Safety Appliance Act authorizing the American Railway Association to designate to the Interstate Commerce Commission the standard height of drawbars for railroad cars did not involve an unconstitutional delegation of power to the Railway Association. 210 U.S. 281 (1908). On the other hand, in *Carter v. Carter Coal Co.*, the Court held unconstitutional a delegation to private parties. There the Court invalidated the Bituminous Coal Conservation Act of 1935 which required all Code members to observe maximum hours agreed to in contracts negotiated between producers of two-thirds of the annual national tonnage and representatives of more than one-half of the employed mine workers. 298 U.S. 238 (1936). The Court found that this delegation violated the Due Process Clause of the Fifth Amendment:

> The power conferred on the majority is in effect the power to regulate the affairs of an unwilling minority. This is legislative delegation in it most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others on the same business.

Id. at 311. In a subsequent case, *Old Dearborn Co. v. Seagram Corp.*, Mr. Justice Sutherland, the author of the opinion in *Carter Coal*, speaking for the Court, said:

> We find nothing in [the application of the so-called non-signer provisions of the Fair Trade Acts making it unlawful for any person to sell a commodity at a lower price than that stipulated in a contract between third parties] to justify the contention that there is an unlawful delegation of power to private persons to control the disposition of the property of others . . . .

299 U.S. 183, 194 (1934). The Court distinguished *Carter Coal* on the ground that there the property affected had been acquired without any preexisting restriction whereas, in *Old Dearborn*, "the restriction, already imposed with the knowledge of appellants, ran with the acquisition and conditioned it." *Id*.

All of the above cases dealt with the delegation of legislative power. Here however we are concerned with the authorization of certain private individuals to exercise an executive power—the arrest power—over other individuals. Private individuals have long been used as instrumentalities of the government. *See Wilson v. Black-Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829) (a measure benefitting the public held valid although it was to be made effective through the instrumentality of a private company). Section 507 of title 19, U.S. Code, authorizes a customs officer "to demand of any person . . . to assist him in making any arrests, search or seizure authorized by [title 19, Customs Duties]." Private individuals also have been authorized to arrest and carry firearms when specifically deputized as Deputy United States Marshals. 18 U.S.C. § 3053. *See infra* Part II.D.

It is arguable that, so long as adequate standards are established to govern the conduct of the private individuals, Congress can constitutionally authorize private individuals to exercise the arrest power. However, such a step will inexorably present problems in defining the category of private individuals who are or should be accorded the arrest authority, delineating the territorial limits of the authority accorded and determining which, if any, of the immunities, rights, and duties of federal law enforcement officers are applicable to the private individuals. The standards for the arrest and the law enforcement powers, such as the power to search and seize, that are concomitant to the power to arrest also present problems of definition. Concerns such as these and more generally the concern over the

exercise of power left in the hands of unofficial persons who owe no allegiance to the government other than as citizens, may well have led to the enactment in 1893 of the Act of March 3, 1893, ch. 208, 27 Stat. 572, 591 (now codified as amended at 5 U.S.C. § 3108), which prohibits the employment by the federal government of any individual employed by the Pinkerton Detective Agency or similar organization.

To our knowledge there are presently no federal statutes, other than 19 U.S.C. § 507 and 18 U.S.C. § 3053 referred to above, authorizing private individuals to arrest or to assist in the arrest for federal crimes. Thus, the power of private security personnel to arrest for federal offenses depends on whether state law accords them this power, *see infra* Part II.C, or on whether they have been "delegated" the arrest power from a body that possesses that power, e.g., the United States Marshals Service, which "delegates" the arrest power by deputization, *see infra* Part II.D.

C. Existing Authority of Private Security Personnel to Arrest for Violation of Federal or Local Laws

The answer to this question, like the answer to the question concerning the authority of local law enforcement officers to arrest for federal offenses without a warrant, *see supra* Part II.A.2, must be found in state law. We have not attempted a comprehensive survey of state law in this respect. It is our understanding, however, that there is no general rule. While some states limit the authority to carry firearms and/or to arrest to law enforcement officers, others authorize private detectives or security guards to arrest and carry arms.

D. Authority of the Federal Government to Deputize Private Security Personnel as Deputy United States Marshals

Section 562 of title 28, U.S. Code, provides that the Attorney General may authorize a United States Marshal to appoint deputies. Pursuant to 28 U.S.C. § 510, the Attorney General has delegated this function to the Director, United States Marshals Service, 28 C.F.R. § 0.17, who in turn has authorized United States marshals, upon the approval of the Office of the Director or in acute emergency situations, independently, to deputize federal employees and other persons as Deputy United States Marshals. United States Marshals Manual § 130.01.

A marshal may deputize a private citizen to assist him in the performance of his official duties. *Jewett v. Garrett*, 47 F. 625 (C.C. N.J. 1891); *cf. Murray v. Pfeiffer*, 59 A. 147 (N.J. Err. & App. 1904). In specific instances, 5 U.S.C. § 3108 may prohibit the deputization of an individual employed by the Pinkerton Detective Agency or similar organization. Moreover, although the authority to deputize

private individuals on an emergency basis is clear, long-term deputizations may be questionable. *See* United States Marshals Manual § 130.01.

ROBERT G. DIXON, JR.
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Office of Legal Counsel

Presidential or Legislative Pardon of the President

Under the fundamental rule that no one may be a judge in his own case, the President cannot pardon himself.

If under the Twenty-Fifth Amendment the President declared that he was temporarily unable to perform the duties of the office, the Vice President would become Acting President and as such could pardon the President. Thereafter the President could either resign or resume the duties of his office.

Although as a general matter Congress cannot enact amnesty or pardoning legislation, because to do so would interfere with the pardoning power vested expressly in the President by the Constitution, it could be argued that a congressional pardon granted to the President would not interfere with the President's pardoning power because that power does not extend to the President himself.

August 5, 1974

MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL[*]

I am forwarding to you an outline on the question whether the President can receive an executive or legislative pardon, and several substitute measures. Please advise me whether you require a more definitive memorandum, and, if so, which portions should be expanded upon and which may be dealt with summarily.

I. Executive Action

1. Pursuant to Article II, Section 2 of the Constitution, the "Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment," is vested in the President. This raises the question whether the President can pardon himself. Under the fundamental rule that no one may be a judge in his own case, it would seem that the question should be answered in the negative.

2. The necessity doctrine would not appear applicable here. That doctrine deals with the situation in which the sole or all judges or officials who have jurisdiction to decide a case are disqualified because they belong to a class of persons who have some interest in the outcome of the litigation, thus depriving the citizen of a forum to have his case decided. In that situation the disqualification rule is frequently relaxed to avoid a denial of justice. *Evans v. Gore*, 253 U.S. 245, 247–48 (1920);[**] *Tumey v. Ohio*, 273 U.S. 510, 522 (1927). It is, however, extremely questionable whether that doctrine is pertinent where the deciding official himself would be directly and exclusively affected by his official act. *See Tumey*, 273 U.S. at 523.

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[*] Editor's Note: A hand-written note in the margins of this memorandum in the OLC daybook states that the memorandum was "Hand carried by Lawton to Dep AG 8/5/74."

[**] Editor's Note: A different aspect of the holding in *Evans* was subsequently overruled by *United States v. Hatter*, 532 U.S. 557, 569–70 (2001).

3. A different approach to the pardoning problem could be taken under Section 3 of the Twenty-Fifth Amendment. If the President declared that he was temporarily unable to perform the duties of his office, the Vice President would become Acting President and as such he could pardon the President. Thereafter the President could either resign or resume the duties of his office.

II. Legislative Action

1. *Legislative pardon.* The question whether Congress has the power to enact legislation in the nature of a pardon or of an amnesty has not been authoritatively decided. However, recently, in connection with several bills pertaining to an amnesty to Vietnam War resisters, the Department of Justice has taken a very strong position to the effect that Congress lacks the power to enact such legislation. *See Hearings on Bills and Resolutions Relating to Amnesty Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the H. Comm. on the Judiciary*, 93d Cong. at 29–36 (1974) (testimony of Deputy Assistant Attorney General Leon Ulman, Mar. 8, 1974) ("Ulman Testimony"). It would appear to be questionable whether the Department should reverse its position now and establish an embarrassing precedent.

It should be noted, however, that Deputy Assistant Attorney General Ulman's testimony was based on the theory that Congress cannot enact amnesty or pardoning legislation because to do so would interfere with the pardoning power vested expressly in the President by the Constitution. This would permit the argument that Congress can enact such legislation in those areas where that power is not vested in the President. A congressional pardon granted to the President would not interfere with the President's pardoning power because, as shown above, that power does not extend to the President himself.

2. *Enactment of a plea as bar to criminal prosecution.* The suggestion has been made that Congress could enact legislation to the effect that impeachment, removal by impeachment, or even a recommendation of impeachment by the House Judiciary Committee could be pleaded in bar to criminal prosecution.

While it has been the position of the Department of Justice that Congress cannot enact pardoning legislation, it has conceded that Congress has the power to enact legislation establishing defenses or pleas in bar to the prosecution in certain circumstances. However, in the present circumstances it would seem that such legislation would be identical with a legislative pardon unless it is of fairly general application. The proposal of such legislation by the Administration therefore could undercut the sincerity of its opposition to legislative pardons.

Moreover, it could be argued that such legislation would be inconsistent with the language, if not the spirit, of Article I, Section 3, Clause 7 of the Constitution pursuant to which in case of impeachment "the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment according to Law." In our view this clause does not require subsequent criminal proceedings; it

merely provides that they would not constitute double jeopardy. To read this clause as being mandatory would, of course, preclude any kind of pardon.

In any event care would have to be taken in drafting such legislation to have it cover all prosecutions and not only those offenses which are the subject matter of the impeachment proceedings. This may be important in view of the tax delinquencies not included in the proposed articles of impeachment.

3. *Concurrent resolution requesting the next President to grant a pardon.* Inasmuch as such a concurrent resolution would be only hortatory and have no legal effect, it would not interfere with the future President's pardoning power; hence, it would be acceptable. The Department of Justice took that position with respect to the Vietnam amnesty bills. *See* Ulman Testimony at 31, 33–34.

4. *Immunity resulting from testimony before congressional committees*. Title 18, section 6005 of the U.S. Code (1970) establishes a procedure to grant immunity to witnesses testifying before congressional committees. That immunity, however, is limited to the use of the testimony or other information given by the witness or to any information directly or indirectly derived from that testimony or information. 18 U.S.C. § 6002. It does not bar prosecution with respect to the subject matter of that testimony. The scope of 18 U.S.C. §§ 6002 and 6005 therefore would not bar any prosecution based on evidence other than that obtained from the witness.

MARY C. LAWTON
Acting Assistant Attorney General
Office of Legal Counsel

FOIA Appeal from Denial of Access to FBI COINTELPRO Files Regarding Professor Morris Starsky

As a matter of administrative discretion, the Department of Justice should grant the FOIA request of an attorney for the FBI's COINTELPRO-New Left files regarding his client, a professor at Arizona State University and an active member of the Socialist Workers Party.

FOIA Exemption (7) is technically applicable to the withheld documents. However, like all of the exemptions, Exemption (7) is only discretionary, and should not be asserted unless such action is in the public interest. Assertion of the exemption is not recommended for these documents.

November 27, 1974

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This memorandum transmits for your signature a proposed disposition of Mr. Kyman's appeal, on behalf of his client, Professor Morris Starsky, from Director Kelley's denial of Mr. Kyman's request for access to all Federal Bureau of Investigation ("FBI") records pertaining to his client. Fourteen of the documents are in COINTELPRO files and the rest are in investigatory files. Director Kelley's denial was predicated on Exemptions (7), (1), and (5) of the Freedom of Information Act ("FOIA"), exempting from mandatory disclosure, respectively, investigatory files compiled for law enforcement purposes, material classified pursuant to executive order, and inter-agency or intra-agency memoranda involved in the government's internal deliberations. 5 U.S.C. § 552(b)(7), (1) & (5). A response is due immediately.[1]

The proposed response affirms almost all of Director Kelley's denial, but grants access as a matter of administrative discretion to some of the 14 documents pertaining to Professor Starsky generated as part of the COINTELPRO-New Left program.

I. Documents at Issue

Mr. Kyman has requested access to all Bureau files and records pertaining to his client and is especially interested in any communication between the Bureau and the Board of Regents of the University of Arizona. In addition to the 14 documents pertaining to Professor Starsky in the COINTELPRO-New Left files, he is the subject of four conventional FBI investigatory law enforcement files. We

[1] At the request of the Bureau the original due date of September 16, 1974 was extended to October 15, 1974 by letter dated September 11, 1974. A copy of this extension letter is attached to Mr. Kyman's appeal letter of August 13, 1974. The due date was further extended to November 15, 1974 by letter of this Office dated October 21, 1974. On November 15 I advised Mr. Kyman by telephone that a positive response would soon be forthcoming.

recommend that access to all of these be denied on the basis of Exemptions (7) and (1).

With regard to the 14 COINTELPRO documents, we recommend withholding four of them in their entirety on the basis of Exemptions (1), (7), and (5). For another four, we recommend release with deletions of material that either can be considered outside the scope of Mr. Kyman's request or whose release would either constitute an unwarranted invasion of personal privacy of individuals other than Mr. Starsky (Exemption (6)) or jeopardize FBI sources or informants (Exemption (7)). The remaining six documents we recommend making available without deletions.

Among the COINTELPRO documents, the most serious difficulty is presented by the anonymous letter addressed to the Arizona State University ("ASU") Faculty Committee on Academic Freedom and Tenure, which was conducting hearings on Professor Starsky's continued tenure as a faculty member. It was signed "a concerned alumnus" by an FBI agent with the prior approval of the Director; it was designed to neutralize Starsky as an active member of the Socialist Workers Party, by discrediting him in his academic community.

The letter related as true an alleged incident in which Professor Starsky, his wife, and two male associates invaded the apartment of a student co-worker and threatened to beat him unless he returned certain socialist material he had borrowed. It went on to characterize the incident as evidence of the totalitarian nature of Professor Starsky's academic socialism, analogous to that advocated by Himmler or Beria. It suggested that if Starsky were not insulated by his position at the University, he would have been properly punished for this conduct.[2]

The following subsequent events are relevant to the gravity with which this letter must be regarded: The Committee to which the letter was addressed did not recommend Starsky's dismissal, but the University's Regents overrode that decision. It is uncertain whether the letter or its contents were considered by the Regents.[3] Starsky sued in federal court to be reinstated, in which suit he was

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[2] We disagree with the Bureau's characterization of the contents of this letter as "factual." Although the narrative was taken from the Bureau's substantive subversive investigatory file on Professor Starsky, the incident described is only documented by the ASU student's complaint to the local police. This complaint was voluntarily dropped, and there is no proof that the incident actually took place as alleged. Furthermore, the letter questions Professor Starsky's competence and fitness as a University employee because of the qualities evidenced by the alleged incident. This judgmental conclusion can in no way be considered "factual."

[3] The Bureau's memorandum asserts that the Regents fired Starsky "for reasons unrelated to the anonymous letter." This is true, if it refers to the reasons which the Regents *expressed*. It is also technically true if it refers to the "primary reason" which the court in *Starsky v. Williams* found to have been the true principal motivation of the Regents—namely, Starsky's expression of unpopular views. 353 F. Supp. 900, 927 (D. Ariz. 1972). But on the basis of the limited information we now possess, it is impossible to tell what effect the letter, or secondhand accounts of the letter, might have had on the Regents' view of the case. In any event, regardless of whether there was any direct or indirect effect upon the firing, the matter would seem sufficiently serious if we merely accept the Phoenix agents'

represented by the same lawyer who has made the present FOIA request in his behalf. The suit was a total success, the court finding that the Regents' action was intended to repress Starsky's free speech and violated his First Amendment rights. *Starsky v. Williams*, 353 F. Supp. 900 (D. Ariz. 1972).[*]

II. Applicability of Exemption (7) to the 14 COINTELPRO-New Left Documents

The principal basis on which it might be asserted that the 14 COINTELPRO-New Left documents can be withheld is Exemption (7), which protects "investigatory files compiled for law enforcement purposes." Pub. L. No. 90-23, 81 Stat. 54, 55 (1967) (adding 5 U.S.C. § 552(b)(7)). We do not find any basis for the applicability of other exemptions asserted by the FBI, a matter which we will discuss below.

In our view, it can be maintained that Exemption (7) is applicable, and such a position is consistent with the action you took previously in affirming the denial of most COINTELPRO documents to Fred Graham of CBS News. Such a position risks reversal by a judicial finding that the "investigatory files" exemption does not apply to files compiled for intelligence purposes;[4] or that the "investigatory files" exemption is not a "blanket" exemption, applying to all documents contained within the applicable file, whether or not they individually are prepared for law enforcement purposes.

Because of considerations discussed below, we think the risks of a judicial finding that Exemption (7) is not applicable are much higher in this case than in Graham; as will also be discussed below, it may be a reversible abuse of the discretion conferred by the Exemption to withhold the documents in this case. Nonetheless, it is our position that the Exemption is technically applicable.

III. Advisability of Asserting Exemption (7)

Like all of the exemptions, Exemption (7) is only discretionary, and should not be asserted unless in your opinion such action is in the public interest. I cannot recommend such an exercise of your discretion in the present case.

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own evaluation that the letter succeeded in thoroughly discrediting Professor Starsky in the academic community.

[*] Editor's Note: The district court's ruling in *Starsky v. Williams* was affirmed in part, reversed in part, and remanded for further proceedings, 512 F.2d 109 (9th Cir. 1975).

[4] At the time you considered the Graham appeal, the D.C. district court had already so held, in *Stern v. Richardson*, 367 F. Supp 1316 (D.D.C. 1973). Since that time, the same court has reaffirmed this position. *Black v. Sheraton Corp.*, 371 F. Supp. 97 (D.D.C. 1974).

A. Policy Considerations

In the last analysis, the only policy reason for withholding most of the requested documents is to prevent a citizen from discovering the existence of possible misconduct and abuse of government power directed against him. In my view, this is not only no reason for asserting the exemption; it is a positive reason for declining to use it, even where other reasons for asserting it exist. The obtaining of information of this sort is perhaps the most important reason for which the Freedom of Information Act exists.

B. Practical Considerations

Even if you are able to sustain the denial in this case in the courts (which is far from certain and perhaps unlikely), the Freedom of Information Act revision recently passed would require the documents to be provided as soon as a new request is made under the newly enacted legislation. Pub. L. No. 93-502, § 2(b), 88 Stat. 1561, 1564 (Nov. 21, 1974) (amending 5 U.S.C. § 522(b)(7)). We believe that the principal basis for withholding COINTELPRO documents of this type under the new legislation will be the "privacy" provision of the revised Exemption (7) (5 U.S.C. § 522(b)(7)(C))—which is unavailable here because it is the subject himself who is making the request.

Moreover, despite the modification of Exemption (7) in the recent legislation, judicial rejection of our assertion of non-coverage under the present law might well be based upon such a ground that it would impair our position with respect to COINTELPRO files when the new legislation becomes effective. For although under the new law Exemption (7) is eliminated as a files exemption, the specific bases for non-disclosure which the new Exemption (7) provides still apply only to "investigatory" records. It is only with respect to an "investigatory" record that withholding will be able to be supported on the basis of disclosure of investigative techniques (the new Exemption (7)(E), 5 U.S.C. § 552(b)(7)(E)) or disclosure of the identity of a confidential source (the new Exemption (7)(D), *id.* § 552(b)(7)(D)). Thus, if we provoke a judicial decision to the effect that COINTELPRO records are not records compiled for investigative purposes, we have substantially impaired our position.

The chances of losing the present case in the courts are immensely greater than were the chances of losing the Graham request. We are, first of all, dealing with a requestor who has already filed and won a law suit dealing with the filing of these documents. *Starsky v. Williams*, 355 F. Supp. 900 (D. Ariz. 1972). The lawyer who represented him in that suit is representing him in this appeal. It is in our view certain that he will sue if the appeal is denied.

In the Graham request, since only "program" files were requested, it would have been possible to litigate the denial on a relatively abstract level, arguing that counter-intelligence programs, as programs, are a necessary form of preventive

law enforcement. There was a fair chance that this line of defense could have avoided any judicial receptivity to the suggestion that the documents in question should be examined in camera. In the present case, by contrast, there is a very specific, concrete set of actions which is the subject of the inquiry. It is unimaginable that a court would sustain our denial without looking at the documents in question. It is further unimaginable that having looked at the documents, it would fail to find some way to hold against us—perhaps by denying the "investigative" character of all COINTELPRO activities, with the adverse effects described above.

IV. Availability of Other Exemptions

Although our recommendation is not based upon the unavailability of exemption in this case, but rather on the undesirability of asserting it, it is nevertheless pertinent to discuss several other exemptions which the FBI memorandum asserts to be applicable. The Bureau asserts the applicability of Exemption (2), covering documents "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). The assertion of the applicability of that exemption in a case similar to this was specifically rejected by the D.C. district court in the *Stern* case. 367 F. Supp. at 1319–20. It has generally been rejected in areas other than those which would involve disclosure of the government's "play book." *See, e.g.*, *Cuneo v. Laird*, 338 F. Supp. 504 (D.D.C. 1972), *rev'd and remanded in part*, 484 F.2d 1086 (D.C. Cir. 1973); *Hogan v. United States*, --- F. Supp. --- (S.D. Fla. 1974).*

The Bureau's memorandum further asserts the possible applicability of Exemption (3), which permits the withholding of documents pertaining to matters "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3). It relies for this on the general statute prohibiting communication of material "relating to the national defense" which "could be used to the injury of the United States or to the advantage of any foreign nation." 18 U.S.C. § 793(d). Although there may be some COINTELPRO documents which may meet this description, the 14 documents involved in the present appeal are assuredly not among them. The mere fact that Professor Starsky was being investigated because he was active in the Socialist Workers Party—without any indication or suspicion that he obtained any defense secrets or had any connection whatever with foreign powers—is by no stretch of the imagination sufficient to render all the documents pertaining to his investigation documents "relating to the national defense." And it is even less

* Editor's Note: We have not located the unpublished decision cited here, but it is likely from the case of *James J. Hogan v. United States*, No. 73-1385 (S.D. Fla.), which is cited in the Freedom of Information Act Source Book, S. Doc. No. 93-82 (1974). The Freedom of Information Act Source Book indicates that the plaintiff in *Hogan* was seeking "the Department of Justice Wiretap Manual" and that the court denied the government's motion to dismiss in October 1973. *Id.* at 188.

likely, if they should relate to the national defense, that they could be used to the injury of the United States or to the advantage of any foreign nation.

V. Recommendation

We recommend disclosure of those documents and portions of those documents from the COINTELPRO-New Left files pertaining to Professor Starsky which are enumerated and recommended for disclosure.[*] In particular, we recommend the release in their entirety of (a) the April 7, 1970 Airtel requesting authorization to write the anonymous letter to the members of the Committee on Academic Freedom and Tenure; (b) the anonymous letter sent to the members (the author of which is not an alumnus of the University); (c) the April 24, 1970 instruction to write the letter; (d) the May 12, 1970 acknowledgement of the authorization; and (e) the June 30, 1970 letter from Phoenix to headquarters commenting on the results of the "neutralizing" activity.

ANTONIN SCALIA
Assistant Attorney General
Office of Legal Counsel

[*] Editor's Note: The memorandum referred here to an attachment listing the COINTELPRO-New Left files recommended for disclosure. That attachment was not preserved in our daybooks. It appears that some, if not all, of the listed files were ultimately released. *See* Michael Newton, *The FBI Encyclopedia* 322-23 (2003); James K. Davis, *Spying on America: The FBI's Domestic Counterintelligence Program* 59-60 (1992); Nicholas M. Horrock, *Files of F.B.I. Showed It Harassed Teacher*, N.Y. Times, Jan. 29, 1975, at 12.

Constitutionality of Bill Establishing American Folklife Center in the Library of Congress

A bill creating an American Folklife Center in the Library of Congress would violate the separation of powers by vesting the Librarian of Congress, a congressional officer, with executive functions.

The bill would also violate the Appointments Clause by permitting certain members of the Board of Directors of the American Folklife Center to be appointed by members of Congress, the Board of Directors of the Smithsonian Institution, and the Librarian of Congress.

December 31, 1975

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

This is in response to the telephone request of Mr. Barry Roth of your staff for the views of the Department of Justice on the constitutional aspects of the above-entitled enrolled bill, with which the Department has had no prior contact.

The bill contains findings to the effect that it is appropriate and necessary for the federal government to support research and scholarship in American folklife, and that the encouragement and support of American folklife is an appropriate matter of concern to the federal government. H.R. 6673, 94 Cong., 1st Sess. § 2 (1975). The bill then sets up an American Folklife Center in the Library of Congress. *Id.* § 4(a). The Center would be under the direction of a Board of Trustees composed as follows:

> (1) four members appointed by the President [of the United States];
>
> (2) four members appointed by the President pro tempore of the Senate . . . and four members appointed by the Speaker of the House of Representatives . . . ;
>
> (3) the Librarian of Congress;
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> (4) the Secretary of the Smithsonian Institution;
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> (5) the Chairman of the National Endowment for the Arts;
>
> (6) the Chairman of the National Endowment for the Humanities; and
>
> (7) the Director of the Center.

Id. § 4(b).

The Librarian of Congress is empowered to appoint a Director of the Center after consultation with the Board. *Id.* § 4(f). The Director would be the chief executive officer of the Center, and would have responsibility for carrying out the

functions of the Center, subject to the direction of the Board and the general supervision of the Librarian. *Id.* § 4(g).

Section 5 sets forth the functions which the Librarian of Congress is authorized to perform under the Act (subsection (a)) and provides that they are to be carried out through the Center (subsection (b)).

In our view the bill presents two important constitutional problems: the first involves the doctrine of the separation of powers, which requires that statutes assigning executive duties must be administered by the Executive Branch and not by congressional officers, such as the Librarian of Congress; the second is the principle that functions of an executive nature must be carried out by officers of the United States appointed in compliance with the requirements of Article II of the Constitution.

I.

Article I of the Constitution vests the legislative power of the United States in the Congress. Article II vests the executive power of the United States in the President and directs him to "take care that the laws be faithfully executed." This means that statutes creating functions of an executive nature are to be carried out by the Executive Branch of the government under the supervision of the President, and not by congressional agencies. This basic constitutional consideration, of course, does not preclude the performance of internal congressional functions and of congressional services by congressional officers. The bill, however, goes far beyond that. Some of the functions to be performed by the Librarian of Congress through the American Folklife Center have, it is true, a substantial nexus with the Library of Congress (*see, e.g.*, H.R. 6673, § 5(a)(2)–(5))—though even as to these it is open to question whether they truly come within the ambit of an institution whose primary purpose is to give library and reference service to Congress. This, however, cannot under any circumstances be said of the contract authority set forth in section 5(a)(1), empowering the Librarian to

> enter into, in conformity with Federal procurement statutes and regulations, contracts with individuals and groups for programs for the—
>
> > (A) initiation, encouragement, support, organization, and promotion of research, scholarship, and training in American folklife;
> >
> > (B) initiation, promotion, support, organization, and production of live performances, festivals, exhibits, and workshops related to American folklife;
> >
> > (C) purchase, receipt, production, arrangement for, and support of the production of exhibitions, displays, publications, and presentations (including presentations by still and motion picture films,

> and audio and visual magnetic tape recordings) which represent or illustrate some aspect of American folklife; and
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> (D) purchase, production, arrangement for, and support of the production of exhibitions, projects, presentations, and materials specially designed for classroom use representing or illustrating some aspect of American folklife.

These activities do not appear to be related to any internal congressional function or service. While it is true that a few other functions of the Library, such as the provision of books and sound production records to the blind and other physically handicapped persons, 2 U.S.C. § 135a, are not directly so related either, they are at least a logical adjunct of the historical library function which the venerable institution has provided. While one may permit this for reasons of practicality and historical prescription, the extension of the institution's activities into the entirely unrelated field of funding folklife training and performances is a change of qualitative nature. The extension would thus have been made first, from an institution which serves the Congress as a library; to one which serves the public in the same capacity; and finally, to one which serves the public in capacities entirely unrelated either to congressional service or to libraries. This last extension moves the Library of Congress into areas now occupied by the National Endowment for the Arts, and the National Endowment for the Humanities (both executive agencies).

II.

The second constitutional problem in the bill concerns the manner in which ten members of the Board of Trustees of the American Folklife Center are to be appointed.

Under the bill, the Board would perform important functions in the administration of the statutory program; its responsibilities would not be limited to advice. For example, it would give direction, not merely advice, to the Director of the Center, an official appointed by the Librarian (H.R. 6673, § 4(g)(1)); and certain functions of the Center could be undertaken only if the Board considers them "appropriate" (*id.* § 5(a)(5), (6)). Again, certain types of contracts may be entered into only with the concurrence of the Board. *See, e.g.*, *id.* §§ 6(a), 7(a)(3), 7(a)(8). Under section 7(a)(7) a majority of two-thirds of the members of the Board may even waive otherwise applicable bonding requirements.

The Board therefore performs functions of an executive nature. Its activities are not merely of an advisory nature or limited to a single task of limited duration, as is the case with so-called ad hoc officers. *See The Constitution of the United States: Analysis and Interpretation*, S. Doc. No. 92-82, at 523 (1973).

It follows that the functions of the members of the Board of Trustees can be performed only by persons who are officers of the United States and appointed in the manner prescribed by Article II, Section 2, Clause 2 of the Constitution, namely, by the President by and with the advice of the Senate, or with congressional authorization by the President alone, or the courts of law, or the heads of departments.

The bill fails to comply with these constitutional requirements with respect to the following members of the Board:

> (a) The eight members appointed by the President pro tempore of the Senate and the Speaker of the House, respectively;
>
> (b) The Secretary of the Smithsonian Institution, who is appointed by the Board of Regents of the Smithsonian Institution (20 U.S.C. § 44), which cannot be viewed as the equivalent of a department head within the meaning of Article II; and
>
> (c) The Director of the Center who would be appointed by the Librarian of Congress who similarly does not have the status of a department head within the meaning of Article II of the Constitution.

A similar problem arose in connection with the legislation establishing the Japan-United States Friendship Commission (Japan-United States Friendship Act, Pub. L. No. 94-118, 89 Stat. 603 (1975)) and in the Arts and Artifacts Indemnity Act (Pub. L. No. 94-158, 89 Stat. 844 (1975)). There, as indicated in the President's signing statements, Statement on Signing the Japan-United States Friendship Act, 2 *Pub. Papers of Pres. Gerald R. Ford* 1718, 1719 (Oct. 21, 1975); Statement on Signing the Arts and Artifacts Indemnity Act, 2 *id.* 1990, 1991 (Dec. 22, 1975), it was possible to obviate the difficulty by considering the members appointed by the President pro tempore and the Speaker to be advisory, nonvoting members. This approach does not appear to be available here, because the improperly appointed members would constitute ten out of seventeen of the Board's membership.

For the above reasons, it is our view that the provisions of this legislation are contrary to the strict provisions of the Constitution. It must be acknowledged, however, that in the area of cultural and educational affairs, the separation of powers may not have been strictly observed. Despite the fact that they do not constitute as drastic a departure from the constitutional requirements as the present bill, those provisions of the Library of Congress statute which authorize the provision of specific services to the public must be considered a technical anomaly. Indeed, it is probably demonstrable that from an early date the primary function of the Library of Congress has been public service rather than congressional assistance. Similarly, the makeup of the Smithsonian Institution—if that is

to be regarded as a federal agency, a point which is subject to some dispute—contravenes the constitutional text.

Complete acceptance of this historical practice runs the risk of inviting further transfers to the Library of Congress of cultural and educational functions; and perhaps of encouraging more serious encroachments upon executive prerogatives through the assignment of entirely different functions to the General Accounting Office. Moreover, it appears from our experience with the Japan-United States Friendship Commission and the Arts and Artifacts Indemnity Act, discussed above, that only a presidential veto directed at this practice will suffice to call the attention of Congress to the problem involved. Given the very nature of all of these cultural and educational proposals, it may be vain to await an occasion for a presidential veto more propitious than the present. Nonetheless, in light of the historical practice, we think the President can responsibly sign the present legislation with the expression of his serious reservation concerning the constitutional propriety of placing such functions outside the Executive Branch.[*]

ANTONIN SCALIA
Assistant Attorney General
Office of Legal Counsel

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[*] Editor's Note: President Ford signed H.R. 6673 into law as the American Folklife Preservation Act, Pub. L. No. 94-201, 89 Stat. 1129 (Jan. 2, 1976). As advised, he expressed "serious reservations concerning the constitutional propriety of placing the functions to be performed by the Center outside the executive branch and the assignment of executive duties to officers appointed by Congress." Statement on Signing the American Folklife Preservation Act, 1 *Pub. Papers of Pres. Gerald R. Ford* 6, 6 (Jan. 3, 1976). "However," said President Ford, "given historical practice and custom in the area of cultural and educational affairs and the potential of H.R. 6673 to enrich the cultural life of the Nation, I am granting my approval to the measure." *Id.* at 6-7. The American Folklife Center remains a part of the Library of Congress today. *See* 20 U.S.C. §§ 2101 *et seq*.

A recent D.C. Circuit decision reached a different conclusion regarding the separation of powers and Appointments Clause issues addressed in this opinion, holding that the Library of Congress is part of the Executive Branch and that the Librarian is a department head, at least with respect to the Copyright Office. *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1342 (D.C. Cir. 2012).

Constitutionality of Bill Creating an Office of Congressional Legal Counsel

Congressional officers representing the combined power of both houses of Congress—in contrast to officers of either house—who perform significant governmental duties must be appointed as provided in the Appointments Clause of the Constitution.

The authority to bring a civil action requiring an officer or employee of the Executive Branch to act in accordance with the Constitution and laws of the United States is an exclusive executive function that must be exercised by an executive officer who must be appointed as provided for in the Appointments Clause and be subject to the President's unlimited removal power.

February 13, 1976

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

This is in response to your memorandum of January 12, 1976, in which you ask for information designed to assist you in complying with a request of the Subcommittee on Separation of Powers of the Senate Judiciary Committee for "Materials to be Submitted for the Record" in connection with your recent testimony before that Subcommittee. The two topics assigned to us are:

I.

Statements Submitted to Congress in Which the Department of Justice Opposed Congressional Attempts to Provide for a Counsel of Its Own

Since the Office of Legislative Affairs is the clearing house for reports submitted to Congress, we checked with that Office in order to answer this question. The Office of Legislative Affairs advised us that there have been only two instances in which statements relating to congressional attempts to provide for a counsel of its own were submitted to the Congress by the Department of Justice. They were your own statement of December 12, 1975, before the Senate Judiciary Committee, of which you, of course, are aware (*Representation of Congress and Congressional Interests in Court: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 94th Cong. 4 (1976) (testimony of Rex. E. Lee, Assistant Attorney General, Civil Division)), and Assistant Attorney General Uhlmann's testimony of December 3, 1975, before the Senate Committee on Government Operations on S. 495, on pages 15–21 of the prepared text (*Watergate Reorganization and Reform Act of 1975: Hearings on S. 495 and S. 2036 Before the S. Comm. on Government Operations*, 94th Cong. pt. 2, at 15–21 (1976)).

This Office is not aware of any other instances in which the Department submitted to Congress any statements pertinent to this issue.

For your information, I may point out that this problem came up in connection with S. 1384, 90th Cong. (as introduced Mar. 23, 1967) ("To establish the Office of Legislative Attorney General"). The comments prepared in this Office, however, were not submitted to Congress. The late Professor Bickel, however, commented adversely on the proposal. *Separation of Powers: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 90th Cong., pt. 1, at 248–50 (1967).

II.

Comments on the Constitutionality of S. 2731, 94th Cong., 1st Sess.

This rather complex bill would establish the Office of the Congressional Legal Counsel as an office of the Congress. S. 2731, 94th Cong. § 4(a)(1) (as introduced Dec. 2, 1975)). The Congressional Legal Counsel would be appointed jointly by the President pro tempore of the Senate and the Speaker of the House of Representatives, subject to approval by a concurrent resolution of the Senate and the House of Representatives. *Id.* The appointment would be for a term which would expire at the end of the Congress following the Congress in which the Congressional Legal Counsel was appointed; he could be removed by concurrent resolution for misconduct, incapacity, or incompetence. *Id.* § 4(a)(2).

Sections 5 and 6 would provide that the Congressional Legal Counsel shall prosecute and defend certain civil litigation in which Congress has an interest. Briefly those actions fall into the following categories:

> (a) Defense of either house or of congressional agencies, members, officers, or employees in any civil action in which such house, etc., is a party defendant in which there is placed in issue the validity of
>
> > (i) any proceeding of, or action taken, including any subpoena or order issued, by such house, joint committee, subcommittee, member, officer, employee, office, or agency; or
> >
> > (ii) any subpoena directed to such house, joint committee, committee, subcommittee, member, officer, employee, office, or agency (*id.* §§ 5(a)(1), 6(2)).
>
> (b) Prosecution of civil actions on behalf of Congress, etc.,
>
> > (i) to secure a declaratory judgment concerning the validity of any subpoena directed to, or subpoena or order issued by, Congress,

> or such house, joint committee, committee, subcommittee, member, officer, employee, office, or agency (*id.* §§ 5(a)(2)(B); 6(1)); or
>
> (ii) to require an officer or employee of the executive branch of the Government to act in accordance with the Constitution and laws of the United States (*id.* § 5(a)(2)(A)).

Under section 7(a), the Congressional Legal Counsel would make recommendations as to whether a civil action requiring an officer or employee of the Executive Branch to act in accordance with the Constitution and laws of the United States should be brought.

Section 8(a) would provide for the intervention or appearance as amicus curiae by the Congressional Legal Counsel in any legal action in which

> (1) the constitutionality of any law of the United States is challenged and the United States is a party to such action, or a Member, officer, or employee of Congress does not consent to representation by the Congressional Legal Counsel under section 5 of this Act; and
>
> (2) the powers and responsibilities of Congress under article I of the Constitution of the United States are placed in issue.

Section 9 would confer on the Congressional Legal Counsel certain advisory and consultative functions.

Section 10 would implement the responsibilities of the Congressional Legal Counsel under the preceding sections. Sections 11 and 12 deal with internal procedural matters.

Section 13 would provide for the supersedure of the Attorney General by the Congressional Legal Counsel if the latter undertakes any representational service. We assume that this provision is not intended to apply to proceedings under section 5(a)(2)(A), i.e., where the Congressional Legal Counsel institutes a civil action to require a officer of the Executive Branch "to act in accordance with the Constitution and laws of the United States." The remainder of the bill contains provisions mainly of a procedural nature. Section 15(f), however, would put on a permanent general basis Public Law 93-190, 87 Stat. 736 (1973), which authorized the Senate Select Committee on Presidential Campaign Activities to enforce its subpoenas or orders in judicial proceedings.

It may be briefly mentioned that the reference to section 6 or 7 on page 18, line 10 of the bill should probably be section 5 or 6.

In commenting on the constitutionality of the bill it must be recognized, first, that the bill represents a conscious effort to obviate certain constitutional obstacles inherent in other bills providing for a Congressional Legal Counsel by limiting his activities to the fields of civil litigation and the giving of advice and the making of

recommendations. And, second, that the pertinent law has been substantially clarified by the decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), which was rendered after the introduction of the bill.

Provisions for a congressional officer charged on a permanent basis with the function of representing Congress, its agencies, members and employees in judicial proceedings, raise two questions: (a) whether the appointment of a joint congressional officer performing only legislative functions must comply with Article II, Section 2, Clause 2 of the Constitution, and (b) whether, assuming that the answer to (a) is no, the functions of the counsel envisaged in the bill are sufficiently of an executive nature to require his appointment pursuant to Article II, Section 2, Clause 2 for that reason. Further serious problems are raised by section 5(a)(2)(A) which would confer upon the Congressional Legal Counsel the power to bring a civil action against an executive officer in order to require him "to act in accordance with the Constitution and the laws of the United States."

1. Article II, Section 2, Clause 2 of the Constitution provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

It will be noted that this constitutional provision is not limited to executive officers. Judicial officers are appointed pursuant to it, and, as will be presently shown, also a number of important congressional officers.

United States v. Hartwell defines an office as a public station or employment which "embraces the ideas of tenure, duration, emolument, and duties," to distinguish it from relationships of a purely occasional or contractual nature. 73 U.S. (6 Wall.) 385, 393 (1867). The elements of tenure, duration, emoluments, and duties relating to the office of the Congressional Legal Counsel are spelled out in detail in the bill, as has been shown above.[1]

In *United States v. Germaine*, the Court held:

> That all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be inclined within one or the other of these modes of appointment there can be but little doubt.

[1] Since the definition of office includes the elements of duration and tenure, the subsequent discussion is not concerned with the representation of Congress, etc., by counsel retained on a case by case basis in the rare situations in which the Executive Branch is unable to represent it.

99 U.S. 508, 510 (1878).

And most recently the Court amplified on this in *Buckley v. Valeo*:

> We think its fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an "Officer of the United States," and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of that Article.

424 U.S at 126.

The functions to be conferred on the Congressional Legal Counsel clearly vest in him significant authority under the laws of the United States; they are not limited to an internal advisory nature. The provisions for his appointment therefore are unconstitutional unless the Constitution "otherwise provides" for his appointment. In our view there is no such alternative provision for his appointment.

Article I, Sections 2 and 3 of the Constitution provide that the House of Representatives and the Senate choose their respective officers. There is, however, no provision in the Constitution "otherwise providing" for the appointment of officers serving Congress as such rather than its components.

Buckley v. Valeo demonstrates that the failure of the Constitution to authorize Congress to appoint officers who are not officers of the respective houses but of Congress as a whole was no oversight. 424 U.S. at 124–31. This conclusion is supported by the consideration that the Constitutional Convention deliberately split the Legislative Branch into two houses lest it overwhelm the other two branches of the government. As James Madison stated in *The Federalist* No. 51:

> In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, *as little connected with each other* as the nature of their common functions and their common dependence on the society will admit. . . . [T]he weight of the legislative authority requires that it should be thus divided . . . .

Id. at 322 (Clinton Rossiter ed., 1961) (emphasis added). John Adams' three volumes in the *Defence of the Constitutions of Government of the United States of America* (1794), based on a formidable amount of historical research, were compiled in order to establish the proposition that, in order to be viable, a republican form of government must be based not only on the principle of the separation of powers but also on that of bicameralism. Hence, it must be concluded that the Constitutional Convention deliberately denied Congress the power to appoint joint congressional officers, in order to hold "connections" between the two Houses of Congress to a minimum. Such officers, therefore, like all other officers of the United States, have to be appointed pursuant to Article II, Section 2 of the Constitution.

Legislative precedent supports this conclusion. The principal joint congressional officers have been traditionally appointed in this manner: the Comptroller General (31 U.S.C. § 42 (Supp. III 1973)); the Librarian of Congress (2 U.S.C. § 136 (Supp. III 1973)); and the Public Printer (44 U.S.C. § 301 (Supp. III 1973)) are appointed by the President by and with the advice and consent of the Senate; the Architect of the Capitol is appointed by the President alone (40 U.S.C. § 162 (1970)). Significantly, the legislative counsel appointed by the President pro tempore of the Senate and by the Speaker of the House of Representatives, respectively (2 U.S.C. § 272 (1970)), are officers of the house to which they have been appointed and not officers of Congress at large (2 U.S.C. §§ 271, 281 (1970)).

This is not to say that there may not be some congressional officials—such as joint committee staffs—who are not appointed pursuant to Article II, Section 2, Clause 2. But their functions are purely internal and advisory; they do not carry out any significant authority outside the limits of the Capitol.

It is therefore concluded that congressional officers—in contrast to officers of either house—who perform significant governmental duties must be appointed as provided in Article II, Section 2 of the Constitution. In other words, if Congress provides for an officer representing the combined power of both houses of Congress, it must pay the price by giving the President the authority of selection.

2. This portion of the discussion is based on the assumption *arguendo* that congressional officers, even if they do perform significant governmental functions, need not be appointed according to the procedures set forth in Article II, Section 2, Clause 2 of the Constitution provided their functions are not of an executive or administrative nature.

The principal pertinent functions of the Congressional Legal Counsel would lie in the field of litigation. The kind of proceedings in which he would be involved fall into three categories:

> i. Generally, to defend Congress, its agencies, members and employees in cases involving the validity of congressional action, congressional subpoenas, or orders issued by or directed against Congress.
>
> ii. To bring civil actions for declaratory relief concerning the validity of a subpoena issued by or directed against Congress or to enforce any congressional subpoena or order.
>
> iii. To bring civil actions requiring an officer or employee of the Executive Branch to act in accordance with the Constitution and laws of the United States.

The last category quite obviously and uncontrovertibly involves an exclusively executive function. To require an officer to act in accordance with the Constitution

and laws of the United States is nothing but a paraphrase of the constitutional text to "take Care that the Laws be faithfully executed." That responsibility is vested, pursuant to Article II, Section 3 of the Constitution, in the President and not in Congress. An officer whose duty it is to compel action in accordance with the requirements of the Constitution and laws of the United States, therefore, is an executive officer who must be appointed as provided for in Article II, Section 2, Clause 2 of the Constitution and be subject to the President's unlimited removal power. *Buckley v. Valeo*, 424 U.S. at 134–41.

In view of this recent pertinent ruling in *Buckley v. Valeo*, we do not consider it necessary to discuss here the alternative consideration whether Congress or a member has standing in court to require an officer to act in accordance with the Constitution and laws of the United States. We merely refer to the recent holding of the U.S. Court of Appeals for the Fourth Circuit in *Harrington v. Schlesinger*, decided on October 8, 1975:

> A legislator may sue to prevent dilution of his voting power in the legislature. In *Kennedy v. Sampson*, D.C. Cir., 511 F.2d 430 [(1974)], the Court decided that a Senator had standing to challenge a President's "pocket veto" of a bill for which he had voted. The Senator was challenging the diminution of his voting power in the legislative process. By analogy, the four congressmen in this action claim that they have an interest in ensuring enforcement of laws for which they voted. Once a bill has become law, however, their interest is indistinguishable from that of any other citizen. They cannot claim dilution of their legislative voting power because the legislation they favored became law.
>
> . . . .
>
> . . . The plaintiffs' status as congressmen does not give them standing to sue for a declaration that Executive activities are illegal. The congressmen's interest seems little different from that of any citizen who might find a court's advice useful in casting his votes in presidential or congressional elections. In both instances the interest is too generalized to provide a basis for standing.
>
> . . . .
>
> While we hold that none of the plaintiffs has standing to seek a judicial resolution of the controversy, they are not without a remedy, for the controversy is subject to legislative resolution. If there is a difference between a majority of the members of both houses of Congress and the President as to the interpretation and application of the statutes, the Congress has the resources through its committees to

> ascertain the facts. With the facts before it, it may tighten the statutory restrictions, if that be the congressional will. The fact that the Congress has done nothing suggests that the Executive's interpretation of the statutes is in agreement with the congressional intent, but that is an issue in this case which we do not reach.

528 F.2d 455, 459 (4th Cir. 1975) (footnote omitted).

In other words, while a congressman may have standing to determine whether or not legislation which had passed both Houses of Congress has become law (*Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974)),[*] once a statute has been approved by the President, the congressional power over it becomes *functus officio*. *See* Cong. Globe, 39th Cong., 1st Sess. 186 (Jan. 11, 1866) (statement of Sen. Davis). In this connection it should be remembered that "standing to sue" is a constitutional requirement flowing from the limitation of the jurisdiction of the federal courts to cases and controversies in Article III, Section 2, Clause 1 of the Constitution. It therefore cannot be waived by statute, which is apparently what section 14(a) of the bill seeks to accomplish.

Portions of the litigating functions conferred upon the Congressional Legal Counsel in categories (i) and (ii) described above—notably the defense of actions against individual congressmen with respect to the performance of their legislative functions, and the defense or prosecution of suits relating to congressional subpoenas—are less exclusively executive in nature; it is our view, however, that the lodging of any of them in a non-executive officer is subject to serious constitutional doubt. Litigation is basically an executive function. This conclusion is supported by section 14(c) of the bill, which would vest in the Congressional Legal Counsel the powers conferred by law upon the Attorney General, which powers, of course, are of a preeminently executive nature. It is also significant that the responsibility of defending congressional officers has been vested in the Attorney General for more than a century. *See* 2 U.S.C. § 118 (1970) (derived from Act of Mar. 3, 1875, ch. 130, § 8, 18 Stat. 371, 401). The Supreme Court suggested in *Buckley v. Valeo* that legislative power may come to an end at the courtroom door: "[The] discretionary power to seek judicial relief . . . cannot possibly be regarded as merely in aid of the legislative function of Congress." 424 U.S. at 138. *Kennedy v. Sampson* is of course not in point, since that involved the standing of individual members of Congress rather than the power of the Congress, as an institution, to represent individual members, or the Congress itself, in litigation.

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[*] Editor's Note: In *Chenoweth v. Clinton*, 181 F.3d 112, 115–17 (D.C. Cir. 1999), the Court of Appeals expressed doubt about the continuing viability of *Kennedy v. Sampson* in light of *Raines v. Byrd*, 521 U.S. 811 (1997).

The preceding discussion encompasses the constitutional objections to the bill which appear to us to be the most serious ones. While we realize that there are others lurking in it, space and time preclude us from dealing with all of them.

For the above reasons, it is our conclusion that the bill is subject to substantial constitutional infirmities.

ANTONIN SCALIA
Assistant Attorney General
Office of Legal Counsel

Appointment of a Federal Judge to the United Nations Delegation

If this were a matter of first impression, appointing a federal judge to be a representative of the United States to the General Assembly of the United Nations would be inconsistent with the constitutional doctrines of separation of powers and independence of the judiciary. However, because of the longstanding practice of appointing federal judges to temporary office in the Executive Branch, and the absence of any explicit constitutional text, it cannot be maintained that such an appointment would be unconstitutional.

August 5, 1976

MEMORANDUM OPINION FOR THE ASSOCIATE COUNSEL TO THE PRESIDENT

This is in response to your inquiry relating to the appointment of a judge of the U.S. Court of Appeals[1] to be a representative of the United States to the General Assembly of the United Nations.

Section 2(c) of the United Nations Participation Act of 1945, Pub. L. No. 79-264, § 2(c), 59 Stat. 619, *codified at* 22 U.S.C. § 287(c) (1976), provides that the President shall appoint by and with the advice and consent of the Senate not to exceed five representatives of the United States to attend a specified session or sessions of the General Assembly of the United Nations. Pursuant to section 3 of the Act, 22 U.S.C. § 287a (1976), those representatives "act in accordance with the instructions of the President transmitted by the Secretary of State."

Even though the Constitution does not contain for judges any express prohibition from simultaneous service in the Executive Branch similar to that established for congressmen under Article I, Section 6, Clause 2, I would nonetheless advise, if this were a matter of first impression, that an appointment of the sort suggested would be inconsistent with the constitutional doctrines of separation of powers and independence of the judiciary. However, in addition to the absence of any explicit prohibition, there is a constitutional practice of appointing federal judges to temporary office in the Executive Branch which goes back to the diplomatic service rendered by Chief Justices John Jay and Ellsworth during the administrations of Presidents Washington and John Adams. The last instance was the appointment of District Judge Boldt to the position of Chairman of the Pay Board in 1971.[2] Because of this longstanding practice, and the absence of any explicit

[1] We have been informally advised that the judge in question is in active service.

[2] For other instances, *see, e.g.*, *International Military Tribunal*, 40 Op. Att'y Gen. 423 (1945); *Nominations of Hon. Marvin Jones and Hon. John Caskie Collet*, S. Exec. Rep. No. 80-7 (1947), *reprinted in Independence of Judges: Should They Be Used for Non-Judicial Work?*, 33 A.B.A.J. 792 (1947); Alpheus Thomas Mason, *Harlan Fiske Stone: Pillar of the Law* 704 & n. (1956) ("Mason").

constitutional text, I think it cannot be maintained that such an appointment would be unconstitutional.

During this century, however, it has been asserted with increasing frequency that, while the practice of appointing judges to temporary positions in the Executive Branch may have been justified by the conditions prevailing during the early years of the Republic, "the propriety of the practice should be examined anew if the integrity of the judiciary in American life is to be preserved." S. Exec. Rep. No. 80-7, *supra* note 2, at 2. That report cites the following undesirable aspects of such appointments:

> (1) Reward may be conferred or expected in the form of elevation to a higher judicial post.
>
> (2) The judicial and executive functions may be improperly merged.
>
> (3) The absence of the judge from his regular duties increases the work load of the other judges of the court, if any, and may result in an impairment of judicial efficiency in the disposition of cases.
>
> (4) Nonjudicial activities may produce dissension or criticism and may be destructive of the prestige and respect of the Federal judiciary.
>
> (5) A judge, upon resumption of his regular duties, may be called upon to justify or defend his activities under an Executive commission.

Id. at 6 (footnotes omitted).[3]

In 1958, Chief Justice Warren, in a letter addressed to Congressman Keating, commented adversely on a proposal to have a justice of the Supreme Court serve on a commission to determine presidential disability:

> MY DEAR MR. CONGRESSMAN: During the time the subject of inability of a President to discharge the duties of his office has been under discussion, the members of the Court have discussed generally, but without reference to any particular bill, the proposal that a member or members of the Court be included in the membership of a Commission to determine the fact of Presidential inability to act.

[3] For Chief Justice Stone's rejection of President Franklin D. Roosevelt's offer to serve on a commission to study the rubber supply during World War II, and for his attitude on Justice Jackson's service on the Nuremberg Tribunal, *see* Mason, *supra* note 2, at 709–20.

> It has been the belief of all of us that because of the separation of powers in our Government, the nature of the judicial process, the possibility of a controversy of this character coming to the Court, and the danger of disqualification which might result in lack of a quorum, it would be inadvisable for any member of the Court to serve on such a Commission.
>
> I realize that Congress is confronted with a very difficult problem, and if it were only a matter of personal willingness to serve that anyone in the Government, if requested to do so, should make himself available for service. However, I do believe that the reasons above mentioned for nonparticipation of the Court are insurmountable.[4]

This trend culminated in 1973 in the approval by the Judicial Conference of the United States of Canon 5(G) of the Code of Judicial Conduct of United States Judges:

> *Extra-judicial appointments.* A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent his country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.
>
> *Commentary:* Valuable services have been rendered in the past to the states and the nation by judges appointed by the executive to undertake important extra-judicial assignments. The appropriateness of conferring these assignments on judges must be reassessed, however, in light of the demands on judicial manpower created by today's crowded dockets and the need to protect the courts from involvement in extra-judicial matters that may prove to be controversial. Judges should not be expected or permitted to accept governmental appointments that could interfere with the effectiveness and independence of the judiciary.

Since the duties of the United States Representative to the General Assembly of the United States are not of a historical, educational, or cultural nature, Canon 5(G) precludes a federal judge on active duty from accepting that position. It is far

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[4] *Reprinted in Presidential Inability: Hearings Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 85th Cong., 2d Sess. at 14 (1958). Nevertheless, Chief Justice Warren accepted the position of Chairman of the Commission to investigate the assassination of President Kennedy.

from clear what sanctions are available for violation of the Judicial Conference's Canons. Some judges have openly refused to comply with those portions which relate to required financial disclosure—with apparent impunity except for publication of their names by (I believe) the Administrative Office of the United States Courts. Nonetheless, it does seem inadvisable to place the President in the position of prompting action which is in violation of the Canons.

Finally, I wish to recall the fact that the Executive Branch has taken a rather firm stand of late on various matters bearing upon the principle of separation of powers. I refer in particular to our opposition to disapproval of executive action by one-house or concurrent resolutions, and congressional participation in the appointment of executive officers. It would invite attack to combine such a pristine view of separation vis-à-vis the Congress with a latitudinarian stance insofar as the courts are concerned.

ANTONIN SCALIA
Assistant Attorney General
Office of Legal Counsel

Constitutionality of Regulatory Reform Legislation for Independent Agencies

Although there is no constitutional impediment to the bill's requirement that independent regulatory agencies communicate their legislative and budgetary messages directly to the Congress without first clearing them with OMB, a uniform rule in the opposite extreme—i.e., that *no* communication from an independent agency may be sent to OMB unless it is simultaneously sent to the Congress—would not adequately protect important interests of the Executive Branch. The congressional access provisions of the bill would not affect the power of the President, or the agency acting on the President's behalf, to assert executive privilege, because in the absence of express language in the bill, it must be assumed that the bill does not constitute an attempted infringement of the constitutionally based privilege, which is available with respect to those functions of independent regulatory agencies that are of an executive or quasi-executive nature.

September 1, 1976

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGISLATIVE AFFAIRS

This is in response to the request by Tom Boyd for the views of the Office of Legal Counsel on the Interim Regulatory Reform Act of 1976, S. 3308, 94th Cong., as it passed the Senate on May 19, 1976. 122 Cong. Rec. 14,528–34 (1976).

Our June 9 memorandum to you discussed the bill as it was introduced, when it merely would have required agencies to submit proposals for the recodification of their existing regulations. This proposal is retained in section 4 of the bill, modified and improved somewhat. However, the bill now also deals with such additional matters as substantive law revision for the seven independent agencies involved,[1] timely consideration of rulemaking petitions, congressional access to agency information, conduct of the agencies' civil litigation, protection of agency personnel, conflicts of interest, and a limited waiver of sovereign immunity. Each of these provisions, except that dealing with substantive law revision, is patterned after a virtually identical section of a law already in effect for one or another of the agencies. The effect of S. 3308 is therefore to extend these provisions to the seven agencies involved so that all will be on equal footing. We will discuss the proposals in order.[2]

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[1] As introduced, S. 3308 applied to the Departments of Commerce and Transportation, Civil Aeronautics Board ("CAB"), Interstate Commerce Commission ("ICC"), Federal Trade Commission ("FTC"), Federal Communications Commission ("FCC"), Federal Maritime Commission ("FMC"), and Consumer Product Safety Commission ("CPSC"). *Id.* § 3 (as introduced Apr. 13, 1976). The two departments have now been dropped from the bill and the Federal Power Commission ("FPC") has been added. *Id.* (as amended May 19, 1976); 122 Cong. Rec. 14,528.

[2] Rules recodification, law revision, and protection of agency personnel are dealt with in sections 4, 5, and 9, respectively. Each of the remaining provisions listed in the text is the subject of a separate section of the bill. However these sections (6, 7, 8, 10, and 11) apply only to the FTC, FCC, FPC, and

I. Rules Recodification

This section (§ 4) applies to all seven agencies. It would require the chairman of each agency, within 360 days after the Act is passed, to prepare and submit to the Congress and to the Administrative Conference of the United States an initial proposal setting forth a recodification of all the rules which the agency has issued and which are in effect or proposed as of the date of submission. S. 3308, § 4(a). The recodification is to be only "technical"—i.e., a streamlining or simplification of existing rules to make them more understandable and capable of effective and fair enforcement. The bill expressly provides that the recodified rules "shall not be at variance, in any substantive respect, with the text of the rules of the agency involved which are in effect or proposed as of the date of such submission." *Id. See also* S. Rep. No. 94-838, at 2–3 (1976) ("Senate Report"). After studying the comments and recommendations of the Administrative Conference and others, the chairman of each agency must submit to the Congress a final proposal for recodification of the agency's rules, which will take effect 90 days after this final submission. S. 3308, § 4(c). The provisions for judicial review in chapter 7 of title 5, United States Code, are expressly made applicable to the repromulgated rules. S. 3308, § 4(e).

Although section 4 as it passed the Senate does not contain several of the defects we identified in the original version of S. 3308, we still have reservations about it:

The term "rule" is defined in section 4(f) of the bill in language that to some extent parallels the definition of the term in 5 U.S.C. § 551(4) (Supp. V 1975). However, the term also includes "any general statement of policy, and any determination, directive, authorization, requirement, designation, or similar such action," but not an "order" as defined in 5 U.S.C. § 551(6) (1970). The express exclusion of "orders" from the definition is unnecessary, and it is not clear what is covered by the additional phrase just quoted.

Moreover, the definition of the term "rule" encompasses many agency determinations—such as "the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor, or valuation, costs, or accounting"—which affect a limited number of parties and are not ordinarily codified in the Code of Federal Regulations. Yet sections 4(a) and 4(c) require the agency to prepare initial and final proposals "setting forth a recodification of *all* of the rules which such agency has issued and which are in effect or proposed" (emphasis added). Perhaps this means that the agencies must review and repromulgate only

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CPSC. Sections 12–14 each deal with one of the three other agencies, so that all remaining matters affecting the CAB, ICC, or FMC are included in one section. The substance of the proposals as to each of the three is largely the same as that set forth in the earlier sections. The CAB, ICC, and FMC were separated out because they are not subject to the jurisdiction of the House Commerce Committee.

those rules which have already been codified. It would be advisable to make this qualification explicit, however, or at least to limit the definition of the term "rule" in section 4(f) to matters of general applicability.[3] In our view, the Department should not endorse any proposal which would require the agencies to reexamine and codify all previously promulgated rules of particular applicability.

The bill directs the chairman of each independent agency to "develop, prepare, and submit" the initial and final proposal for the technical recodification of the agency's rules. S. 3308, § 4(a), (c). However, because the proposals will contain revisions of the agency's governing rules, which must ordinarily be approved by a vote of all the members of the commission or board, we assume that the chairman is to submit the agency's proposals only after they have been approved by the commission or board.

Section 4(e) provides that the text of the initial and final proposals must be published in the Federal Register and that written comments are to be invited on them. Solicitation of comments makes sense with respect to the initial plan, which is in the nature of a notice of proposed rulemaking, but we see no reason to provide another opportunity for public comment on the final proposal.

We also question the advisability of the provision for judicial review in section 4(e). Presumably there was an opportunity for judicial review of the substantive content of the agency's existing rules when they were first promulgated. Because the recodification is to be only technical, judicial review of the substance of the new rules is unnecessary. Furthermore, a court has no particular expertise to determine whether an agency should have gone further in simplifying and consolidating its rules. That is essentially a legislative-type determination to be made by the agency and the Congress. And if there were any question as to whether a given change was in fact merely technical, a court in a later case would no doubt construe and apply the new rule in such a way that it would not be at variance in any substantive respect with its predecessor. Judicial review of the recodified rules will therefore serve no legitimate purpose, and it could lead to delay and confusion as to the force of the recodified rules pending review.

Finally, we doubt whether the possible benefits of simplification of agency rules—assuming they materialize—will outweigh the costs involved in the recodification process. Agency personnel and those subject to the agency's jurisdiction are familiar with the regulations as they are presently written and codified. The transition period will introduce considerable uncertainty. It is also possible that the proposed "technical" recodification will divert attention from the more profound assessment of the agency's functions contemplated in section 5 of

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[3] In this connection, we note that section 1 of S. 796, 94th Cong. (as introduced Feb. 22, 1975), which is based on recommendations of the American Bar Association ("ABA") and the Administrative Conference, would exclude matters of particular applicability from the definition of "rule" under the Administrative Procedure Act, 5 U.S.C. §§ 551–559, and include them in the definition of a new term, "rate-making and cognate proceedings."

S. 3308. In fact, major portions of the recodification could be rendered moot by the substantive law revision, if it is adopted. However, the ultimate wisdom of section 4 involves questions of policy on which this office defers to the seven agencies involved.

II. Law Revision

Each of the seven agencies is directed by section 5(a) of S. 3308 to conduct a full review of the statutory and case law relating to the agency and to make recommendations to the Congress for revision and codification of the statutes and other lawful authorities administered by or applicable to it, including repeals or amendments "as such agency feels may better serve to enhance commerce and protect consumers." The purpose of the study and recommendations is to facilitate congressional consideration of regulatory reform and to clarify, simplify, and improve applicable law, both substantively and technically.

The chairman, upon the approval of a majority of the members, would appoint a director to supervise the agency's law revision activities and to serve as the agency's reporter, S. 3308, § 5(b), and he would also appoint an Advisory Committee on Law Revision comprised of "individuals who by reason of knowledge, experience, or training are especially qualified to assist in such law revision," *id.* § 5(c). Section 5(e) requires the chairman to submit a preliminary report on law revision to the President and Congress within one year after the bill is passed and an interim and final report within two and three years of passage, respectively. The latter two reports would include an analysis of the economic and other consequences of the revision and codification and a discussion of alternatives considered.[4]

It is somewhat dubious that proposals for regulatory reform will be made in an objective and thorough manner when they are developed under the control of the very agencies sought to be reformed. For example, none of the agencies would be likely to propose that it cede jurisdiction in certain matters to another body, or that Congress provide for deregulation in a sector of the economy which would result in a significant diminution of the agency's role. Also, S. 3308 does not contemplate reports from or about other agencies or executive departments whose functions are related to those of the seven dealt with in the bill and which would therefore be affected by the substantive law revision. By way of contrast, S. 3428, 94th Cong. (as introduced May 13, 1976), an administration bill, would require the President to submit regulatory reform proposals to the Congress which cut across agency and departmental lines and cover entire sectors of the economy, such as

[4] A similar but less elaborate law revision requirement is currently applicable to the ICC by virtue of section 312 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, 60 ("RRRRA"). *See* Senate Report at 82–83. This provision would be repealed by section 13(a) of S. 3308.

transportation, agriculture, mining, manufacturing, finance, and communications. However, whether or not this broad ranging approach is preferable to the more compartmentalized study called for in S. 3308 involves questions of policy on which this office takes no position.

We do have one technical suggestion, however. It may be desirable to include in section 5(c) an authorization for compensation for the members of the Advisory Committees.

III. Timely Consideration of Petitions

Sections 6, 12(a) and 14(a) of S. 3308 would amend the organic acts of the FTC, FCC, FPC, CAB, and FMC[5] to require these agencies to grant or deny petitions filed under 5 U.S.C. § 553(e) (1970) within 120 days and to publish the reasons for each denial in the Federal Register. If the agency denies the petition or fails to act on it within 120 days, the petitioner would be entitled to bring a civil action for an order directing the agency to initiate a proceeding to take the action requested in the petition. To obtain such an order, however, the petitioner would be required to demonstrate (by a preponderance of the evidence in the record before the agency, or, if the agency had failed to act, in a "new proceeding" before the court) that the failure to grant the petition was arbitrary and capricious, that the action requested in the petition is necessary, and that the failure to take the action requested in the petition "will result in the continuation of practices which are not consistent with or in accordance with" the agency's organic act or any other act administered by the agency or applicable to it. However, a court would have no authority to compel the agency to take any action other than the initiation of a proceeding for the issuance, amendment, or repeal of an order, rule, or regulation.

Somewhat similar provisions are already in effect for the CPSC, *see* 15 U.S.C. § 2059 (Supp. V 1975), and for the ICC with respect to common carriers by railroad, *see* 49 U.S.C. § 13(6) (as added by RRRRA, *supra* note 4, § 304(b), 90 Stat. at 52). S. 3308 therefore contains no new provision regarding rulemaking petitions filed with the CPSC, and section 13(b) merely extends to all ICC matters the provisions for the timely consideration of petitions that are now applicable only to those involving common carriers by railroad.

The Administrative Procedure Act ("APA"), 5 U.S.C. § 553(e), now provides that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." By letter dated April 26, 1976, from Assistant Attorney General Uhlmann to Senator Eastland, the Department opposed the enactment of S. 3123, 94th Cong. (as introduced Mar. 10, 1976), which would have amended 5 U.S.C. § 553(e) to provide that an agency must either deny such a petition or initiate the requested rulemaking proceeding within 60 days of the

[5] In the case of the FMC, "organic act" refers to Reorganization Plan 7 of 1961, 75 Stat. 840.

receipt of the petition. It was pointed out in the letter that 5 U.S.C. § 555(b) and (e) (1970) already impose an obligation on agencies to act on such petitions in a reasonable time and that a person aggrieved by an agency's delay in acting on a petition would appear to have a right to seek judicial review under 5 U.S.C. § 706(1) (1970) to compel the agency to decide whether to deny the petition or initiate rulemaking. The court cannot now, and could not under S. 3123, address the merits of the petition or direct the agency to initiate the requested rulemaking proceeding.

S. 3308 is in certain limited respects an improvement over S. 3123, because it would allow the agencies 120 rather than 60 days to take action on petitions, S. 3308 §§ 6, 12(a), 14(a), and because it would not amend 5 U.S.C. § 553(e) and thereby impose a rigid deadline on *all* departments and agencies covered by the APA. Moreover, only the person who files the petition could seek judicial review of the agency's denial or failure to act on his petition. The generally applicable judicial review section of the APA (5 U.S.C. § 702 (1970)), on the other hand, allows any person suffering legal wrong because of agency action or adversely affected or aggrieved within the meaning of a relevant statute to seek judicial review. Nevertheless, there may still be some question as to whether a fixed deadline is appropriate. The FPC, FCC, CAB and FMC opposed the provision in their letters to the Senate Commerce Committee regarding S. 3308. *See* Senate Report at 65, 67, 71, 78.

Whatever may be the merits of the fixed deadline provided for in S. 3308, however, we recommend that the Department oppose the bill's judicial review provisions. The bill would require a court to determine whether the action requested in a petition is "necessary" and whether the agency's failure to take the action will result in the continuation of practices which are not consistent with the agency's responsibilities. *Id.* §§ 6(a)(1), 6(b), 6(c), 12(a), 14(a). These are substantive determinations of a kind ordinarily reserved to the agency. Yet, having made a decision which is tantamount to a decision on the merits of the petition, a court could do no more than remand the matter to the agency for another exploration of the same issues in rulemaking proceedings. Notwithstanding the statement in the Senate Report that the bill does not make "administrative expertise subservient to the orders of the judiciary," *id.* at 5, it is our opinion that this judicial review procedure would seriously undermine the independence of the agencies involved. An agency would be most reluctant to refuse to take the action requested in a petition after a reviewing court has already determined that such action is "necessary" and that the failure to take the action is not consistent with the agency's goals. As a result, judicial review, which would frequently be made on an incomplete record and without the benefit of the agency's expertise, would give the appearance of pre-judging the merits of the petition for the agency and thereby casting doubt on the integrity of subsequent agency proceedings.

Quite aside from public pressures and problems of appearances resulting from the timing of judicial review, the bill has the added disadvantage of forcing a court

to second-guess the agency on the allocation of its scarce resources among various administrative proceedings and other agency functions. As a practical matter, the reviewing court might also be forced to consider each petition in isolation, without giving due regard to related proceedings or the agency's long-term goals.

The provisions for the timely consideration of petitions in S. 3308 were patterned after 15 U.S.C. § 2059, *see* Senate Report at 4, which permits a district court to order the CPSC to initiate rulemaking proceedings if the petitioner can demonstrate to the court that the consumer product involved "presents an unreasonable risk of injury" and that the failure of the CPSC to initiate rulemaking proceedings "unreasonably exposes the petitioner or other consumers to a risk of injury presented by the consumer product," 15 U.S.C. § 2059(e)(2). It may be questioned whether a court should second-guess the CPSC on such a matter, but at least a court's intervention is limited to situations which pose a significant threat of injury. In such cases, the interference with the independent judgment of the CPSC may be thought to be out-weighed by an overriding public interest in safety. An overriding public interest of this type is not present in most matters coming before the other agencies covered by S. 3308. Thus, the CPSC provision is not necessarily a precedent for the present bill.

It might be argued, of course, that the independence of the agencies is preserved in S. 3308 by the added requirement that a court may not direct an agency to commence rulemaking proceedings unless it concludes that the agency acted arbitrarily and capriciously in denying the petition or failing to act on it. We doubt that this will be the effect. If the court determines that the action requested in the petition is necessary and that the failure to take the action would not be consistent with the act administered by the agency, the court would be hard-pressed to conclude that the agency's denial or failure to act was nevertheless not arbitrary and capricious.

Finally, we have some questions about the evidence on which the reviewing court must base its decision. The relevant sections of the bill provide that the decision is to be based on "a preponderance of the evidence in the record before the [agency] or, in an action based on a petition on which the [agency] failed to act, in a new proceeding before such court." S. 3308, §§ 6, 12(a), 14(a). There is now no requirement in the APA that a decision whether to grant or deny a petition be made on the basis of a record developed before the agency and that an agency's denial be substantiated by such a record. This makes sense, because the agency's determination as to whether to initiate rulemaking proceedings depends not merely on the "facts" pertinent to the petition, but also on broader policy, budgetary, and related considerations which it would often be unnecessarily wasteful to reduce to writing in each case. The effect of S. 3308, then, would be to force the agency to go to the added expense of preparing an administrative record in a kind of mini-rulemaking proceeding so that its denial of a petition will be supported by the preponderance of the evidence in the record. Again, while this result might be

acceptable for the CPSC because of public safety considerations, there is far less justification for it with respect to the other agencies covered by the bill.

For these reasons, we believe that the provisions for judicial review raise far more problems than they would solve. In our view, judicial review of the type now available to compel an agency to make a decision whether to grant or deny a petition is as far as the bill should go in this area.

IV. Congressional Access to Information

A.

Sections 7, 12(a) and 14(a) of S. 3308 would have the effect of establishing a uniform requirement that the agencies transmit to the Congress copies of budget information, legislative recommendations, testimony for congressional hearings, and comments on legislation at the same time that such materials are submitted to the President or to the Office of Management and Budget ("OMB"). The sections further provide that no officer and no other agency of the United States shall have authority to require the agency to submit its legislative recommendations, testimony, or comments for approval, comments, or review prior to their submission to Congress. Provisions of this type are already applicable to the CPSC under 15 U.S.C. § 2076(k) (Supp. V 1975), enacted in 1972, and to the ICC by virtue of section 201(j) of the Budget and Accounting Act of 1921, 31 U.S.C. § 11(j) (as added by RRRRA, *supra* note 4, § 311, 90 Stat. at 60). A similar provision applicable to the FTC was also included in section 4 of S. 2935, as it passed the Senate on March 18, 1976. *See* 122 Cong. Rec. 7203 (1976); Senate Report at 5–6, 86.

Under existing law, the Secretary of the Treasury, the Director of OMB, and the heads of "executive agencies" (which in this context presumably includes independent regulatory agencies) must, upon request, furnish a committee of either House of Congress, the Comptroller General, or the Director of the Congressional Budget Office information as to the "location and nature of available fiscal, budgetary, and program-related data and information." 31 U.S.C. § 1153(a)(1) (Supp. V 1975). This provision would appear to require the head of a department or agency to furnish Congress with the budgetary proposal that the department or agency has transmitted to OMB, although this Department's administrative counsel has construed the provision to compel the furnishing of the Department's budgetary data to Congress only after OMB has completed the overall budget process. This is apparently OMB's position as well. *See* OMB Circular No. A-10, §§ 3–4. OMB Circular A-19 requires independent agencies to clear their legislative proposals through OMB, although section 7(g)(2) of the Circular permits such reports to be submitted without approval where time limits require.

Thus, the effect of S. 3308 would be to alter the time at which Congress could obtain copies of budget and legislative materials prepared by the seven independent agencies and to make them available to Congress without OMB clearance or a

formal request from the Congress. The bill would not lift the present requirement that agencies' budgetary and other materials be submitted to OMB as well. Thus, the Executive Branch will be informed of all agency transmissions to Congress and will be able to counter them through its own recommendations, testimony, and comments.

In general, we see no constitutional impediment to the requirement that independent regulatory agencies communicate their legislative and budgetary messages directly to the Congress without first clearing them with OMB. In *Humphrey's Executor v. United States*, 295 U.S. 602, 629–31 (1935), the Supreme Court held that Congress could establish a regulatory agency, in that case the FTC, and insure its independence from Executive Branch control by establishing a fixed term for its members and providing that such members could be removed only for inefficiency, neglect of duty, or malfeasance in office. In our view, Congress may legitimately conclude that a uniform practice of clearing all communications with Congress through OMB might undermine the agencies' intended independence from the Executive Branch. *See* Senate Report at 5–6.

On the other hand, a uniform rule in the opposite extreme—i.e., that *no* communication from an independent agency may be sent to OMB unless it is simultaneously sent to the Congress—would not adequately protect important interests of the Executive Branch. For example, we do not believe that independent agencies should be permitted to transmit to Congress copies of comments they have prepared on legislation or reports drafted by executive departments before the legislation or reports have themselves been transmitted to Congress. The departments' draft legislation and reports are subject to review by OMB prior to submission to Congress. This measure of Executive Branch control—which has constitutional underpinnings in the duty of the President to "from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient," U.S. Const. art. II, § 3—would be lost if copies of independent agency comments made available to Congress disclosed the substance of the Executive Branch proposals while the proposals were still in their formative stage. In our view, the same principle applies when draft legislation, reports, or comments prepared by an independent agency relate to other important interests of the Executive Branch, as might be the case, for example, with a proposal to take jurisdiction in a certain area away from an executive department or to alter the application of civil service laws to the agency's personnel.

B.

The other feature of sections 7, 12, 13 and 14 of S. 3308 having to do with congressional access to agency information directs each agency, whenever a duly authorized committee having responsibility for authorizations or appropriations for the agency makes a written request for documents in the possession or subject to

the control of the agency, to submit such documents (or copies thereof) to the committee within 10 days of the request. The bill prescribes no sanctions for an agency's failure to comply, nor does it contain any other means of enforcement, although the bill does expressly provide that it "shall not be deemed to restrict any other authority of either House of Congress, or any committee or subcommittee thereof, to obtain documents," *id.* §§ 7(a), 7(b), 7(c), 7(d), 12(a), 14(a)—apparently referring to the subpoena power. A similar congressional access provision was recently made applicable to the ICC in a new paragraph 15 of section 17 of the Interstate Commerce Act, 49 U.S.C. § 17(15) (as added by RRRRA, *supra* note 4, § 301, 90 Stat. at 47). In our opinion, the Department of Justice should oppose the adoption of this aspect of S. 3308, because it does not adequately preserve the confidentiality of trade secrets and similar information obtained from persons subject to the agencies' regulation and because it could lead to inappropriate involvement by the Congress in the ongoing operation of the agencies, especially in pending cases and investigations.

Confidential information in the hands of an independent regulatory commission should be protected from casual disclosure in the course of compliance with a sweeping, undifferentiated, and perhaps passing congressional request for materials. *Cf. Authority of Federal Communications Commission to Disclose Confidential Information to Senate Committee on Interstate and Foreign Commerce*, 41 Op. Att'y Gen. 221, 228 (1955) (Brownell, A.G.). The provision applicable to the ICC recently enacted as section 17(15) of the Interstate Commerce Act contains a key limiting provision designed to enable agencies to afford just such protection, while at the same time preserving the right of a congressional committee to obtain the material by means of subpoena if it concludes that circumstances warrant disclosure. The limiting provision reads:

> This paragraph shall not apply to documents which have been obtained by the Commission from persons subject to regulation by the Commission, and which contain trade secrets or commercial or financial information of a privileged or confidential nature.

90 Stat. at 47. Similar qualifying language was apparently contained in the relevant paragraphs of S. 3308 when the bill was circulated to the seven agencies in working paper form, *see* Senate Report at 68, but it has since been deleted. Section 13(c)(5) of S. 3308 would delete the passage from the Interstate Commerce Act as well. At a minimum, this protection for confidential information should be restored to the bill.

Even with this modification, however, we have serious doubts about the disclosure provision. The Department of Justice has taken the position that executive privilege is available with respect to those functions of independent regulatory agencies that are of an executive or quasi-executive nature. The privilege must be assertible by the President or in a manner suitable to him. In our view, S. 3308

would not affect the power of the President, or the agency acting on the President's behalf, to assert executive privilege, because in the absence of express language in the bill, it must be assumed that the bill does not constitute an attempted infringement of the constitutionally based privilege. Nevertheless, the passage of these congressional access sections of S. 3308 could introduce added confusion into an already unsettled area.

Aside from the question of executive privilege as such, it should also be noted that within its own area of operations, an independent regulatory agency has a strong interest in the free flow of communications to and from the heads of the agency—i.e., the members of the commission or board—which is analogous to that giving rise to the privilege of the President as head of the Executive Branch. *See United States v. Nixon*, 418 U.S. 683, 705, 708 (1974). An independent regulatory agency also has a strong interest in the integrity of ongoing cases and investigations which could be seriously prejudiced if the facts and legal arguments are freely reported to the Congress. Similar interests have been asserted to support the withholding of investigation-related evidence compiled by the FBI, an agency of the Executive Branch. *Position of the Executive Department Regarding Investigative Reports*, 40 Op. Att'y Gen. 45 (1941) (Jackson, A.G.). In our view, S. 3308 does not give adequate weight to these important interests.

It is true that the bill contains no sanctions for violations and that an agency might therefore be thought to be free to decline to comply with a request for information on either of the above-mentioned grounds or for any other reason. But an agency should not be placed in the position of defying mandatory language in a statute in order to protect the confidentiality of certain of its internal communications and operations. For these reasons, we recommend that the Department oppose passage of those portions of sections 7, 12(a), 13(c), and 14(a) which purport to require agencies to furnish information to Congress within 10 days of a request.

V. Representation in Litigation

Section 8, 12(a), 13(d) and 14(a) of S. 3308 contain provisions which would in essence permit the FCC, FPC, CAB, ICC, and FMC, through their own attorneys, to commence, defend, or intervene in any action (including any appeal of such action) having to do with matters under their jurisdiction if the Department of Justice fails to assume the case on behalf of the agency within 45 days of the receipt of written notification from the agency. The right of an agency to handle its own appeals in cases in which the Department of Justice has declined to represent the agency apparently would include appeals and petitions for certiorari to the Supreme Court, thereby undercutting the Solicitor General's control over such matters. The agencies would also be authorized to seek temporary and preliminary injunctive relief without first giving the Department of Justice an opportunity to take responsibility for the case.

Congress recently enacted somewhat similar legislation for the FTC, *see* 15 U.S.C. § 56(a) (Supp. V 1975), and the CPSC, *see* Consumer Product Safety Commission Improvements Act of 1976, Pub. L. No. 94-284, § 11, 90 Stat. 503, 507–08.[6] S. 3308 therefore contains no section dealing with the litigating authority of these two agencies.

The Department of Justice vigorously opposed the expansion of the FTC's litigating authority on the traditional ground that the government's litigation should be centrally controlled and under the supervision of experienced trial attorneys, *see* H.R. Rep. No. 93-1107, at 51–52, 67–68 (1974), and the Chief Justice informed the Congress that the justices unanimously recommended against dilution of the Solicitor General's control over government litigation in the Supreme Court, *see* S. Rep. No. 93-1408, at 39 (1974). Both objections were to no avail. The Department also unsuccessfully opposed the expansion of the CPSC's litigating authority. *See Consumer Product Safety Act Amendments: Hearings Before the Subcomm. on Consumer Protection and Finance of the H. Comm. on Interstate and Foreign Commerce*, 94th Cong. 158–67 (1975) (statement of Joe Sims, Special Assistant to the Assistant Attorney General, Antitrust Division).

We assume that the Department will also oppose S. 3308 to the extent that it would result in a loss of litigating authority to the other five agencies,[7] although

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[6] The FTC provision is actually considerably broader than the litigating authorizations in S. 3308 for the FCC, FPC, CAB, and FMC, because it grants the FTC exclusive litigating authority in such areas as injunctive relief, consumer redress, judicial review of rules and cease and desist orders, and enforcement of subpoenas. 15 U.S.C. § 56(a)(2). Section 13(d) of S. 3308 would grant the ICC exclusive litigating authority in essentially the same areas as those in which the FTC has been granted such authority. This ICC provision is virtually identical to one passed by the Senate as part of the RRRRA but dropped from the bill (S. 2718) because of a jurisdictional objection by a House Committee. *See* S. Rep. No. 94-595, at 158–59 (1976) (Conf. Rep.). The Department of Justice apparently did not formally communicate with the Congress on this feature of the Senate version of S. 2718.

The CPSC provision enacted in May gives the CPSC exclusive litigating authority only in injunction and forfeiture actions, and it expressly denies the CPSC the authority to handle its own cases in the Supreme Court. It does, however, permit the CPSC, with the concurrence of the Attorney General, to prosecute and appeal any criminal action. S. 3308 does not propose to give the other six agencies any authority with respect to criminal cases.

[7] The existing litigating authority of the five agencies varies considerably. For example, the FPC currently has authority to be represented by its own attorneys in actions to review FPC orders or to enjoin violations of the Federal Power Act and Natural Gas Act. *See* 15 U.S.C. §§ 717r, 717s; 16 U.S.C. §§ 825*l*, 825m (1970). Section 8(b) of S. 3308 therefore appears to *enhance* the authority of the Department of Justice by giving the Attorney General 45 days in which to assume responsibility for such actions. *See* Senate Report at 65–66. Similarly, the FCC's right under 47 U.S.C. § 401(e) (as added by S. 3308, § 8(a)) to be represented by its own attorneys in appeals of FCC orders and decisions under 47 U.S.C. § 402(b) (1970), *see* Senate Report at 68–69, may be undercut by the Attorney General's right of first refusal under 47 U.S.C. § 402(e)(1)(B) (as added by S. 3308, § 8(a)). *See also* 49 U.S.C. § 1486(a) (1970) (CAB); 46 U.S.C. § 828 (1970) (FMC); Senate Report at 72–73 (CAB), 79 (FMC). In other respects, however, the litigating authority of these agencies would be enhanced insofar as actions the Attorney General has refused to bring are concerned. The somewhat different provisions in section 13(d) would apparently have little substantive effect on the ICC's present authority. Senate Report at 54–55.

that is a question of policy on which this office defers to the Solicitor General, the Civil Division, and other interested litigating divisions.

VI. Protection of Officers

Section 9 of S. 3308 would amend 18 U.S.C. § 1114 (Supp. V 1975) to make it unlawful to kill an officer or employee of the ICC, FTC, FPC, FCC, CAB or FMC who is "assigned to perform investigative, inspection, or law enforcement functions, while engaged in the performance of his official duties, or on account of the performance of his official duties." Section 1114 now prohibits the killing of officers and employees of various executive departments and agencies and of the CPSC, which was brought under the section's coverage as a result of an amendment contained in section 18 of the Consumer Product Safety Commission Improvements Act, 90 Stat. at 514. Also, 18 U.S.C. § 111 (1970) makes it a federal crime forcibly to assault, resist, oppose, impede, intimidate or interfere with a person designated in 18 U.S.C. § 1114 while he is engaged in, or on account of, the performance of his official duties.

We do not disagree with the statement in the Senate Report (at page 8) that there should be no distinction, for purposes of federal criminal jurisdiction, between officers and employees of the Executive Branch and those of independent agencies, but we question whether piecemeal amendment to 18 U.S.C. §§ 111 and 1114 is the proper approach. This Department has previously sought more general amendment to those provisions bringing within federal jurisdictions all assaults on federal officers occasioned by their status or their performance of duties. This is the approach taken in S. 1, 94th Cong. (as introduced Jan. 15, 1975).

VII. Avoidance of Conflict of Interest

The organic acts of each of the seven agencies would be amended by sections 10, 12(d), 13(f), and 14(b) of S. 3308 to provide that no commissioner or member shall, for a period of two years following the termination of his service as a commissioner or member, "represent any person before the [Commission or Board] in a professional capacity."[8] The prohibition is intended to prevent a conflict of interest or the appearance of a conflict of interest, Senate Report at 8, presumably resulting from the possibility that a former commissioner or member might have lingering influence with the agency by virtue of his former position.

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[8] Section 14(b) would add a new section 102(e) to Reorganization Plan 7 of 1961 to prohibit a commissioner of the Federal Maritime Commission from engaging in any other business, vocation, profession, or employment. A similar prohibition is already in effect for members of the other six agencies, although only FCC commissioners are expressly precluded from engaging in any other "profession." 47 U.S.C. § 154(b) (1970). For the sake of uniformity, S. 3308 would add the word "profession" to the provisions applicable to the CPSC (§ 10(d)), FTC (§ 10(a)), CAB (§ 12(d)), ICC (§ 13(f)), and FPC (§ 10(c)). We have no objection to these changes.

Under existing law, a specific prohibition similar to this is in effect only for former FCC commissioners, although the FCC provision is applicable only for one year and only if the former commissioner did not serve the full term for which he was appointed. However, members and employees of all seven agencies covered by S. 3308 are subject to the criminal conflict of interest laws, including 18 U.S.C. § 207 (1970). Subsection (a) of section 207 bars a former officer or employee of an independent agency from knowingly acting as agent or attorney for anyone other than the United States, either before the agency or in court, in connection with any case or other particular matter in which he participated personally and substantially as such an officer or employee. In addition, subsection (b) prohibits a former officer or employee of an independent agency, for a period of one year following the termination of his service, from knowingly acting as agent or attorney for anyone other than the United States in connection with any particular matter which was under his "official responsibility" within one year prior to the termination of such responsibility. All matters pending within an independent agency are under the "official responsibility" of the commissioners or members. *See* 18 U.S.C. § 202(b) (1970). Thus, the effect of 18 U.S.C. § 207(b) is to prohibit, for a period of one year, a former commissioner or member of any of the agencies involved here from representing a private party in connection with any particular matter that was pending within the agency during the year prior to the time he left office, even if he had not participated in it or had no knowledge of it while he was in office.

The conflict of interest section of S. 3308 would supplement the existing ban on representational activity contained in 18 U.S.C. § 207. We recommend that the Department support this proposal. Former commissioners or members are free under 18 U.S.C. § 207 to represent private parties before the agency in which they previously served in new matters that arise in the agency after they leave. Yet the potential for a former commissioner or member to exert undue influence in an agency proceeding because of his prior position is just as great in new matters as in matters that were pending in the agency at the time he was there. S. 3308 would prevent the use of such influence.

S. 3308 would impose a two-year ban on representational activities rather than the one-year ban found in 18 U.S.C § 207. This longer period was chosen to make the conflict of interest section in S. 3308 consistent with 18 U.S.C. § 283,[*] which prohibits a retired officer of the Armed Forces of the United States, during the two years following his retirement, from acting as agent or attorney or otherwise

[*] Editor's Note: By the time of this opinion, 18 U.S.C. § 283 was listed in the U.S. Code as having been repealed. *See* 18 U.S.C. §§ 281–284, at 4185–86 (1970). As explained in the reporter's note to the 1970 edition of the U.S. Code, however, section 283 was only partially repealed by section 2 of Public Law 87-849, 76 Stat. 1119, 1126, and remained applicable to "retired officers of the armed forces of the United States." *Id.*

assisting in the prosecution of a claim against the United States involving the department in which he holds retired status.

Unlike 18 U.S.C. §§ 207 and 283, the conflict of interest provisions of S. 3308 would prevent representational activities only before the agency itself, not those rendered in court in connection with matters under the agency's jurisdiction, such as in judicial review of an agency order. We have no objection to this more limited scope of S. 3308. There is obviously a much greater potential for a former commissioner or member to use undue influence in administrative proceedings in which he is dealing directly with his former colleagues and subordinates than there is once the matter reaches court, where the case is subject to independent supervision by the court.

Also, we note the S. 3308 does not provide for criminal sanctions for former commissioners and members who violate its conflict of interest provisions. Presumably each agency will enforce the ban on representational activities by disqualifying the individual involved, either on its own motion or on the motion of a party to the administrative proceeding in which the former commissioner or member is appearing. This method of enforcement should be adequate. Because the ban extends only to services rendered before the agency, agency officials will be in a position to detect most if not all violations. For this reason, and because attorneys—the group at which this aspect of S. 3308 apparently is aimed[9]—would be required as a matter of professional ethics to comply with the ban, *see* ABA, Model Code of Professional Responsibility, DR Rule 2-110(B) (1976), the added deterrent effect of criminal sanctions does not appear to be necessary in order to accomplish the purposes of the statute.

VIII. Accountability

Sections 11, 12(a), 13(g), and 14(a) of S. 3308 would amend the organic act of six of the agencies to provide that the Federal Tort Claims Act, 28 U.S.C. § 2680(a), (h) (1970 & Supp. V 1975), does not prohibit the bringing of a civil action against the United States based upon misrepresentation or deceit on the part of the agency or any of its employees or based upon any exercise or performance, or failure to exercise or perform, a discretionary function on the part of the agency or its employees which was grossly negligent.[10] Judgments would be paid out of general funds rather than out of funds appropriated for the operation of the respective agencies. Senate Report at 9.

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[9] S. 3308 prohibits a former commissioner or member from representing a person before the agency "in a professional capacity." *See also* Senate Report at 8. The phrase "acts as agent or attorney," which appears in 18 U.S.C. §§ 207 and 283, is somewhat broader, covering informal contacts on behalf of others by the former employee in addition to those made in a professional capacity.

[10] The waiver of sovereign immunity in S. 3308 would apply only with respect to acts committed by the agencies or their employees prior to January 1, 1979, so that Congress may assess the impact of the waiver for discretionary acts before making it permanent. Senate Report at 9.

The sovereign immunity sections of S. 3308 are drawn almost verbatim from a provision that is already applicable to the CPSC. 15 U.S.C. § 2053(i) (as added by section 5 of the Consumer Product Safety Commission Improvements Act, 90 Stat. at 504). The Department of Justice apparently did not formally relay its views to Congress on that aspect of the CPSC legislation, but Assistant Attorney General Uhlmann did advise OMB by letter dated May 5 that the Department would support a veto of the bill (S. 644) because of the waiver of sovereign immunity and the expansion of the CPSC's litigating authority. The President approved the CPSC legislation without mentioning the Department's reservations. We assume that the Department will oppose an identical waiver of sovereign immunity for the other six agencies covered by S. 3308.

However, it should be noted that both the CPSC statute and the pertinent sections of S. 3308 contain two features which might serve to limit the scope of the waiver of sovereign immunity to some extent. First, there can be no recovery on a claim against the United States which is based on "agency action" as defined in 5 U.S.C. § 551(13) (1970)—i.e., "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." The purpose of the exception in the CPSC legislation was to eliminate the possibility that an action to recover damages under the Federal Tort Claims Act based on the performance of or failure to perform a discretionary act would be used as an alternative to seeking judicial review of the agency action under the Administrative Procedure Act. 121 Cong. Rec. 23,577–78 (July 18, 1975). We assume that the corresponding exceptions in S. 3308 have the same purpose. The effect of the qualification, however, will be to preclude liability for most major policy determinations which the discretionary act exception in the Federal Tort Claims Act, 28 U.S.C. § 2680(a), was designed to insulate from liability for damages. Presumably, this exception for agency action in S. 3308 will also apply to discretionary decisions and acts in the course of the administrative process which precede a final agency determination, not merely the formal agency action itself.

Second, the CPSC provision (15 U.S.C. § 2053(i) (as added by section 5 of the Consumer Product Safety Commission Improvements Act, 90 Stat. at 504)) and S. 3308 (§§ 11(a)(1), 11(b), 11(c)) both provide that a judgment may not be entered against the United States on a claim based upon the performance of or failure to perform a discretionary function "unless the court in which such action was brought determines (based upon consideration of all the relevant circumstances, including the statutory responsibility of the [agency] and the public interest in encouraging rather than inhibiting the exercise of discretion) that such exercise, performance, or failure to exercise or perform was unreasonable." As Assistant Attorney General Uhlmann pointed out in his May 5 letter to OMB on S. 644, this "reasonableness" test appears on its face to impose a standard of conduct on the agency and its personnel that is more lenient than and therefore inconsistent with the requirement, also contained in the CPSC legislation and S. 3308, that a claimant may not recover damages unless the discretionary conduct at issue was

"grossly negligent." However, the conference report on the CPSC legislation states that the court must find that the discretionary conduct was unreasonable "as a matter of law." H.R. Rep. No. 94-1022, at 18 (1976) (Conf. Rep.). This is the standard under tort law generally for taking an issue away from the jury, and it is ordinarily thought to be satisfied only when no reasonable person could reach a contrary conclusion. William L. Prosser, *Handbook of the Law of Torts* § 37, at 207 (4th ed. 1971). If Congress actually intends to impose such a stringent limitation on recoveries in addition to the separate requirement that the conduct be "grossly negligent," the waivers of sovereign immunity in S. 3308 may not result in many recoveries. But passage of this feature of the bill could nevertheless result in the filing of numerous and often frivolous damage claims by disgruntled persons or companies who have been only incidentally injured by a low level administrative decision or oversight. It is by no means clear that the cost and effort entailed in processing and defending all such claims is warranted in order to permit recovery in a few meritorious cases.

The CPSC provision which serves as a prototype for the sovereign immunity sections of S. 3308 was passed largely in response to a single incident involving the Marlin Toy Company that arose when the CPSC mistakenly included one of the company's products on a list of banned products. When Marlin requested that the list be corrected, the CPSC admitted its error but did not issue a retraction until it published a new list some eight months later. The company sustained a substantial financial loss as a result, but it could not recover until the Congress enacted special legislation enabling it to do so. *See* 121 Cong. Rec. 23,578 (July 18, 1975); 121 Cong. Rec. 33,686 (Oct. 22, 1975). We agree with the observation of Assistant Attorney General Uhlmann in his letter to OMB on S. 644 that the genuine hardship cases that have given rise to the sentiment in support of the CPSC provision, and presumably those in S. 3308 as well, are best dealt with by private relief legislation, as was in fact done in the Marlin Toy Company case.

For the foregoing reasons, we recommend that the Department oppose the adoption of the sovereign immunity sections of S. 3308. This could be justified on the ground that it is necessary to assess the impact of the special CPSC provision before extending the concept to other agencies.

MARY C. LAWTON
Deputy Assistant Attorney General
Office of Legal Counsel

OTHER MEMORANDA AND CORRESPONDENCE

OF THE

DEPARTMENT OF JUSTICE

Constitutionality of Legislation to Confer Citizenship Upon Albert Einstein

Congress has the authority to enact a law granting citizenship to Albert Einstein.

April 9, 1934

MEMORANDUM FOR THE ASSISTANT SOLICITOR GENERAL

The Constitution, Article I, Section 8, Clause 4 provides that:

> The Congress shall have Power . . . to establish an uniform Rule of Naturalization . . . .

In the early days of the government the courts seemed inclined to the view that the power to admit to citizenship remained in the states, except as Congress might provide uniform rules on the subject, which would supersede any state rules or laws. However, the courts soon adopted the view, which has since prevailed unquestioned, that the exclusive power to admit to citizenship vests in the Congress. *See* Frederick Van Dyne, *Treatise on the Law of Naturalization of the United States* 6–9 (1907) ("*Treatise on Naturalization*") (discussion of cases); U.S.C.A. Const., pt. I, at 378–79 (1928) (digest of cases); *United States v. MacIntosh*, 283 U.S. 605, 615 (1931) ("Naturalization is a privilege, to be given, qualified or withheld as Congress may determine").

The requirement of uniformity does not appear to have been judicially considered except as indicated in the following excerpt from *Darling v. Berry*:

> In my opinion, when a bankrupt, revenue, or *naturalization law is made by its terms applicable alike to all the states* of the Union, without distinction or discrimination, it cannot be successfully questioned on the ground that it is not uniform, in the sense of the constitution, merely because its operation or working may be wholly different in one state from another.

13 F. 659, 667 (C.C.D. Iowa 1882) (emphasis added).

Ruling Case Law states that:

> The requirement of uniformity is construed to mean that the mode or manner of naturalization prescribed by Congress should have uniform operation in all the states.

1 R.C.L. § 62, at 848 (William M. McKinney & Burdett A. Rich eds., 1914).

Congress has long exercised the power of conferring citizenship by the following methods:

(l) General statutes empowering the courts upon the finding of prescribed facts to grant certificates to persons within classes specified.

(2) General statutory provisions conferring citizenship upon aliens who marry American citizens, upon children of aliens whose parents acquire American citizenship, etc.

(3) Statutes admitting to citizenship aliens residing in the United States during prescribed periods; thus, the Act of April 14, 1802, admitting all persons residing in the United States before January 29, 1795, upon proof of two years residence.

(4) The statutes admitting to citizenship all persons, or specified classes of persons, residing in purchased or conquered territory.

(5) Statutes admitting to citizenship Indians of specified tribes.

(6) Statutes and resolutions conferring citizenship upon individual aliens, designated by name.

(7) Practically every treaty of cession has contained provisions concerning the collective naturalization of persons within the ceded territory, sometimes with express exceptions.

The foregoing methods are treated with illustrations in Van Dyne, *supra*, and Alexander Porter Morse, *Treatise on Citizenship* (1881). *Boyd v. Thayer* states that "[t]he instances of collective naturalization, by treaty or by statute, are numerous," pointing out a number of such instances, and specifically upholding all such collective naturalization as applied to persons within the territory of Nebraska. *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 162 (1892).

Concerning naturalization of named individuals by special act or resolution, Van Dyne states that "[t]here are numerous instances of naturalization by special statutes." *Treatise on Naturalization* at 317.

Morse states generally: "Sometimes the sovereign power or legislative will speaks directly, and grants naturalization to a particular individual by name." *Treatise on Citizenship* § 93, at 128.

The following are instances of naturalization of named aliens by a special act or resolution of Congress:

Nellie Grant Sartoris, married an alien and readmitted to American citizenship by Resolution of March 18, 1898, 30 Stat. 1496.

Eugene Prince, son of an American citizen residing abroad, admitted to citizenship by Resolution of July 19, 1912, 37 Stat. 1346.

George E. Lerrigo, son of an American citizen residing abroad, admitted to citizenship by Act of February 23, 1915, 38 Stat. 1476.

> Mrs. Slidel, of Louisiana, admitted to American citizenship by special act or resolution about 1915. Information supplied by the Bureau of Naturalization but no act or resolution can be found—possibly accounted for in that Mrs. Slidel may have been admitted under her maiden name and afterwards married.
>
> Joseph Beech, an alien of many years residence in the United States, admitted to citizenship by Resolution of February 26, 1917, 39 Stat. 1495.
>
> Frances Scoville-Mumm, American citizen married to an alien, readmitted to citizenship by Resolution of October 25, 1919, 41 Stat. 1449.
>
> Augusta Louise deHaven-Alten, American citizen married to an alien, readmitted to citizenship by Resolution of April 8, 1920, 41 Stat. 1463.

The Bureau of Naturalization (Mr. Volker) states that there have been other such special acts and resolutions but that no records have been kept and that it would be impossible to compile such cases except through the expedient of a page-by-page examination of the statutes since the beginning of the government.

Of course, all efforts in Congress to confer citizenship by a special act or resolution are not successful. For example, a resolution was introduced in the House of Representatives on December 3, 1930, to confer citizenship upon Mr. Brent Balchen, the renowned explorer. 74 Cong. Rec. 166. While the Resolution remained undisposed of, Mr. Balchen applied for and obtained naturalization under the general statutes. This information is supplied by the Bureau of Naturalization.

All such acts and resolutions have conferred citizenship "unconditionally," usually in language substantially similar to that of the resolution now pending, except, of course, as to the part which recites the considerations upon which the proposed action would be taken.

Mr. Volker stated that the files of the Bureau of Naturalization disclose that no question concerning the power of Congress to confer citizenship in such manner was raised until recent years. Formerly, they considered such questions when presented only upon consideration of the merits of the particular case, but lately they have inclined to the view that such naturalization may be construed as a violation of the constitutional provision concerning "an uniform Rule." He says they have no authorities, but rely solely upon the language of the Constitution.

I think the view presently entertained by the Bureau of Naturalization is erroneous. As indicated above, the uniformity mentioned is geographical uniformity. Prior to the Constitution when the states exercised the power of naturalization, it was possible for a person to be a citizen in one state and an alien in another. It was this condition which the constitutional provision was intended to remedy. Furthermore, the practice, since the earliest days, is opposed to the view that Congress

may not discriminate against or in favor of aliens upon considerations of race, nationality, geographical residence (either abroad or in this country), relationships by blood or consanguinity, periods of residence, education, etc. In other words, Congress has the sole power to determine the requisites of citizenship by naturalization, and to determine even more specifically who may or who may not be admitted to such citizenship.

Mr. Volker says that they concede the power of Congress to admit to citizenship directly rather than leaving it to others to ascertain the prescribed facts and they admit the power of Congress to specify a class so limited that perhaps only Professor Einstein might come within it. These things, I think, are necessarily true and when you accept them, it appears to me to be somewhat inconsistent to question the power of Congress to admit Professor Einstein to citizenship by name and without more. Even assuming that the uniformity requirement means avoidance of discrimination as applied to individual aliens, it would still be necessary to prove that Congress would not take the same action with respect to other aliens of similar status and circumstances in order to prove discrimination.

The files have been examined carefully and do not reveal any previous consideration of such a question in this department.

Of course, it may be unwise to admit Professor Einstein to citizenship, and I have found no case of the admission of an alien under precisely similar circumstances.

J.T. FOWLER, JR.
Attorney-Adviser
Office of the Assistant Solicitor General

Jurisdiction and Procedure of the Office of the Assistant Solicitor General

This memorandum summarizes the authorities and internal operating rules for the Office of the Assistant Solicitor General, the predecessor entity within the Department of Justice to the Office of Legal Counsel. Although the litigation functions have largely been shifted to other components, many of the other practices and procedures described in this memorandum (in particular, preparation of opinions and review of executive orders) remain in place to the present day.

June 1, 1939

MEMORANDUM FOR THE OFFICE OF THE ASSISTANT SOLICITOR GENERAL

In the belief that it will be of assistance to this office both now and in the future to have in written form an outline of its jurisdiction and procedure, I am setting down the matters which now are assigned to it and the manner in which they are now handled. Of course, hereafter the assignments to the office may be increased or decreased and it may be found advantageous to make changes in the present procedure of the office; but a description of the present jurisdiction and practice will be useful as a basis for future action—particularly for successors to me and additions to the staff of the office.

I.

Procedure in Handling Special Assignments

The act creating the office of the Assistant Solicitor General (Independent Offices Appropriation Act, 1934, Pub. L. No. 73-78, § 16, 48 Stat. 283, 307–08 (June 16, 1933), *codified at* 5 U.S.C. § 293a (1934)) provides that he is to assist the Solicitor General in the performance of his duties and perform such additional duties as may be required of him by the Attorney General. By Departmental Order 2507 of December 30, 1933, it was provided that the Department should consist, among others, of the Office of the Assistant Solicitor General, and its functions were set forth in Exhibit A accompanying that order as:

> 1. Such matters (including briefs and arguments in the Supreme Court) as may be assigned by the Solicitor General.
>
> 2. Executive orders.
>
> 3. Compromises.
>
> 4. Preparation of opinions.
>
> 5. Special assignments by the Attorney General.

It will be noted that divisions 1 and 5 comprehend assignments of any character upon which either the Attorney General or the Solicitor General desires assistance. Divisions 2 (which comprehends also proclamations), 3, and 4 are more specific and the procedure in handling those matters will be indicated under separate headings. Because the assignments under 1 and 5 are so miscellaneous in character, it is impossible here to do more than mention some that are more or less typical. In general the office procedure and mechanics indicated under the other headings cover that applicable to these two.

A standing assignment from the Solicitor General is the preparation of recommendations by this office to him for or against the taking of appeals from the United States Customs Court to the Court of Customs and Patent Appeals; this assignment will be handled under a separate heading hereafter. *See infra* Part VI.

A standing assignment from the Attorney General is the handling of gifts, bequests, and devises to the United States, and this also will be handled under a separate heading hereafter. *See infra* Part VII.

In April 1936 the Attorney General began sending to this office for its recommendation for or against allowance of claims presented under the Trading with the Enemy Act, as amended, for the return of property seized by the Alien Property Custodian during the World War. Since Executive Order 8136 of May 15, 1939, 3 C.F.R. 500 (1938–1943), however, these claims rarely go through this office.

Acting Attorney General. By Departmental Order 2860 of June 20, 1936, the Assistant Solicitor General is Acting Attorney General in the absence of the Attorney General and the Assistant Attorneys General.

Acting Solicitor General. By Departmental Order 2869 of July 7, 1936, in the absence of the Solicitor General, the Assistant Solicitor General is Acting Solicitor General.

Supreme Court Cases. From time to time the Solicitor General may assign to this office the preparation and argument of cases in the Supreme Court. Generally the briefs in such cases have been prepared in the division which has handled them in the lower courts and reviewed by a member of the Solicitor General's staff. Sometimes opportunity is afforded in cases assigned to the Assistant Solicitor General for argument to revise the briefs before they are printed, in which event this office makes such changes as it deems desirable if approved by the Solicitor General. The Assistant Solicitor General argues the cases personally unless assigned by the Solicitor General to a member of the staff of this office. He is assisted in the preparation for argument by such members of the staff of this office or of that of the Solicitor General's as he may call upon.

Intradepartmental Opinions. Requests frequently are received from the Attorney General, the Solicitor General, or the heads of the respective divisions or bureaus for opinions presented in the administration of this Department. Sometimes the President may desire informal advice and either a memorandum prepared in this office directed to the Attorney General or in blank is transmitted to the

President with a covering communication from the Attorney General, or the Attorney General orally advises on the basis of such memorandum. When such matters are received in this office, they are assigned to one or more of its attorneys who prepare the required memoranda for transmission by the Assistant Solicitor General.

Committees. The Assistant Solicitor General or members of his staff sometimes are appointed to represent the Attorney General on committees of various kinds. In such event they attend committee meetings and actively assist in their work.

Preparation of Proposed Legislation. Sometimes the Attorney General calls upon this office to draft or to assist interested departments or agencies to draft legislation to be submitted to the Congress.

II.

Procedure in Handling Proposed Executive Orders and Proclamations

Authority of the Attorney General for Considering Proposed Executive Orders and Proclamations. Executive Order 7298 of February 18, 1936, requires that all executive orders and proclamations be submitted to the Attorney General for his consideration as to form and legality before submission to the President. This order superseded Executive Order 6247 of August 10, 1933, which contained a similar provision.

Reference to the Attorney General. Paragraph 2 of the said Executive Order 7298 provides that proposed executive orders and proclamations shall first be submitted to the Director of the Bureau of the Budget and that after he approves them he shall transmit them to the Attorney General for his consideration. The Attorney General has assigned the function of considering proposed orders and proclamations to the Office of the Assistant Solicitor General.

File Numbers. Upon receipt of the proposed order or proclamation in the Office of the Attorney General it is sent to the Division of Records, where it is given the proper file number and then transmitted to this office. If the order is deemed urgent, it is sent directly to this office from the Attorney General's office, and is not given a file number until after it has been disposed of. In any event, however, the order is given preferred attention in the Division of Records and is sent to this office as expeditiously as possible.

Preliminary Examination. The attorney in this office to whom the order or proclamation is assigned examines the order as soon as he receives it to determine how expeditiously it should be handled. Frequently after it is received in the Department of Justice the presenting agency requests that it be given preferred attention in this Department so that it may reach the White House as soon as possible. All proposed orders and proclamations are handled as promptly as possible whether considered urgent or not.

Views of Other Officers. In some cases, because of the nature or subject matter of the order, it is referred to another division or divisions in the Department for their views and recommendations. This is particularly true in regard to orders involving public land, such orders being occasionally referred to the Lands Division. In other cases, because of doubtful legal questions involved, the head of the presenting department or agency is requested to furnish an opinion of its chief law officer as to the legality of the order or proclamation.

Consideration and Revision. In accordance with the requirements of Executive Order 7298, this office considers proposed orders and proclamations as to both form and legality. It is first determined whether the order is legally authorized. If it is found to be without sufficient legal authority, the presenting agency is informally notified of the Department's views and consideration is given to the question whether the order can be modified so as to eliminate the legal objections. If this cannot be done so that it is satisfactory to the presenting agency, the order is either withdrawn by the presenting agency or returned with a letter of the Attorney General setting forth the legal reasons why the order cannot be approved.

If the order is found to be legally unobjectionable there is for determination the question whether it should be revised as to form. It has been found that in the vast majority of cases revision as to form and language is necessary, although the order may be without legal objection. Section 1 of Executive Order 7298 provides that proposed orders and proclamations shall be prepared in accordance with certain formal requirements, for example, the authority under which it is issued must be cited, it must be typewritten on paper of a certain size, and matters of style (punctuation, capitalization, spelling, etc.) must conform to the Government Printing Office style manual. The instrument is revised to conform to these more or less mechanical requirements. However, the most important function in revision is to give the order or proclamation the proper language and structure. The aim is to make it clear and unambiguous by conforming it to all the principles of good writing and good composition. Generally, revisions in form are made without consultation with or the consent of the presenting agency; in some cases, however, the changes are so extensive that the revision is referred informally to the presenting agency for its approval. In no case is a change made in the substance of the order without the approval of the presenting agency.

Submission to the Attorney General. After the proposed order or proclamation has been properly revised, in case revision is necessary, it is submitted, with four carbon copies thereof (three of which accompany the original to the White House), to the Attorney General by memorandum of the Assistant Solicitor General, which, ordinarily, contains a description and explanation of the order and a citation and discussion of the law under which the order is authorized. Accompanying the memorandum to the Attorney General is a draft of a transmittal letter to the President for the signature of the Attorney General if the order is approved by him. This letter ordinarily contains an explanation of the order and states that it is approved as to form and legality.

Opinions. In a considerable number of cases where difficult points of law are involved the Attorney General in his letter to the President expresses his opinion in some detail on the legality of the order—such opinions being similar in all essential respects to opinions expressly requested of the Attorney General by the President. Such opinions may or may not be published, according to the general principles governing the publication and non-publication of opinions of the Attorney General.

Transmission to Mail Room. When the transmittal letter to the President is signed by the Attorney General, it is sent, together with the memorandum and the proposed order, to the mail room for proper recordation. In accordance with the said Executive Order 7298 it is then transmitted to the Division of the Federal Register, National Archives, which in turn forwards it to the White House. In some urgent cases the proposed order is brought to this Department by a representative of the Bureau of the Budget, who desires to carry the order to the White House after it is approved by the Attorney General and the Division of the Federal Register. In such cases the order is returned to this office by the office of the Attorney General and then delivered to the representative of the Bureau of the Budget.

Publication and Printing. In conformity with the requirements of the Federal Register Act approved July 26, 1935 (Pub. L. No. 74-220, § 5(a)(1), 49 Stat. 500, 501), all executive orders and proclamations having general applicability and legal effect are published in the Federal Register. All other orders and proclamations are printed and copies thereof furnished this office.

File and Index. The chief attorney of this office maintains a complete file of all proposed Executive orders and proclamations handled by this office, together with copies of all memoranda to the Attorney General and transmittal letters to the President. Such correspondence is filed in loosely bound volumes, each volume containing the correspondence for one calendar month. In addition, the chief attorney maintains a separate record of all proposed executive orders and proclamations submitted by this office to the Attorney General. A topical index of all proposed executive orders and proclamations handled by this office is being prepared under the direction of, and will be maintained by, the chief attorney.

Informal Submission to this Office. In a considerable number of cases proposed orders or proclamations are informally submitted for the consideration of this office either as to form or legality, or both. As an accommodation to and for the convenience of the presenting agency, an attorney of this office revises the draft so submitted or suggests changes therein. In some cases, also, this office is informally requested to draft or aid in the drafting of a proposed order or proclamation before its formal submission.

III.

Procedure and Jurisdiction in Handling Offers in Compromise

Thoroughness and Expedition. In the handling of offers in compromise the primary purpose of the Department is to act for the best interests of the United States. Final action on offers in compromise should be expedited as much as possible, always consonant, of course, with thorough and careful consideration of the facts and the law involved. Expedition benefits both the government and the citizen.

Order of Procedure. When an offer in compromise is received in the Department to pay the government an amount in satisfaction of a claim by it, or to accept from the government an amount in satisfaction of a claim against it, the offer is referred to the division or bureau in the Department which handles that type of case. There it is studied and further investigated if necessary. Then the offer is transmitted to the Assistant Solicitor General with the file and the recommendation of the head of the division or bureau for acceptance or rejection of the offer. In the office of the Assistant Solicitor General the case is assigned to an attorney for careful review. If the case is complicated, or there is doubt respecting the recommendation, frequently it is reviewed in the Assistant Solicitor General's office by more than one attorney. Then it is submitted to the Assistant Solicitor General with the recommendation or recommendations of the reviewer or reviewers and he either accepts or rejects the offer or makes his recommendation to the Attorney General, depending on the amounts involved as hereinafter noted. If within the final jurisdiction of the Assistant Solicitor General, his office then transmits it back to the division or bureau from which it came. If the amounts bring the case within the Attorney General's exclusive jurisdiction, after he has acted on the Assistant Solicitor General's recommendation, the case is referred back to the division in which it originated through the Assistant Solicitor General's office, in order that it may be advised of the action of the Attorney General.

Recommendations of U.S. Attorneys, etc. If an offer in compromise grows out of a case pending in the office of a United States Attorney, it is usually referred to that official for his recommendation. In war risk insurance cases the United States Attorney's recommendation is required by statute. It is also customary, with the exception of war risk insurance cases, to refer the case to the department or bureau in which it originated for comment on the offer. Although this Department is not bound by the recommendations of other departments or bureaus, careful consideration is given to their recommendations.

Tenders with Offers. In any case involving a claim in favor of the United States, the amount offered in compromise should be submitted with the offer. Occasionally the Department accepts an offer which is to be paid on the installment basis. In such cases it is desirable that the installment payments should not be

extended over a period of more than one year. Unless the full amount of an offer is paid at the time of acceptance, suits are not dismissed and judgments are not entered as satisfied on the record until the full amount of the offer has been paid.

Jurisdiction of the Assistant Solicitor General. By Departmental Order 2873 of July 14, 1936, the Attorney General authorized the Assistant Solicitor General to take final action on offers in compromise in cases involving claims in favor of the United States not exceeding $50,000 and in cases involving claims against the United States where the amount of the proposed settlement does not exceed $10,000. By the same order the Attorney General authorized United States Attorneys to compromise directly Indian claims and security and farm credit loan claims in cases not exceeding $500 upon the recommendation of the Superintendent of the local Indian agency or the local representative of the administration which made the loan, respectively. In all other cases action by the Attorney General is required.

Attorney General's Compromise Power. The authority of the Attorney General to compromise claims in favor of and against the United States is derived in part from statutes and in part from the inherent power in the office. The power to compromise granted to the Secretary of the Treasury and other officers under the provisions of such statutes as sections 3229 and 3469 of the Revised Statutes (2d ed. 1878), 18 Stat. pt. 1, at 620, 688 (repl. vol.); section 617 of the Tariff Act of June 17, 1930, Pub. L. No. 71-361, 46 Stat. 590, 757; and section 9 of the Suits in Admiralty Act of March 9, 1920, Pub. L. No. 66-156, 41 Stat. 525, 527–28, was transferred to the Attorney General in connection with any case referred to the Department of Justice by Executive Order 6166 of June 10, 1933. Thus, once a case is referred to the Department of Justice for action, the power to compromise that case is vested in the Attorney General regardless whether some other officer had power to compromise it prior to the reference. The Attorney General has direct statutory power to compromise yearly term war risk insurance cases after suit has been instituted under the Act of June 16, 1933, Pub. L. No. 73-78, 48 Stat. 283, 302, as amended by the Act of February 24, 1938, 52 Stat. 81 (codified at 38 U.S.C. § 445(b)), and also suits brought under the Public Vessels Act, Pub. L. No. 68-546, 43 Stat. 1112 (codified at 46 U.S.C. § 786). The Attorney General under his broad primary power also has authority to compromise any case which has been referred to him for litigation and matters germane thereto. *See Compromise of Claims Under Sections 3469 and 3229 of the Revised Statutes—Power of the Attorney General in Matters of Compromise*, 38 Op. Att'y. Gen. 98 (1934) (Cummings, A.G.).

Basis for Acceptance. Claims in favor of or against the United States cannot be compromised unless there is a sufficient basis for such action. Mere considerations of equity, hardship, sympathy, etc. do not furnish such a basis. In cases involving claims by the United States to justify compromise it must be shown (1) that a judgment in all probability cannot be recovered, or (2) that a judgment, if recovered, in all probability cannot be collected. The question whether a judgment can

be recovered usually depends upon legal or factual considerations. If the law as laid down by the courts is contrary to the government's contentions or if the government does not have the requisite testimony to prove its case within a reasonable certainty, there is sufficient doubt as to the ability of the government to recover a judgment to justify compromise. If there is little or no doubt that the government can recover a judgment, compromise can only be made when it appears improbable that more than the amount offered can be collected. In cases involving insolvent defendants, the government has the right of priority under the provisions of section 3466 of the Revised Statutes (2d ed. 1878), 18 Stat. pt. 1, at 687 (repl. vol.), and if the defendant's property is not covered by prior liens, the government under its right of priority may be able to collect even though he is insolvent. However, as against insolvent banks, the government may not collect tax claims if to do so will diminish the assets necessary to pay the depositors. *See* 12 U.S.C. § 570.

With reference to claims against the United States, the only question to be considered is whether the United States can successfully defend, since in such cases there is no question of collectibility. Claims against the United States may not be compromised without express statutory authority unless there is an appropriation available to pay them. Ordinarily claims against the United States are not compromised by the Department until suit has been instituted. The statutes which expressly authorize the Attorney General to compromise so provide. In other cases the claims are not referred here until suit has been instituted. *See* Annual Report of the Attorney General, 1938, at 77.

Criminal Cases. Criminal cases may not be compromised without express statutory authority. The only class of criminal cases which Congress has authorized government officers to compromise are those arising under the Internal Revenue laws. *See* section 3229 of the Revised Statutes; section 7 of the Federal Alcohol Administration Act, Pub. L. No. 74-401, 49 Stat. 977, 985–86 (codified at 27 U.S.C. § 207). In connection with income, gift, and estate tax cases, the policy of the Department is not to accept money in compromise of criminal liability. If the case is one where successful prosecution is unlikely, the case may be compromised by payment of an amount not less than the government could otherwise collect. If the case is one wherein prosecution is likely to be successful, the Department will accept only the maximum amount of the taxes, penalties, and interest which the taxpayer can pay, together with a plea of guilty or *nolo contendere*. After compromise the case is submitted to the court by the United States Attorney without any recommendation for or against leniency. In connection with minor liquor tax violations, the Department accepts amounts of money in compromise of criminal liability in appropriate cases. *See* Annual Report of the Attorney General, 1938, at 76, 92, 200.

War Risk Insurance Cases. As heretofore stated, the Attorney General is authorized by law to compromise any suit brought under the provisions of the World War Veterans' Act, 1924, Pub. L. No. 68-242, 43 Stat. 607 (as amended), on a

contract of yearly renewable term insurance, upon the recommendation of the United States Attorney charged with the defense, for sums within the amount claimed to be payable. The maximum face value of such a contract is $10,000. This authority does not extend to suits brought on converted policies. The Veterans Administration's files in cases recommended by the United States Attorney for acceptance are referred to the Bureau of War Risk Litigation for use of the Director in preparing his recommendation to the Assistant Solicitor General upon the merits of the claim. Since the plaintiffs in these suits are entitled to trial by jury, each case is examined, after investigation by the Federal Bureau of Investigation, to determine whether plaintiff has sufficient evidence to make a prima facie case for a jury and whether such evidence is sufficient to support a verdict. In those cases where it appears that plaintiff can get his case to a jury and it seems probable that a verdict would be returned in his favor, the compromise offer, if reasonable, is accepted. Action by the Assistant Solicitor General for the Attorney General is final, unless the amount to be paid out exceeds (as is rarely the case) $10,000. Where acceptance is indicated, the Assistant Solicitor General signs a written consent to enter judgment. The case is then referred back to the United States Attorney for entry of judgment against the United States. *See* Annual Report of the Attorney General, 1938, at 202.

Note. Assistant Solicitor General Bell discussed the general subject of compromise before a conference of United States Attorneys in Washington on April 21, 1939. That discussion is to be printed and reference may be made to what was then said by him and the heads of other divisions and bureaus on the subject.

IV.

Procedure in Handling Opinions

Prime Purpose. In the preparation and publication of opinions requested by the President and the heads of the executive departments, including the Veterans Administration, the following steps ordinarily are taken in the order in which they are set forth; but this detail and routine is not permitted to interfere with the accomplishment of the prime purpose—the prompt preparation of well considered opinions.

Weekly Report. The weekly report of this office to the Attorney General should show file numbers and (l) all opinions completed and sent to the Attorney General during the week; (2) all opinions transmitted to the Chief Clerk for publication; and (3) all opinion requests pending, from whom and when received, when acknowledged, present status and the estimated date of completion. (For form see previous weekly reports.)

File Numbers. Requests for opinions are routed to the Assistant Solicitor General, sometimes directly from the Attorney General's office and sometimes through the Division of Records. In the latter case, file numbers are assigned by

the Division of Records. If no file number has previously been assigned, the papers are forwarded to the Division of Records for this purpose.

Acknowledgment. If an opinion is to be rendered but cannot immediately be prepared because of the necessity for study, etc., an acknowledgment of the request should be made without delay.

Unauthorized Requests. If the request is from an officer or other person not authorized by law to require opinions of the Attorney General, a letter is prepared acknowledging the request and then stating, with such variations as the case and courtesy may require:

> The Attorney General is authorized by statute to give opinions only to the President and the heads of the executive departments. He would like to be of service to you but I am sure you will feel, as he does, that he ought not depart from the prevailing practice.

It is the practice, however, to supply any helpful information that may be available, particularly if the request is from a member of the Congress; and if the request is from the head of an independent establishment other than the Veterans Administration (which is authorized by law to obtain opinions) the suggestion is often made, either within the letter or otherwise informally, that under established practice opinions required for the guidance of the independent establishments may be requested by the President, if he deems it proper, upon suggestion from the agency concerned.

Questions upon Which Opinions Not Rendered. If the request is from an officer authorized to obtain opinions it is considered and determined, under the principles laid down by the Attorneys General regarding the non-rendition of opinions in certain circumstances, whether the question is moot, pending in court, etc. The circumstances may be such, moreover, as to require an opinion showing the reasons why the opinion asked should not be rendered. A controlling principle in this connection, however, is that if the officer is charged or confronted with the duty of taking some present step or making some present determination he is entitled to whatever advice the Attorney General can furnish to guide him, although it may not amount to a categorical opinion upon the precise question of law involved. (For illustrations, see Exhibit A annexed.)

Views of Chief Law Officer. If additional information is required or if the views of the chief law officer of the affected department have not been furnished in accordance with the established practice, this information is requested in the letter of acknowledgment. The practice is reflected by the following: letters of October 15, 1906, signed by Acting Attorney General Purdy, and September 15, 1924, signed by Attorney General Stone, addressed to the heads of the executive departments and independent establishments; printed "instructions" (not dated) issued from the White House in 1918, addressed "to those who (though otherwise not entitled to an opinion) have asked the President to secure an opinion from the

Attorney General," directing that "if there is a law clerk or officer, or person acting as such, for the officer or board seeking the submission, his opinion, covering the entire subject, with complete data . . . should accompany the inquiry." Special Opinion Rules, Dep't File No. 19-012. Also see the more recent letter of March 6, 1939, addressed to the Administrator of Veterans Affairs. Dep't File No. 19-33-64.

Views of Other Officers. It is also considered at this time whether the views of any other department or officer are necessary or would be helpful; if so, letters to them asking their views are prepared and the officer requesting the opinion so advised. Frequently the requesting officer or his staff is orally consulted for further light on the request.

A memorandum is also prepared requesting the views of the Assistant Attorney General or other officer of this Department concerned in the subject matter or apparently in a position to afford helpful assistance.

Preliminary Study. Study in this division of the question involved is undertaken as promptly as possible, and is not deferred pending receipt of views and information requested as above pointed out save only when and to the extent that the exigencies require. In some cases tentative drafts of opinions are prepared in advance of the receipt of such information and views.

Preparation of Opinion. As promptly as possible the attorney to whom the matter has been assigned prepares (in rough draft or final form, depending upon the exigencies) a completed draft of an opinion. In connection therewith he may, and frequently does, consult the Assistant Solicitor General and other members of the staff. When the draft is completed it is turned over to the Assistant Solicitor General and by him carefully studied and subjected to such revision as he finds proper. Frequently, and particularly in connection with questions that are difficult or of major import, the Assistant Solicitor General obtains the independent views of several or all the members of the staff. At times tentatively finished drafts may be submitted to officers of the Department and other divisions for their comments or suggestions. In some cases the general views of the Attorney General are obtained preliminarily through the submission of memoranda, rough drafts or conferences.

Avoidance of Conflicts with Briefs. Special effort is made to avoid conflicts with positions taken by the Department in briefs filed in the courts. The Solicitor General and members of his staff are consulted informally to such extent as the exigencies warrant and in particular cases the completed draft of the opinion is submitted to the Solicitor General before it is forwarded to the Attorney General. Also, the Solicitor General is furnished a copy of the weekly report with red-penciled references to the completed and pending opinions listed therein.

Uniformity in Citations, Capitalization, etc. In order to achieve greater uniformity and to obviate changes in the copy for the printer, all attorneys and stenographers have been instructed to adhere rigidly to the Government Printing Office style manual in the matter of capitalization, punctuation, etc., and to

observe prescribed uniform methods of citing the United States Code, the Statutes at Large, opinions of the Attorney General, the reported cases, etc. The Printing Office has also been requested to make any necessary changes in the matter of capitalization and punctuation (e.g., placing of commas and periods in connection with quotation marks, etc.).

Recommendation re Publication. If it is considered that the opinion should be withheld from publication a memorandum embodying such recommendation and addressed to the Attorney General accompanies the opinion. It is prepared by the attorney to whom the opinion was assigned and is signed by the Assistant Solicitor General. It provides on the bottom thereof a place for the Attorney General's indication of approval or disapproval of the recommendation.

If it is considered that the opinion should be published it is accompanied by a letter for the Attorney General's signature and directed to the officer to whom the opinion is addressed, asking whether or not he perceives any objection to publication.

Opinions ordinarily are published, as provided by law (5 U.S.C. § 305), unless they relate to matters deemed confidential or amount to mere practical suggestions or informal advice of little or no value as a precedent.

Submission to the Attorney General. The proposed opinion with such recommendation or letter respecting publication is transmitted with the complete file relating to the matter to the Attorney General bearing a printed tag requesting return to this office when acted upon.

When the proposed opinion reaches the Attorney General he subjects it to such consideration and to such revision as he deems proper. It is perhaps a tribute to the care displayed in the preparation of these drafts that they are usually approved and signed by the Attorney General without revision.

Opinion Returned to Assistant Solicitor General. If the opinion is signed by the Attorney General it is returned to this division in order that proper entries in our records (i.e., record book in Assistant Solicitor General's office and card index in opinion section) may be made.

Opinion Transmission to Mail Room. Immediately after such entries have been made the opinion is transmitted to the mail room for dispatch by messenger to the addressee. The papers accompanying the opinion, together with a carbon copy of the letter, are required by departmental rules to be sent with the opinion to the mail room, where they are properly stamped—indicating the time that the opinion leaves the Department—and thence go to the Division of Records for recording and preparation of the file.

File Returned by Division of Records. The file, together with a carbon of the record card, is transmitted by the Division of Records to this division.

Opinion Files Confidential. The opinion files are regarded as confidential and there is affixed to each file in the Division of Records a pink label bearing the following legend:

> Unpublished letters and memoranda in the opinion files must not be cited or made public without approval by the Attorney General. Questions relating thereto should be handled with the Assistant Solicitor General.

Additional Verification if Publication Recommended. If publication of the opinion has been recommended, the file copy of the opinion is now again verified and citations and quotations checked against original sources.

Syllabi. Headnotes and title are prepared, and are approved or revised by the Assistant Solicitor General.

Reference to Other Divisions. If the opinion affects or is of apparent interest to other divisions or officers of this Department, including the Solicitor General, the file is referred to them for noting and prompt return to this office.

Response to Letter re Publication. When response is received from the officer to whom the opinion was addressed regarding publication his recommendation is ordinarily followed as a matter of course. If he objects to publication the opinion usually is not published, although this lies in the discretion of the Attorney General. If he requests that it be withheld temporarily note is made to that effect and the matter followed up by inquiry from time to time until publication.

Copies for Publicity Section and Law Week. If the opinion is to be published a carbon copy is now sent to the United States Law Week and another to the Publicity Section of the Attorney General's office.

Mimeographed Copies. Mimeographed copies are prepared under the supervision of this division if required by the Publicity Section or if the matter is of such nature that some immediate distribution is desirable or immediate requests for copies appear imminent.

Copies to Chief Clerk for Printing. When released for publication a carbon copy of the opinion with title and headnotes is transmitted by memorandum from this division to the Chief Clerk with the request that he arrange for printing and distribution.

Verification of Proof. The opinion is printed at the Government Printing Office in pamphlet form. The proof is read and verified against the carbon copy of the opinion in the office of the Chief Clerk, and is referred to this division for approval before being returned to the Printing Office.

Distribution and Mailing List. Seven hundred twenty-five copies are ordinarily printed. Approximately 650 copies are distributed to persons on the mailing list, which is kept in the Chief Clerk's Office but subject to supervision of this office—leaving approximately 75 copies on hand to supply future needs and to fill requests from persons (ordinarily officials) who are not upon the mailing list or require copies additional to those ordinarily sent.

A separate mailing list for these opinions is also kept by the Superintendent of Documents at the Government Printing Office, comprising largely private persons

(who pay a small fee), and libraries and other depositaries designated by statutes which relate to official publications generally.

Bound Volumes and Digests

Same Type Used. The type used in printing the pamphlet is kept standing at the Government Printing Office for eventual use in the printing of the bound volumes of the opinions of the Attorney General—with such changes and corrections as may subsequently be found necessary.

Additions and Corrections. The printed pamphlet opinion is carefully examined in this office and is verified against the carbon copy of the opinion as an additional precaution against appearance of errors in the bound volume; also at times it appears advisable to indicate some minor change or the addition of a citation or footnote in the bound volume.

Setting up Type for Bound Volumes. From time to time copies of the pamphlet opinions with running headlines and with such eliminations, additions and corrections as may be necessary are transmitted by this office to the Government Printing Office for setting up in paged form as they will appear in the bound volume. The frequency with which this is done is dependent in part upon the number of opinions, bearing in mind also that the effect of setting up the type for the bound volume is to make impracticable the obtaining of any additional copies in pamphlet form—an exigency which occasionally arises. Also the temporary withholding of opinions for publication, or delay in obtaining approval of publication by the head of the Department affected, has bearing upon this.

Opinions Temporarily Withheld from Publication. An opinion withheld from publication beyond the time when the opinions for that period are set up for the bound volume must be (for reasons of practicability and economy) inserted in the volume out of its ordinary order with respect to time. Formerly such opinions were placed in the volumes as of the approximate time of their release for publication. It has now been determined, however, that such delayed opinions will hereafter be placed at the end of the volume, with proper notations.

Indices and Digests. As the printed pamphlet copies of opinions are received from the Government Printing Office they are digested and indexed on cards (in duplicate) and the cards filed in proper alphabetical order for use in printing the index digest in the bound volume.

When the work of preparing the bound volumes, digests, etc., was transferred to this office a little over a year ago it was assigned to Mr. Fowler for supervision and execution with such assistance as should be found necessary and available. Some changes in method and arrangement have been devised and approved.

Supplement to General Digest. It is contemplated that a supplement to the general digest (now in course of preparation) will be issued as promptly as possible after Volume 39 is completed, and that thereafter attention will be given to the question of reissuance of the entire digest.

Unpublished Opinions

All opinions determined to be withheld from publication are carefully examined and if they appear to be worthy of preservation as precedents copies are made and bound with appropriate headnotes and indices for confidential use in this office. This work is being performed by Mr. Arthur Robb, who is on the payroll of the Administrative Division but has been assigned to the supervision of this office for this purpose.

Important memoranda and opinions (intradepartmental) prepared by this office for the assistance of the Attorney General and others, upon questions arising in this Department or otherwise, are similarly preserved, bound and indexed, by Mr. Robb under the supervision of this office. All such items since the establishment of the office of the Assistant Solicitor General (January 1, 1934), and including in addition some such memoranda and opinions prepared previously thereto in the office of the Assistant Attorney General, Admiralty and Civil Division, have been collected and are now in course of preparation for binding and indexing.

V.

Procedure in Handling Gifts, Bequests, and Devises

Unconditional gifts and bequests of personal property are accepted by the Secretary of the Treasury and other administrative officers without express statutory authority under a practice which has prevailed, with knowledge of and apparent approval by the Congress, since the earliest days of the government. A few statutes, mostly of recent origin, authorize acceptance of gifts, bequests and devises by particular agencies. There is no general statute, but the enactment of such a statute has recently been recommended by this Department. *See* Dep't File No. 103-01-1.

As cases arise and are brought to the attention of this Department (by other departments of the government, or by United States Attorneys, or executors, or counsel for executors, etc.) the United States Attorneys are instructed by letters or telegrams prepared in this office to enter appearances on behalf of the government to protect its interests. United States Attorneys when first confronted with a will involving a bequest to the government are sometimes at a loss as to how to proceed and it becomes necessary for this office to instruct them, pointing out the applicable principles and practice, and at times to assist them in preparing arguments in support of the government's position. For some typical precedents, see Dep't File Nos. 103-11-1; 103-16-A; 103-9-1; 103-32-2; 103-51-10; 103-51-4.

In connection with gifts inter vivos this Department extends assistance only as requested by the head of the department or agency concerned.

VI.

Procedure in Handling Customs Cases

Appeals. The United States Customs Court has jurisdiction of cases involving the classification and reappraisement of merchandise imported into the United States. The decisions of the Customs Court are appealable to the Court of Customs and Patent Appeals and may be taken from the latter court to the Supreme Court on a writ of certiorari. These cases are handled by the Assistant Attorney General in charge of the Customs Division located in New York City. In any case where the decision is against the government and where the Assistant Attorney General in charge of the Customs Division is of the opinion that an appeal should be taken, he prepares a recommendation to that effect and transmits it to the Solicitor General.

Such cases are referred by the Solicitor General to the Assistant Solicitor General where they are assigned to an attorney to prepare a recommendation for or against the taking of an appeal. The case is then forwarded to the Solicitor General who finally decides whether an appeal shall be taken. Such cases are briefed and argued by representatives of the office of the Assistant Attorney General in charge of customs matters. Cases wherein the plaintiff takes an appeal are not referred to this office.

Petitions for Writs of Certiorari. Petitions for writs of certiorari filed by importers in the Supreme Court are referred to the Customs Division in New York where a tentative brief in opposition is prepared and forwarded to the Solicitor General. These cases are then assigned to the Assistant Solicitor General who revises the briefs and submits them to the Solicitor General before they are sent to the Government Printing Office for printing. In cases wherein the government might desire to petition the Supreme Court for a writ of certiorari, the Customs Division in New York transmits the case to the Solicitor General with a recommendation either for or against the filing of the petition. The Assistant Solicitor General then prepares a recommendation to the Solicitor General who finally decides whether or not a petition shall be filed.

Constitutional and Treaty Questions. All cases in the Customs Court wherein there arises a question involving the constitutionality of a statute or the interpretation of a treaty or international agreement are referred to this office for consideration before they are tried. If the case involves a treaty it is referred to the State Department for its views with respect to the defenses to be imposed. If the case involves a constitutional question it is carefully considered here in order that a proper record may be made and all pertinent questions presented to the court in the event the case should reach the Supreme Court of the United States. If the case is an important one, this office actively assists the Assistant Attorney General in charge of customs matters in the preparation of the brief.

VII.

Office Procedure and Mechanics

The staff of the office of the Assistant Solicitor General is not sufficiently large to present any substantial problems of administration such as exist in divisions having larger personnel, like the Lands Division, the Tax Division, etc. Therefore, it will be necessary only briefly to indicate the manner in which the more or less mechanical business of the office is carried on.

Care is taken to see that the general departmental orders respecting the handling of files, correspondence, etc. are observed. Particular care is exercised to see that in all official matters, copies of all correspondence, memoranda, etc. go into the general files of the Department, whatever copies may be retained in this office. The required and customary usage in these matters is observed.

Correspondence—Form. Where possible and when not in conflict with any general departmental order, undue formality in the form of correspondence is avoided: for instance, in the salutation it is generally preferable to say "Dear Mr. Blank" rather than "Dear Sir" or "Gentlemen"; in closing, similarly, it is generally preferable to use "Sincerely yours," "Cordially yours," etc. rather than "Yours truly," etc.

Messenger—Library—Supplies. The library of this office is very small, and it depends primarily upon the main departmental library. The library is managed, as are the office supplies of this office, by its messenger who performs the customary duties of that position in securing books for members of the staff, furnishing them with supplies, receiving and transmitting the mail, memoranda, etc.

Incoming Matter. All incoming official matter—mail, memoranda, compromises, etc. (sometimes routed directly from the Attorney General's office, sometimes through the Division of Records, or in the case of intradepartmental memoranda, from the various divisions and bureaus of the Department)—is received in the head office of the Assistant Solicitor General, where it is stamped in as of the date it is received and a written record made in various record books which have been set up for the purpose. After such records have been made, the mail is then routed to the Assistant Solicitor General and by him assigned to the several attorneys in the division.

Outgoing Matter. All outgoing letters, memoranda, compromises, etc., in fact all official matter leaving the division, is routed by the attorneys to the head office of the Assistant Solicitor General. A written record is there made indicating the date on which the matter is transferred from the attorney to the Assistant Solicitor General. After being acted on by the Assistant Solicitor General, a further record is made indicating the date on which the matter finally leaves the division. In order that complete information may be available in the office, the practice has been established whereby compromise cases requiring the approval of the Attorney General and all opinions, which of course require his signature, are returned to this

office after being approved and signed by him and a record is made of the date of his approval and signature.

Office Record Books

Assignment Book. On Monday morning of each week a typewritten assignment sheet is made up for each attorney in the division. This sheet shows all official matters pending with each attorney, the date on which assigned to him and their general status. For each succeeding day of the week a pen-written record is kept which shows assignments completed by, and new assignments to, each attorney in the division. In this way a current record of the work being handled by each attorney is available at all times.

Opinion Book. The opinion record book contains a separate typewritten sheet for every official request for an opinion of the Attorney General, which, of course, means requests from the President or the head of an executive department of the government. The data kept on each such request is as follows:

1. Department of Justice file number.

2. By whom requested and date of request.

3. Subject matter of the request.

4. Date received in this office.

5. Name of attorney in this division to whom preparation of opinion is assigned and date assigned.

6. Date on which draft of opinion is submitted to Attorney General.

7. Date opinion is signed by the Attorney General.

Executive Order & Proclamation Book. The executive order and proclamation record book contains data similar to that kept in the opinion book and is as follows:

1. Department of Justice file number.

2. Executive order number (available after Order is printed in the Federal Register).

3. Subject matter and by whom order is presented.

4. Date received in this office.

5. Name of attorney in this Division to whom assigned and date assigned.

6. Date on which order with proposed letter of transmittal to the President is submitted to Attorney General for approval.

Compromise Books. Compromise cases are referred to this office from the several divisions and bureaus in the Department and separate data is kept in record books according to the particular division or bureau from which they emanate. Generally the following information is noted for the records of this office:

1. Title of case.

2. Date received in this office.

3. Whether claim is for or against the government.

4. Amount involved.

5. Amount offered in compromise.

6. Acceptance or rejection of offer by Assistant Solicitor General and date such action taken.

When offers in compromise require final action by the Attorney General upon the recommendation of the Assistant Solicitor General, notation is made of the date on which they are submitted to the Attorney General. When final action has been taken by the Attorney General, the cases are returned to this office where a record is made of his action in the matter and of the date on which he acted. The cases are then returned to the respective divisions or bureaus from which they originated.

Custom Appeals Book. As one of the regular assignments of this office is to make recommendations to the Solicitor General as to whether appeals should be taken in customs cases, a record book is maintained containing the following information respecting each case submitted:

1. Title of case.

2. Date received in this office.

3. Date on which appeal expires.

4. Date on which recommendation of Assistant Solicitor General for or against appeal is submitted to Solicitor General.

5. Date on which Solicitor General acts on above recommendation.

6. Date of letter to the Assistant Attorney General, in charge of Customs matters, New York, advising of the Solicitor General's decision in each case.

Reports to the Attorney General

Annual. At the end of each fiscal year an annual report of the work performed by each division and bureau of the Department is submitted to the Attorney General for inclusion in his annual report to the Congress. The report for the division of the Assistant Solicitor General is prepared in narrative form and under headings which show the type and amount of work performed by the office. *See* Annual Report of the Attorney General, 1938, at 26.

Quarterly. Commencing with July 1 of each fiscal year quarterly reports are prepared for the Attorney General. These reports are purely statistical in form and are divided into two parts, the first showing, under the proper headings, the number of assignments completed during the year up to and including the date ending the quarter; and the second showing the number of assignments pending as of the date ending the quarter. Such quarterly reports facilitate the preparation of the annual report. (See those heretofore made.)

Weekly. A report of completed and pending assignments is submitted to the Attorney General at the close of every week during the year. This report, like the quarterly reports, is divided into two parts, the first showing matters completed during the week; and the second showing matters pending at the end of the week. The data contained in the weekly report is grouped under five main headings, as follows:

1. Executive orders and proclamations.

2. Opinions.

3. Compromises.

4. Special Assignments from the Attorney General.

5. Special Assignments from the Solicitor General.

Every assignment completed during the week is listed under one of the above headings so that by consulting the report the amount and type of work performed by the division for any given week can easily be determined; in the same way, the amount and type of matter pending in the division at the end of any given week can easily be determined. (See those heretofore made.)

GOLDEN W. BELL
Assistant Solicitor General

EXHIBIT A

Statutory Limitation on the Power of the Attorney General to Render Opinions

Section 35 of the Act of September 24, 1789, ch. 20, provides, in part:

> And there shall also be appointed a meet person, learned in the law, to act as attorney-general for the United States, who shall be sworn or affirmed to a faithful execution of his office; whose duty it shall be . . . to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments . . . .

1 Stat. 73, 92–93.

The provisions of the above statute were brought forward in sections 354 and 356 of the Revised Statutes (2d ed. 1878), 18 Stat. pt. 1, at 60 (repl. vol.), and later in sections 303 and 304 of title 5, U.S. Code.

For more than a hundred years the above-quoted statute has been construed by the Attorneys General as limiting their power to render opinions. In an opinion dated June 12, 1818, Attorney General Wirt said:

> Under this law, which is the only one upon the subject, I do not think myself authorized to give an *official opinion* in any case, except on the call of the President, or some one of the heads of departments; and I should consider myself as transcending the limits of my commission in a very unjustifiable manner, in attempting to attach the weight of *my office* to any opinion not authorized by the law which prescribes my duties.

Office of Attorney General, 1 Op. Att'y Gen. 211, 212 (1818).

Again, in an opinion dated September 14, 1821, Mr. Wirt said:

> This act limits me to questions of law propounded by the *President and heads of departments*; . . . no officer should be permitted to stretch his authority and carry the influence of his office beyond the circle which the positive law of the land has drawn around him.

Office of Attorney General, 1 Op. Att'y Gen. 492, 492–93 (1821).

Subsequent Attorneys General have generally followed the rule thus laid down by Mr. Wirt. That the Congress has considered this the correct interpretation of the statute is evidenced by the fact that, in 1924, it expressly authorized the Attorney General to render opinions to the Director of the United States Veterans Bureau on

questions of law arising in the administration of the Bureau, Act of June 7, 1924, Pub. L. No. 68-242, § 9, 43 Stat. 607, 610 (codified at 38 U.S.C. § 433), but has otherwise declined to follow recommendations of several Attorneys General to extend the opinion jurisdiction.

Following the rule thus laid down in the early days of the statute the Attorneys General have consistently held that the law does not permit them to render opinions except to the President and to the heads of the departments (including, since 1924, the Director of the United States Veterans Bureau), and to them only upon questions of law which have arisen and are still pending in their respective departments and requiring future determination. They have consistently held that their opinions are limited to such as will aid an administrative officer entitled thereto in determining what administrative action he should take in connection with a particular matter pending and undetermined in his department.

In this connection the Attorneys General have held that the Attorney General "possesses no jurisdiction under the law to revise a conclusion already reached and about which the official presenting the question merely desires my confirmatory opinion." *Jurisdiction of the Attorney General—Certain Cases in Which the Attorney General Will Not Render an Opinion*, 38 Op. Att'y Gen. 149, 150 (1934); *Attorney-General*, 20 Op. Att'y Gen. 440 (1892). In other words, where an officer of the United States authorized to administer a statute has without securing the opinion of the Attorney General adopted thereunder a practice satisfactory to himself, the Attorney General is without authority to question this practice, and will not do so, unless and until it is made to appear that such officer or his successor *entertains some doubt as to the correctness thereof* and for that reason seeks the advice of the Attorney General in connection therewith. Speaking on this subject, Attorney General Butler, in an opinion dated February 12, 1836, said:

> I cannot undertake to give an official opinion on the question proposed to me, without assuming that this office possesses a revisory jurisdiction not conferred upon it by law.

Duties of Attorney General, 3 Op. Att'y Gen. 39, 40 (1836).

The Attorneys General have also generally held that under the statutes the Attorney General is not authorized to render opinions to, or for the benefit of, the Congress or its committees. In an opinion dated March 26, 1937, which discusses at some length the Attorney General's authority to render opinions, the present Attorney General called attention to the ruling of his predecessors in this respect, *Rendition of Opinions on Constitutionality of Statutes—Federal Home Loan Bank Act*, 39 Op. Att'y Gen. 11, 12–13 (1937), and in a footnote to the opinion referred to 80 Cong. Rec. 4370–71 (1936), where a list of some of the opinions of prior Attorneys General on the subject will be found, *id.* at 13 n.1.

Not only have Attorneys General declined to render opinions on direct requests of the Congress or its committees, or members thereof, but they have also

considered it beyond their authority to render opinions to administrative officers where it appeared that the purpose for which the opinions were requested was their use by the Congress or committees thereof. On this question Attorney General Mitchell, in an opinion dated April 25, 1932, said, in part:

> Under date of January 28, 1820, the House of Representatives entered an order requesting the opinion of Attorney General Wirt respecting a matter in which the House was interested. In declining to give the opinion the Attorney General, among other things, said:
>
> > The Attorney General is sworn to discharge the duties of his office according to law. To be instrumental in enlarging the sphere of his official duties beyond that which is prescribed by law would, in my opinion, be a violation of this oath. (1 Op. [Att'y Gen.] 336.)
>
> That opinion has stood unquestioned for one hundred and twelve years and has been repeatedly followed in later rulings. Under date of December 17, 1884, Attorney General Brewster felt obliged to decline compliance with a resolution passed by the House of Representatives requesting his opinion on the application of a section of the Revised Statutes (18 Op. [Att'y Gen.] 87). Having failed to obtain the opinion by direct request, the House of Representatives passed another resolution requesting the Postmaster General to ask for the Attorney General's opinion, and the Postmaster General transmitted the request to the Attorney General who again refused to give the opinion on the ground that he had no authority to give it to the House of Representatives and the Postmaster General did not need it on any question pending in his Department.
>
> Under date of February 14, 1929, my immediate predecessor declined the request of the House Committee on Expenditures in the executive departments for an opinion, and on June 3, 1930, I felt obliged to decline an opinion requested by the Judiciary Committee of the Senate.
>
> Congress has accepted this long standing interpretation of the law and has never attempted by law to enlarge the powers or duties of the Attorney General so as to require him to give opinions to either House of Congress or to committees thereof. Having in mind the constitutional separation of the functions of the legislative, executive, and judicial branches of the Government, there has always been a serious question whether the principle of that separation would be violated by a statute attempting to make the Attorney General a legal

> adviser of the legislative branch, and as a matter of governmental policy the wisdom of constituting as legal adviser of either House of Congress an official of the executive department, who sits in the President's Cabinet and acts as his legal adviser, has always been open to doubt.
>
> When pending legislation affecting the Department of Justice has been referred to Attorneys General for comment or suggestion, it has been their practice to suggest such legal points as are pertinent and which ought to receive consideration by committees, but that practice has never properly involved any formal legal opinions from Attorneys General and has no resemblance to a request for an opinion as to the effect of an existing statute.

Request of Senate for Attorney General's Opinion on Railroad Mergers, 36 Op. Att'y Gen. 532, 534–35 (1932).

The general question of opinions of the Attorney General, their functions, and the practice relating to the rendition thereof are discussed at some length by Cummings and McFarland in *Federal Justice*. For reference to the places where different phases of the question are discussed, *see* Homer Cummings & Carl McFarland, *Federal Justice: Chapters in the History of Justice and the Federal Executive* 571 (1937) (under heading "Opinions of the Attorneys General").

In an opinion to the Secretary of the Treasury dated January 30, 1911, Attorney General Wickersham said in part:

> It appears that the questions presented involve the legality of certain orders issued by the Commissioner of Internal Revenue, the purpose of which is to prohibit the reclamation of spirits from such packages in the absence of affirmative proof that such spirits had been properly tax-paid. The papers in the case show that these orders were issued under your direction and that the Commissioner and the Solicitor of Internal Revenue, as well as yourself, are fully satisfied that your action in the premises is correct, the questions referred to being presented for my consideration merely because of the request of counsel for the parties interested.
>
> There are numerous precedents to the effect that the Attorney-General is precluded from rendering opinions under such circumstances. In an opinion of August 17, 1892 (20 Op. [Att'y Gen.] 440), it appeared that the Treasury Department had reached conclusions upon certain questions which had arisen or might arise therein under a statutory provision, and that an opinion was desired as the "correctness of the interpretations and applications of said law." In declining to accede to this request it was said (*id*. at 441–42):

> It is required not only that the question must be one arising in the administration of a department, but it must be one which is still pending. A matter which has been considered and decided is not now a "question" upon which the head of a Department may require an opinion of the head of the Department of Justice.
>
> An opinion reported in 3 Op. [Att'y Gen.] 39 likewise decides that the Attorney General does not possess the power to revise the decisions of an executive department, deliberately made and entirely satisfactory to the Secretary thereof.
>
> It appears, moreover, that a proper determination of the questions presented can not be accomplished without considerable difficulty, and that the questions are essentially judicial in their nature. There is also every reason to believe that if an opinion should be rendered sustaining the validity of the orders in question, parties interested would resort to the courts for the purpose of having the matter judicially investigated and determined. That it is not proper for the Attorney-General to express an opinion upon a question which must ultimately be decided by the courts has been settled by numerous and unequivocal precedents (Digest Op. 46–48).
>
> . . . .
>
> Under all the circumstances, it seems clear that it would not be proper to attempt to give you the advice requested.

Internal Revenue—Reclamation of Alcohol from the Staves of Empty Spirit Packages—Attorney-General, Opinions, 28 Op. Att'y Gen. 596, 596–97, 598 (1911).

In an opinion to the Administrator of Veterans Affairs dated November 30, 1934, Attorney General Cummings said in part:

> It appears from your letter that I am not called upon to give an opinion upon a question of law now pending and undetermined in the Veterans' Administration but am asked to give an opinion upon a question which you have already considered and decided. It has been held by my predecessors that this Department possesses no jurisdiction under the law to revise a conclusion already reached and about which the official presenting the question merely desires my confirmatory opinion, (20 Op. [Att'y Gen.] 440). Furthermore, I am advised that a similar question is now before the United States District Court for the District of Nebraska in the case of *Mrs. Emma Thomas, Administratrix of the Estate of James A. Hakel, deceased v. United*

> *States*, involving a claim for insurance benefits under Section 309 of the World War Veterans' Act, as amended. This Department has heretofore followed the practice of declining to render opinions upon questions contemporaneously pending before the courts for determination and which are within their competency to decide.

Status of Employees Affected by McKellar Proviso in the Emergency Appropriation Act, Fiscal Year 1935, 38 Op. Att'y Gen. 139, 150 (1934).

In an opinion to the Secretary of the Treasury dated March 3, 1921, Attorney General Palmer said in part:

> It appears that at least the first of the questions submitted by you has been passed upon by Judge Hazel, of the United States District Court for the Western District of New York, and that an appeal from his decision is now pending. The answers to the other questions are necessarily dependent upon the answer to the first. I regret that under these circumstances I can not comply with your request, as it has long been the settled rule of this Department not to render an opinion upon any question whose answer may bring it into conflict with a judicial tribunal, especially while the question is under consideration by the courts.

Railway Companies—Extra Compensation for Customs Officers—Attorney General's Opinion, 32 Op. Att'y Gen. 472, 473 (1921) (citing *Attorney-General*, 20 Op. Att'y Gen. 618 (1893); *Attorney-General—Legacy Tax*, 23 Op. Att'y Gen. 221 (1900); *Returning Chinese Laborers—Treasury Regulations*, 23 Op. Att'y Gen. 582, 585 (1901); *Attorney-General—Opinion*, 24 Op. Att'y Gen. 59 (1902); *Attorney-General—Opinion*, 25 Op. Att'y Gen. 369 (1905)).

In an opinion to the Secretary of the Treasury dated September 7, 1900, Attorney General Griggs said:

> It is not the practice of this Department to give an opinion in a matter where the question involved is disputable and is the subject of a pending suit and awaiting judicial determination.

Attorney-General—Legacy Tax, 23 Op. Att'y Gen. 221, 221–22 (1900).

Wiretapping by Members of the Naval Intelligence Service

In this letter, Attorney General Jackson advises the Secretary of the Navy not to approve and adopt the position taken by the Judge Advocate General of the Navy that records may legally be made of private communications sent or received by use of telephone facilities controlled by the Navy, with a view to the use of such records in prosecutions involving espionage, sabotage, and subversive activities.

June 9, 1941

LETTER FOR THE SECRETARY OF THE NAVY

Reference is made to the letter of Acting Secretary Forrestal, of May 28, transmitting to me a copy of a confidential opinion of the Judge Advocate General of the Navy, of May 24, 1941, on the subject "Wiretapping by Members of Naval Intelligence Service." The Judge Advocate General makes certain suggestions respecting methods and means whereby he believes that records may legally be made of private communications sent or received by use of telephone facilities controlled by the Navy, with a view to the use of such records in prosecutions involving espionage, sabotage, and subversive activities. My comment and advice are requested regarding these suggestions.

In view of the decisions of the Supreme Court and of other courts, discussed at length in the enclosed memorandum prepared in this Department, I am unable to advise that the suggestions be approved and adopted by you.

ROBERT H. JACKSON
Attorney General

June 7, 1941

MEMORANDUM FOR THE ASSISTANT SOLICITOR GENERAL

The question raised by the Secretary of the Navy is whether, despite section 605 of the Communications Act of 1934,[1] the commandant or commanding officer of any naval station or establishment has authority to tap telephones within the confines of his station for the purpose of obtaining information regarding espionage, sabotage and subversive activities; and also whether, if such conduct is not lawful, information obtained from such wiretapping can be admitted as evidence in criminal trials of civilian employees and non-employees.

The relative portion of section 605 of the Communications Act of 1934 reads as follows:

> [A]nd no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . . .

47 U.S.C. § 605 (1940).

Section 605 has been discussed in three decisions of the Supreme Court and in a number of lower federal court decisions. The answer to the Secretary's question requires a brief consideration of these cases.

The first case reaching the Supreme Court was *Nardone v. United States*, 302 U.S. 379 (1937) ("*Nardone I*"). The question involved was whether evidence procured through the tapping of telephone wires by federal officers was admissible in a criminal trial in a United States district court. The Court held that the tapping of telephone wires by a federal officer was a violation of section 605 and that the evidence so obtained was inadmissible.[*] Justice Roberts, speaking for the majority, stated:

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[1] Pub. L. No. 73-416, § 605, 48 Stat. 1064, 1103–04 (codified at 47 U.S.C. § 605 (1940)).

[*] Editor's Note: Decisions of the Supreme Court after *Nardone I* appeared to regard it as an open question whether section 605 prohibited the mere interception of wire communications. *See, e.g.*, *Rathbun v. United States*, 355 U.S. 107, 108 n.3 (1957); *Benanti v. United States*, 355 U.S. 96, 100 n.5 (1957). With the exception of a three-month period during 1940, when Attorney General Robert Jackson "prohibited all wiretapping by the Federal Bureau of Investigation," Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, S. Rep. No. 94-755, bk. III, 279 (1976) ("Church Comm. Rep."), the Department interpreted section 605 as not "prohibiting the interception of wire communications *per se*, [but] only the interception and divulgence of their contents outside the federal establishment." *Id.* at 278; *accord Interception of Radio Communication*, 3 Op. O.L.C. 240, 245 (1979). This approach was consistent with President Roosevelt's directive to Attorney General Jackson on the use of wiretaps, *see* Church Comm. Rep. at 279 (quoting a memorandum from the President to the Attorney General, dated May 21, 1940), and statements to Congress by Attorneys General Jackson and Biddle, *see id.* at 280–81; *Authorizing Wire Tapping in the Prosecution of the War: Hearings on H.J. Res. 283 Before the H. Comm. on the Judiciary*, 77th Cong. 2 (1942).

> Taken at face value the phrase "no person" comprehends federal agents, and the ban on communication to "any person" bars testimony to the content of an intercepted message. Such an application of the section is supported by comparison of the clause concerning intercepted messages with that relating to those known to employees of the carrier. The former may not be divulged to any person, the latter may be divulged in answer to a lawful subpoena.

302 U.S. at 381.

In answer to the government's contention that the legislative history of section 605 showed no intention on the part of Congress that wiretapping by federal officers be prohibited, Justice Roberts stated:

> We nevertheless face the fact that the plain words of § 605 forbid anyone, unless authorized by the sender, to intercept a telephone message, and direct in equally clear language that "*no person*" shall divulge or publish the message or its substance to "*any person*." To recite the contents of the message in testimony before a court is to divulge the message. The conclusion that the act forbids such testimony seems to us unshaken by the government's arguments.

Id. at 382.

> It is urged that a construction be given the section which would exclude federal agents since it is improbable Congress intended to hamper and impede the activities of the government in the detection and punishment of crime. The answer is that the question is one of policy. Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty. The same considerations may well have moved the Congress to adopt § 605 as evoked the guaranty against practices and procedure violative of privacy, embodied in the Fourth and Fifth Amendments of the Constitution.

Id. at 383.

Justices Sutherland and McReynolds dissented on the ground that the word person, as used in the Act, did not apply to federal officers and that Congress had not intended to tie the hands of government enforcement agencies by such restrictions. *Id.* at 385.

The *Nardone* case came back to the Supreme Court two years later. *Nardone v. United States*, 308 U.S. 338 (1939) ("*Nardone II*"). This time the issue was whether section 605 not only forbade the introduction of evidence obtained directly by wiretapping, but also prohibited the admission of evidence procured

through the use of knowledge derived from the wiretapping. The Court upheld the latter interpretation. Reversing the court below, Justice Frankfurter, speaking for the majority, stated:

> We are here dealing with specific prohibition of particular methods in obtaining evidence. The result of the holding below is to reduce the scope of § 605 to exclusion of the exact words heard through forbidden interceptions, allowing these interceptions every derivative use that they may serve. Such a reading of § 605 would largely stultify the policy which compelled our decision in [*Nardone I*]. That decision was not the product of a merely meticulous reading of technical language. It was the translation into practicality of broad considerations of morality and public well-being. This Court found that the logically relevant proof which Congress had outlawed, it outlawed because "inconsistent with ethical standards and destructive of personal liberty." [302 U.S. at 383.] To forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed "inconsistent with ethical standards and destructive of personal liberty." What was said in a different context in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 [(1920)], is pertinent here: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all." *See Gouled v. United States*, 255 U.S. 298, 307 [(1921)]. A decent respect for the policy of Congress must save us from imputing to it a self-defeating, if not dangerous purpose.

Id. at 340–41.

Justice McReynolds dissented without opinion. Justice Reed did not participate. *Id.* at 343.

The third case decided by the Supreme Court is *Weiss v. United States*, 308 U.S. 321 (1939). Here the issue was whether section 605 applied to the interception, not only of interstate communications, but also of intrastate communications. The Court held that the Congress had the power to, and intended to, prohibit interception of both interstate and intrastate communications. Justice Roberts, writing for a unanimous Court, stated:

> Plainly the interdiction thus pronounced is not limited to interstate and foreign communications. And, as Congress has power, when necessary for the protection of interstate commerce, to regulate intrastate transactions, there is no constitutional requirement that the scope of the statute be limited so as to exclude intrastate communications.

> . . . .
>
> We hold that the broad and inclusive language of the second clause of the section is not to be limited by construction so as to exclude intrastate communications from the protection against interception and divulgence.

Id. at 327, 329 (footnote omitted).

The government likewise made the claim in the *Weiss* case that the disclosure of the intercepted communications was "authorized by the sender" and therefore admissible. It appeared that certain of the defendants, upon being told that their conversations had been intercepted, turned state's evidence and testified to the conversations. The Court rejected the government's contention, pointing out that the conversations had been intercepted before consent was given and that, in any event, the consent was not voluntary but "enforced":

> Statement of these facts is convincing that the so-called authorization consisting of the agreement to turn state's evidence, by some of the defendants after they had been apprized of the knowledge of their communications by the Government's representatives, and in the hope of leniency, was not that intended or described by the statute and emphasi[ze] the offensive use which may be made of intercepted messages, whether interstate or intrastate. It is not too much to assume the interdiction of the statute was intended to prevent such a method of procuring testimony.

308 U.S. at 330–31.

There have been a number of decisions on section 605 by the lower federal courts, but only three cases have any direct bearing on the issue here. In *United States v. Polakoff*, 112 F.2d 888 (2d Cir. 1940),[*] it appeared that the defendants had approached one Kafton, who was under indictment, and offered to procure a light sentence for him if Kafton would pay them a sum of money. Kafton reported this to the District Attorney, who sent him to the FBI. Through a telephone in the FBI office, Kafton talked with the defendants, and the conversations were recorded on a machine fixed to an extension of the telephone that Kafton was using. Subsequently, the defendants were tried and convicted for the conspiracy to obstruct justice, and the question on appeal was whether or not the telephone conversations had been properly admitted. The government argued that the conversations were admissible because Krafton was the "sender" and had given his

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[*] Editor's Note: *Polakoff* was later overruled by *Rathbun v. United States*, 355 U.S. 107 (1957). The Court in *Rathbun* held that it did not constitute an "interception" under section 605 for law enforcement, with consent from one party, to employ a regularly-used telephone extension to listen in on a conversation. *Id.* at 107–11.

consent to the recording, and because, in any event, the message had not been "intercepted." The court rejected both contentions and held the conversations inadmissible. On the first point, the court ruled that in a telephone conversation each party must be deemed the "sender" within the meaning of section 605, and, therefore, both must give consent to the interception. As to the second point, Judge Learned Hand stated:

> Moreover, the recording was an "interception." It is true that in the three decisions in which the Supreme Court has interpreted [section] 605, . . . the prosecuting agents had physically interposed some mechanism in the circuit as it had been constructed for normal use; at least that is what we understand by a "tap." That was not the case here; the recording machine was merely fixed to an existing "extension" of the familiar kind in an adjoining room. We assume that the situation would have been no different, had the agent merely listened at the extension, and taken down what he heard by shorthand. The statute does not speak of physical interruptions of the circuit, or of "taps"; it speaks of "interceptions" and anyone intercepts a message to whose intervention as a listener the communicants do not consent; the means he employs can have no importance; it is the breach of privacy that counts. We need not say that a man may never make a record of what he hears on the telephone by having someone else listen at an extension, or, as in the case at bar, even by allowing him to interpose a recording machine. The receiver may certainly himself broadcast the message as he pleases, and the sender will often give consent, express or implied, to the interposition of a listener. Party lines are a good illustration; and it would be unwise to try in advance to mark the borders of such implications. Here, however, we need not be troubled by niceties, because, no matter what the scope of any such implied consent, it cannot extend to the intervention of prosecuting agents bent upon trapping the "sender" criminally. Violation of the privilege, we are admonished, is so grave a dereliction as to be "destructive of personal liberty" [(*Nardone I*, 302 U.S. at 383)] and if it is not to be sham and illusion, it must protect its possessor at least against such intrusions. "A decent respect for the policy of Congress must save us from imputing to it a self-defeating, if not disingenuous purpose." [*Nardone II*, 308 U.S. at 341.] *United States v. Yee Ping Jong*, [26 F. Supp. 69 (W.D. Pa. 1939)], is to the contrary, but does not persuade us.

Id. at 889–90.

Judge Augustus Hand concurred. *Id.* at 890. Judge Clark dissented in a long opinion, saying:

> There can be no real distinction—there is none suggested in the statute or by common sense—between these recordings and a transcription made by a private secretary over the telephone in an outer office, or by a servant on an upstairs extension in a house, or even by a person listening at the telephone receiver held by the party to the conversation. Nor can it be of importance whether the transcriber or the party first makes the suggestion for the recording; in either event it is the party who has the power to direct or prohibit its transcription. Neither is it important whether evidence of the conversation comes from the mechanical device of a record or from testimony of those directed to listen in, except that the mechanical device gives the more trustworthy evidence. Indeed, in the Fallon case the agents themselves testified as to what they had overheard, testimony which must be considered objectionable under the decision here.

Id. at 891.

In a companion case, the court ruled the same way in a situation where the conversations had been intercepted by the installation of the recording device in the house of the chief witness and with his consent. *United States v. Fallon*, 112 F.2d 894 (2d Cir. 1940) (per curiam).

In *United States v. Yee Ping Jong*, 26 F. Supp. 69 (W.D. Pa. 1939), a federal district court reached a somewhat different conclusion from the Second Circuit in the *Polakoff* case. In the *Yee Ping Jong* case, federal agents employed one Loui Wong as an informer and an interpreter, and at the direction of the agent Loui, Wong called the defendant on the telephone from a house belonging to an associate of the agent. A recording of the conversation was made by a device attached to an extension of the "phone." The court held the intercepted conversation admissible on the ground that the recording did not constitute an "interception" within the meaning of the statute, saying:

> The call to the defendant was made by Agent White, and the conversation between his interpreter and the defendant was not obtained by a "tapping of the wire" between the locality of call and the locality of answer by an unauthorized person, but was, in effect, a mere recording of the conversation at one end of the line by one of the participants. It differed only in the method of recording from a transcription of a telephone conversation made by a participant. We are of opinion that the admission of the record in evidence was not error.

Id. at 70.

In the *Polakoff* case, Judge Learned Hand stated that the *Yee Ping Jong* case was inconsistent with the majority decision and refused to follow it. 112 F.2d at 890. It should be noted, however, that the *Yee Ping Jong* case might be distin-

guished from the *Polakoff* case on the ground that Loui Wong acted merely as interpreter for the federal agent, rather than on his own initiative.

There is nothing in the history of section 605 which throws any light on the issue here presented. Indeed, it is not clear from the legislative history that Congress intended section 605 to prohibit wiretapping by government officers at all. That issue, however, is, of course, settled otherwise by the Supreme Court decisions, just mentioned.

Viewed in the light of the foregoing decisions, it seems to me rather clear that section 605 prohibits the tapping of telephone wires even within the confines of a government building. As the Supreme Court pointed out in the first *Nardone* case, that statute provides that "no person" shall intercept any communication and divulge it to "any person." Certainly the interception of calls by a member of the Naval Intelligence Service and the divulging of the contents thereof to a superior would fall within the literal terms of the statute. Neither the fact that one of the parties to the call was an employee of the Navy Department, nor the fact that the call was made to or from a government building, would seem to afford the interception immunity from the precise terms of the act. Nor would an authorization of the interception by the government employee involved justify such interception in the absence of authorization by the other party.[*]

The Supreme Court has shown every disposition to give the words of the statute their strict literal meaning. It is difficult to see, therefore, how the action of the Secretary of the Navy can be sanctioned under the Supreme Court decisions. Moreover, the *Polakoff* case seems even more in point. For in that case, the call was actually made from a government office and was intercepted by a device attached to an extension phone in the government office.

The Judge Advocate General of the Navy suggests in his memorandum that a member of the Naval Intelligence Service (or presumably any other employee of the Navy Department) employed as a switchboard operator should be permitted to divulge to a superior officer the contents of a conversation which he has received, assisted in receiving, or transmitted while assigned to duty at the switchboard. For the reasons just stated, such an interception would seem clearly prohibited by that portion of section 605 which has heretofore been considered. The Judge Advocate General argues, however, that interception in this manner would be justified under the first clause of section 605, which reads as follows:

> No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, sub-

[*] Editor's Note: Later, in *Rathbun*, the Supreme Court held that one-party consent was sufficient in some circumstances to permit the government to monitor and divulge communications without violating section 605. 355 U.S. at 108–11. *See also United States v. Hodge*, 539 F.2d 898, 905 (6th Cir. 1976) ("It is well settled that there is no violation of the Act if the interception was, as here, authorized by a party to the conversation.").

> stance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority.

47 U.S.C. § 605.

It seems clear, however, that the purpose of the clause just quoted is to protect persons employed as telephone and telegraph operators whose duties as such require disclosure of communications to other persons. The suggestion of the Judge Advocate General contemplates the disclosure of communications by agents of the Naval Intelligence Service not in their capacity as switchboard operators, but in their capacity as wiretappers. The interception would, therefore, not seem justified under the provision quoted.

The Judge Advocate General argues that the words "on demand of other lawful authority" in the clause above cited includes the demand of a superior in the Department. This phrase, however, quite clearly refers to demands by administrative bodies, legislative committees and the like, not to demand by a superior for purposes not in connection with the receipt or transmission of the communication. In fact, the Judge Advocate General's interpretation—in effect permitting the superior officer of a telephone or telegraph operator to obtain and disclose any communication—would make the entire clause meaningless.

The Judge Advocate General also suggests in his memorandum that, since the government may permit the use of its telephone lines and equipment by persons outside the government on whatever terms it sees fit, it can by regulation, published in the Federal Register, stipulate as a condition for the use of its phones that all conversations be recorded and reported to lawful authority. It is argued that in this way any person voluntarily using the telephone would be deemed to have accepted the conditions and thereby "authorize" the recording and divulging of the conversation. My own feeling is that this proposal is a subterfuge which should not be approved for the following reasons:

1. The device proposed, if sanctioned, might well lead to a total breakdown of section 605. If the government can obtain constructive authorization in this way, presumably other users of the telephone can do the same thing. Thus any corporation, organization, or individual would be empowered to announce a similar condition; or the telephone or telegraph companies themselves would have authority to limit the use of their lines or wires on such terms. If the practice became widespread, the safeguards of section 605 would, of course, be entirely negatived.

2. I am inclined to doubt that, in view of the nature of the interests protected by section 605—the right to privacy—mere constructive notice of a regulation would be sufficient to imply authorization for interception of the communication. It is hard to see how an invasion of the right to privacy can be authorized by an individual who does not have actual knowledge of the invasion.

3. The device suggested would seem to be unquestionably unlawful in certain situations. Thus, where an individual was called from a government building without being aware of the fact that the call originated in such building, there can hardly be doubt that the interception would be prohibited by the statute. It would, of course, be impossible to separate out such calls from other calls which were being intercepted. On the theory of the *Weiss* case, which is based on the inability to separate intrastate calls from interstate calls, the device would not seem to be warranted.

Justice Holmes, dissenting in the *Olmstead* case, characterized wiretapping as "dirty business." *Olmstead v. United States*, 277 U.S. 438, 470 (1928). And Justice Roberts in the first *Nardone* case referred to it as a device "inconsistent with ethical standards and destructive of personal liberty." 302 U.S. at 383.

The Supreme Court has interpreted section 605 strictly in the light of this view of wiretapping. It does not appear, therefore, that the Court would approve any attempt to evade the comprehensive purpose of the statute, either by permitting the practice in government buildings or by attempting to secure constructive authorization.

I have talked informally with Mr. Telford Taylor, General Counsel of the Federal Communications Commission, and he agrees with the conclusions above expressed.

T.I. EMERSON[*]
Attorney-Adviser
Office of the Assistant Solicitor General

[*] Editor's Note: The author of this memorandum was Thomas I. Emerson, who later became a professor at Yale Law School, successfully argued the petitioner's case in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and wrote a significant treatise on the First Amendment, *The System of Freedom of Expression* (1970). *See* Glenn Fowler, *Thomas I. Emerson, 83, Scholar Who Molded Civil Liberties Law*, N.Y. Times, June 22, 1991, at 21.

Presidential Appointment of Foreign Agents Without the Consent of the Senate

There are many precedents to sustain the power of the President, without the advice and consent of the Senate, to appoint special agents or personal representatives for the purpose of conducting negotiations or investigations.

September 23, 1943

MEMORANDUM FOR THE ASSISTANT SOLICITOR GENERAL

Clause 2 of Section 2, Article II, of the Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls." There are, however, many precedents to sustain the power of the President, without the advice and consent of the Senate, to appoint agents for the purpose of conducting negotiations or investigations. Some Senators have at times objected to the Presidents' actions as being without constitutional authority, but the question has not been passed upon by the courts. Precedents are set forth in 4 John Bassett Moore, *A Digest of International Law* § 632, at 452–56 (1904), and 4 Green Haywood Hackworth, *Digest of International Law* 409–14 (1942). *See also* Edward S. Corwin, *The President's Control of Foreign Relations* 63–66 (1917).

Persons appointed as such special agents or representatives are considered to be the personal representatives of the President and not "Ambassadors" or other "public Ministers" within the meaning of the constitutional provision. In many cases such personal representatives have been given diplomatic rank, including that of minister, envoy, and ambassador. Special representatives with diplomatic rank are not formally accredited to the foreign governments as official diplomatic representatives of our government. It is customary before making such an appointment for the State Department to ascertain from the foreign government concerned whether the appointment is acceptable. If so, such appointees are accredited informally. They are then customarily accorded the diplomatic privileges and courtesies pertaining to their rank.

Two recent examples of special envoys with diplomatic rank are, as cited in Mr, Hackworth's digest, the appointments by President Roosevelt of (1) Norman H. Davis in March 1933 as Chairman of the Delegation of the United States to the General Disarmament Conference at Geneva, with the rank of Ambassador while serving in that capacity; and (2) Myron Taylor in 1938 as the American representative on the special intergovernmental committee to facilitate the emigration from Austria and Germany of political refugees, with the rank of Ambassador Extraordinary and Plenipotentiary. 4 Hackworth, *Digest of International Law* at 412.

Moore gives the following instances of appointments by the Secretaries of State:

> May 12, 1825, John James Appleton was appointed by the Secretary of State to arrange a settlement of claims against Naples.
>
> . . . .
>
> April 17, 1847, Nicholas P. Trist, who was then chief clerk of the Department of State, was appointed a commissioner to conclude a treaty of peace with Mexico, which he did on February 2, 1848.
>
> . . . .
>
> In 1861 Archbishop Hughes and Bishop McIlvaine were sent to Europe by Mr. Seward, with the approval of the President and his Cabinet, as confidential agents in relation to questions growing out of the civil war.
>
> . . . .
>
> A.B. Steinberger was appointed by the Secretary of State, under direction of the President, March 29, 1873, as a special agent to Samoa.

4 Moore, *Digest of International Law* § 632, at 453–54.

With respect to the appointment of Mr. Trist, it appears that the instructions issued to him by Mr. Buchanan, Secretary of State, stated in part:

> The President, therefore, having full confidence in your ability, patriotism, and integrity, has selected you as a commissioner to the United Mexican States, to discharge the duties of this important mission.

5 *id.* § 858, at 781.

The instructions issued to the other appointees above mentioned are not given.

It also appears that Mr. Clayton, as Secretary of State, on June 18, 1849, issued to Mr. A. Dudley Mann, who was then in Europe, instructions in relation to a mission as a special and confidential agent to Hungary. Mr. Mann was given a letter (presumably signed by the Secretary of State) introducing him to the Minister for Foreign Affairs in Hungary as "special and confidential agent of the United States to the Government of Hungary." 1 *id.* § 72, at 219. Moore, however, also states that Mr. Mann "was appointed by President Taylor as a special and confidential agent to Hungary." 4 *id.* § 632, at 453. I suppose that in all five cases above mentioned the State Department would take the position that in making the appointments the Secretary acted for and under the direction of the President.

I spoke to Mr. Hackworth, Legal Adviser to the Secretary of State, with respect to the practice in this matter. He said that there was no uniform procedure. In the

case of Dr. Frank P. Corrigan, President Roosevelt issued a commission to him in 1937 designating him "Special Representative with the rank of Envoy Extraordinary and Minister Plenipotentiary" to meet with representatives of the Governments of Venezuela and Costa Rica to aid in the solution of the boundary controversy. On the other hand, when Mr. Phillips was sent recently to India, the Secretary of State wrote to Mr. Phillips in substance that he was enclosing a letter signed by the President addressed to the Viceroy regarding his appointment to serve near the Government of India as the President's personal representative. The Secretary further stated that his letter would serve in lieu of formal credentials. The usual form of credentials was not used in this case because Mr. Phillips was not being accredited to any foreign government.

Mr. Hackworth further advises that in all cases of special representatives the instructions to them are prepared in the Department of State and signed by the Secretary or the Acting Secretary of State. The State Department also prepares for the President's signature such formal document or letter as may be required or desired in the particular case. When serving in a special capacity, the names of the representatives are not submitted by the State Department to the Senate.

W.H. EBERLY
Attorney-Adviser
Office of the Assistant Solicitor General

Presidential Appointment of Justice Robert Jackson to Prosecute Axis War Criminals in Europe

The President may appoint Justice Jackson as United States prosecutor of the Axis war criminals in Europe.

July 2, 1946

LETTER FOR THE UNITED STATES ATTORNEY
NORTHERN DISTRICT OF NEW YORK

I want to thank you for calling to my attention the criticisms which have been made in your region concerning the President's action in appointing Mr. Justice Jackson as United States prosecutor of the Axis war criminals in Europe.

As I told you on the telephone, I think such criticism is entirely unjustified.

I hope the enclosed memorandum, giving the facts about the appointment, will be of use to you. I don't think my name or that of the Department should be mentioned at the present time in this connection. However, if you should wish a formal statement from me later on, please let me know.

TOM C. CLARK
Attorney General

MEMORANDUM

Appointment of Mr. Justice Jackson as Representative and Chief of Counsel of the United States in the Prosecution of the Axis War Criminals in Europe

By Executive Order 9547 of May 2, 1945, 10 Fed. Reg. 4961, President Truman designated Robert H. Jackson, Associate Justice of the Supreme Court of the United States, to act as the representative of the United States and as its Chief of Counsel in preparing and prosecuting charges of atrocities and war crimes against such of the leaders of the European Axis powers and their principal agents and accessories as the United States might agree with any of the United Nations to bring to trial before an International Military Tribunal. The appointment carried with it no additional compensation.

This appointment was made pursuant to the agreement entered into on August 8, 1945, by the United States, Great Britain, Russia, and France for the prosecution and punishment of the major war criminals of the European Axis. 59 Stat. 1544, 82 U.N.T.S. 280. The Charter of the International Military Tribunal annexed to and made a part of that agreement provides (art. 14) that each signatory power shall appoint a Chief Prosecutor for the investigation of the charges against and the prosecution of major war criminals, and that the Chief Prosecutors shall act as a committee for the following purposes:

> (a) to agree upon a plan of the individual work of each of the Chief Prosecutors and his staff,
>
> (b) to settle the final designation of major war criminals to be tried by the Tribunal,
>
> (c) to approve the Indictment and the documents to be submitted therewith,
>
> (d) to lodge the Indictment and the accompanying documents with the Tribunal,
>
> (e) to draw up and recommend to the Tribunal for its approval draft rules of procedure, contemplated by Article 13 of this Charter.

59 Stat. 1546, 1549, 82 U.N.T.S. 284, 292.

The Charter also provides (art. 15) that the Chief Prosecutors shall individually, and acting in collaboration with one another, perform the following duties:

> (a) investigation, collection and production before or at the Trial of all necessary evidence,

> (b) the preparation of the Indictment for approval by the Committee in accordance with paragraph (c) of Article 14 hereof,
>
> (c) the preliminary examination of all necessary witnesses and of the Defendants,
>
> (d) to act as prosecutor at the Trial,
>
> (e) to appoint representatives to carry out such duties as may be assigned to them,
>
> (f) to undertake such other matters as may appear necessary to them for the purposes of the preparation for and conduct of the Trial.

59 Stat. at 1549, 82 U.N.T.S. at 292–93.

It is hardly necessary to call attention to the fact that the undertaking involved—the indictment, prosecution, and trial of the chief war criminals in Europe—is of supreme importance to the whole civilized world. Nor is it necessary to point out that this grave undertaking is unique in the history of judicial procedure.

It was, therefore, of the utmost importance that the Chief of Counsel for the United States be an exceedingly able man, of wide experience, of exceptional physical vigor, of peculiar aptitude for the task, and of great legal attainments. It was equally important that the President of the United States should be entirely free to select that citizen of the United States who he felt was best qualified to perform the duties of this office.

It must be conceded that Mr. Justice Jackson is eminently qualified to discharge the duties and responsibilities of the task assigned him. His record of accomplishment as Chief Prosecutor for the United States in the trial of war criminals now being conducted at Nuremburg speaks for itself. His record in this respect is, in fact, a complete justification of his appointment.

The appointment of Justice Jackson for this special mission is not only without legal objection, but it is also supported by ample precedent. It is a well-established practice for the President to secure the services of federal judges in connection with important national and international matters. This practice arose long ago. It is well illustrated by the following examples: Chief Justice Jay served as special envoy to England at the request of the President. Chief Justice Ellsworth served as special envoy to France. Chief Justice Fuller twice acted as an arbitrator of international disputes. Circuit Judge Putnam served as a commissioner under a conference with Great Britain relating to the seizure of vessels in the Bering Sea. More recently, Justice Roberts served as chairman of the board appointed by President Roosevelt to investigate the Pearl Harbor disaster of December 7, 1941.

Presidential Authority as Commander in Chief of the Air Force

The President is Commander in Chief of all the armed forces of the United States—the Air Force as well as the Army and the Navy.

August 26, 1947

MEMORANDUM FOR THE SPECIAL COUNSEL TO THE PRESIDENT*

The question has been raised as to whether the President is Commander in Chief of the Air Force established as a separate branch of the National Military Establishment by the National Security Act of 1947, Pub. L. No. 80-253, § 208, 61 Stat. 495, 503.

The Constitution provides: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . . ." U.S. Const. art. I, § 2, cl. 1.

It is clear that the President is Commander in Chief of all the armed forces of the United States comprised within the national military establishment—the Air Force as well as the Army and the Navy. Under the Constitution, the President as Commander in Chief of the Army and Navy is the supreme military commander charged with the responsibility of protecting and defending the United States. The phrase "Army and Navy" is used in the Constitution as a means of describing all the armed forces of the United States. The fact that one branch of the armed forces is called the "Air Force," a name not known when the Constitution was adopted, and the fact that the Congress has seen fit to separate the air arm of our armed forces from the land and sea arms cannot detract from the President's authority as Commander in Chief of all the armed forces.

This conclusion is supported by other parts of the Constitution. Thus the Constitution speaks of the power of the Congress "to raise and support Armies," art. I, § 8, cl. 12, "to provide and maintain a Navy," *id.* cl. 13, and "to make rules for the Government and Regulation of the land and naval Forces," *id.* cl. 14. In so providing, the Constitution, of course, does not use the words "Air Force." It certainly could not be contended that the absence of those words from the Constitution rendered the Congress unable to provide for an Air Force.

HAROLD I. BAYNTON
Acting Assistant to the Attorney General

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* Editor's Note: The copy of this memorandum in the OLC daybook is addressed to "Mr. Clark Clifford," without indication of his position. It appears that Mr. Clifford was serving as Special Counsel to President Truman in 1947. *See* Jeremy Rabkin, *At the President's Side: The Role of the White House Counsel in Constitutional Policy*, 56 Law & Contemp. Probs. 63, 66 (1993).

Presidential Authority to Make Recess Appointments While Incumbents Hold Over

The President may make recess appointments to the Interstate Commerce Commission and to the Board of Directors of the Reconstruction Finance Corporation while members of those entities continue to serve in office under holdover statutes.

October 2, 1950

MEMORANDUM FOR THE DIRECTOR OF PERSONNEL
RECONSTRUCTION FINANCE CORPORATION*

You request information as to whether the President may make recess appointments to the Interstate Commerce Commission and the Board of Directors of the Reconstruction Finance Corporation in cases in which incumbents are still serving under provisions of law which permit them to continue to serve until their successors are appointed and qualified.

The appointment, term, and qualifications of a member of the Interstate Commerce Commission are governed by the provisions of section 11 of title 49 of the United States Code (1946). That section provides for terms of office of seven years and that "[u]pon the expiration of his term of office a Commissioner shall continue to serve until his successor is appointed and shall have qualified."

The appointment, qualifications, and tenure of directors of the Reconstruction Finance Corporation, appointed on and after July 1, 1950, are controlled by 15 U.S.C. § 602 (1946 Supp. II) (codifying Act of May 25, 1948, Pub. L. No. 80-548, § 2, 62 Stat. 261, 262), which provides that the terms of the directors in office when the Act of May 25, 1948 was enacted shall be extended until June 30, 1950, and also provides, after initial staggered appointments, for terms of three years, "but they may continue in office until their successors are appointed and qualified." Present incumbents now holding over, however, were appointed under a previous statute (15 U.S.C. § 603 (1946) (codifying Pub. L. No. 72-2, § 3, 47 Stat. 5, 5–6 (Jan. 22, 1932)), which provided that "[t]he terms of the directors appointed by the President of the United States shall be two years and run from January 22, 1932, and until their successors are appointed and qualified."

The authority of the President to make recess appointments is found in Article II, Section 2, Clause 3 of the Constitution, which provides that "[t]he President

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* Editor's Note: This memorandum was addressed to "the Honorable Donald S. Dawson," without indication of his office or title. At the time of this opinion, it appears that Mr. Dawson was serving as Director of Personnel for the Reconstruction Finance Corporation—an inference supported by the fact that the opinion addresses recess appointments to the Board of Directors of the Reconstruction Finance Corporation. *See* Wolfgang Saxon, *Donald Dawson, 97, Dies; Master of Truman Whistle-Stop*, N.Y. Times, Dec. 29, 2005, at A25, *available at* http://www.nytimes.com/2005/12/29/politics/29DAWSON.html (last visited Aug. 24, 2012).

shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."

A number of decisions in the state courts have dealt with the question whether expiration of the prescribed term, in the case of an officer authorized to hold over until his successor is appointed and qualified, creates a vacancy. The decisions have not been uniform as there are holdings both ways.

No decision under the applicable provision of the federal Constitution has been found. In a number of instances involving United States Marshals and United States Attorneys affected by "hold over" provisions, recess appointments have been given upon expiration of the prescribed term without, apparently, any formal removal or resignation of the incumbent. *See* Memorandum for the Attorney General, from George C. Todd, Assistant to the Attorney General, D.J. File No. 175,594 (Dec. 21, 1914). These officers, by express provision of the law, hold over until their successors are appointed and qualified. The question does not appear to have been raised, however, as to whether a formal removal was necessary.

The President has removal authority with respect to a Director of the Reconstruction Finance Corporation, who appears to be clearly an administrative officer in the Executive Branch. *Myers v. United States*, 272 U.S. 52 (1926). Members of the Interstate Commerce Commission, however, can probably be removed only "for inefficiency, neglect of duty, or malfeasance in office." 49 U.S.C. § 11; *see also Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935); *Power of the President to Remove Members of the Tennessee Valley Authority from Office*, 39 Op. Att'y Gen. 145 (1938) (Jackson, A.G.). Thus, at least insofar as the Reconstruction Finance Corporation is concerned, there is an analogy with the case of United States Marshals.

The Attorney General in *District Attorney—Temporary Appointment*, 16 Op. Att'y Gen. 538 (1880) (Devens, A.G.), held that the President might make a recess appointment to the office of United States Attorney even though the appointee of the court as United States Attorney held the office. He stated that

> The authority given to fill the office to the circuit justice is an authority only to fill it until action is taken by the President. The office in no respect ceases to be vacant in the sense of the Constitution because of this appointment, for the reason that the appointment itself contemplates only a temporary mode of having the duties of the office performed . . . .

Id. at 539–40. Likewise it may be said with respect to the commissioners of the Interstate Commerce Commission that where they hold over under the statute after their regular term, it is contemplated that such a holdover is only a temporary mode of having the duties of the position performed and a vacancy does exist in

the sense of the Constitution. Indeed, the statutory authorization for an incumbent to remain in office after the expiration of his term undoubtedly was provided for the purpose of insuring that the duties of such important offices would not go unattended, and obviously was not designed to nullify the provisions of law with respect to the terms of such offices. If the expiration of the term of the individual holding the office does not create a vacancy in the office, it would seem that the President could not, without first removing the incumbent, send to the Senate a nomination for the office.[*] Such, of course, is not the case and the President frequently sends to the Senate a nomination for an office occupied by an incumbent whose term has expired. To hold that there is no vacancy, merely because the incumbent, whose term has expired, is continuing to serve under statutory authority, would lead to the result that no nomination or appointment could be made until the incumbent resigned or died. Such a conclusion would render entirely meaningless the express statutory provisions which limit the terms of the offices in question to a specified number of years, and obviously is unsound.

In a memorandum for the Attorney General by the Assistant to the Attorney General George C. Todd of December 21, 1914, the question here under consideration was discussed and the conclusion reached that there is a vacancy in office for the purpose of a recess appointment under the circumstances indicated, as set forth in the memorandum:

> John Lord O'Brian was appointed on March 4, 1909 for four years and until his successor should qualify. On December 1, 1914, the Senate being then in recess, the President appointed Mr. Lynn by a commission expiring at the end of the present session of the Senate. Mr. Lynn qualified on December 2, 1914. On December 7, 1914, the Senate convened, and on December 9, 1914, Mr. Lynn was nominated for a full term. On December 14, 1914, the Senate rejected the nomination.
>
> The questions are:
>
> > 1. In view of the fact that Mr. Lynn's predecessor did not resign and was not removed, but ceased to be District Attorney only be reason of the appointment and qualification of his successor, was there any "vacancy" within the meaning of the provision of the Constitution authorizing the President to "fill up all vacancies that may happen during the recess of the Senate?"

[*] Editor's Note: In *Nominations for Prospective Vacancies on the Supreme Court*, 10 Op. O.L.C. 108, 109 (1986), the Office reached a different conclusion, stating that "as a constitutional matter, nothing precludes the nomination and confirmation of a successor while the incumbent still holds office."

> This objection to Mr. Lynn's appointment would seem to be over-refined. Mr. O'Brian held office subject to the absolute power of the removal of the President. [*In re Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839); *Blake v. United States*, 103 U.S. (13 Otto) 227 (1880); *Parsons v. United States*, 167 U.S. 324 (1897); *Shurtleff v. United States*, 189 U.S. 311 (1903).] The reasonable view would be that the action of the President in appointing a successor *ipso facto* created a vacancy in the office. It was equivalent to a removal.

Mr. Todd in this memorandum refers in supporting his conclusion to *In re Marshalship*, 20 F. 379 (M.D. Ala. 1884), and to an opinion of the Comptroller of the Treasury, 5 Comp. Gen. 594 (1926).

In conclusion, it would appear that the President's power to make recess appointments exists with respect to the positions here under consideration.*

PEYTON FORD
Deputy Attorney General

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* Editor's Note: Apart from the sentence identified in the previous Editor's Note, the Office continues to take the position articulated in this opinion. *See* Memorandum for Robert G. Damus, General Counsel, Office of Management and Budget, from Beth Nolan, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Reporting Obligation under the Federal Vacancies Reform Act for PAS Officers Serving Under Statutory Holdover Provisions* (July 30, 1999) ("As a matter of constitutional law, the executive branch consistently has taken the position that there is a vacancy for purposes of the Recess Appointments Clause when an appointment for a term of years expires and the officer continues serving under a holdover provision").

Federal courts, however, have taken conflicting positions on the issue. *Compare Staebler v. Carter*, 464 F. Supp. 585, 589 (D.D.C. 1979) (upholding recess appointment to position on Federal Election Commission still occupied by incumbent, on ground that expiration of incumbent's formal statutory term created immediate vacancy), *with Wilkinson v. Legal Servs. Corp.*, 865 F. Supp. 891, 900 (D.D.C. 1994) (invalidating termination of inspector general by recess appointees on Board of Directors of Legal Services Corporation, on grounds that holdover provision in Legal Services Corporation Act was mandatory and that Board positions were therefore not vacant at time of recess appointments), *rev'd on other grounds*, 80 F.3d 535 (D.C. Cir. 1996); *Mackie v. Clinton*, 827 F. Supp. 56, 58 (D.D.C. 1993), *vacated as moot*, Nos. 93-5287, 93-5289, 1994 WL 163761 (D.C. Cir.) (per curiam) (invalidating recess appointment to position on Postal Service Board of Governors still occupied by incumbent, on ground that statute entitled incumbent to hold position for one year after expiration of formal term). In *Swan v. Clinton*, 100 F.3d 973, 986 (1996), the D.C. Circuit refused to infer tenure protection for holdover members of the National Credit Union Administration "absent clear evidence that this was Congress' intent," because doing so would "preclude[] the President from exercising [the] constitutionally granted power" of recess appointment.

Assertion of Executive Privilege by the Chairman of the Atomic Energy Commission

Questions put to the Chairman of the Atomic Energy Commission regarding conversations he may have had with the President or his assistants in the White House come within the scope of the executive privilege, whereby information, papers, and communications which the President or the heads of the executive departments or agencies deem confidential in the public interest need not be disclosed to a congressional committee. In addition, the questions are within the scope of the President's letter of May 17, 1954 to the Secretary of Defense setting forth the Administration's policy that, in the public interest, advisement on official matters between employees of the Executive Branch of the government be kept confidential, and any conversations, communications, documents or reproductions concerning such advisement not be disclosed in congressional hearings.

Even if it were conceded only for the purpose of argument that the Atomic Energy Commission is a typical independent regulatory commission, which is not in one branch of the government to the exclusion of others but straddles at least two branches so as to be part of each, there is historical precedent indicating that, as to the executive functions of such a commission, its officers and employees have a right, and, when directed by the President, a duty to invoke the executive privilege.

The so-called fraud exception to executive privilege does not exist. The precedent for the so-called exception really evidences the unlimited discretion of the President to determine whether the public interest requires that the executive privilege be invoked or waived in a particular case.

January 5, 1956

MEMORANDUM FOR THE ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

The Honorable Lewis L. Strauss, Chairman, Atomic Energy Commission, in a letter to the Attorney General dated December 7, 1955, states that at a hearing on December 5, 1955 before the Antitrust and Monopoly Subcommittee of the Senate Judiciary Committee regarding the Mississippi Valley Generating Company contract, he was asked to testify "as to conversations or discussions I may have had with the President or his Assistants in the White House with respect to the negotiation of the contract, the decision to bring the contract to an end, and the action by the Commission, on advice of its General Counsel, that the contract should not be recognized as a valid obligation of the Government on the ground of possible conflicts of interest." Chairman Strauss reports that he declined to answer the above inquiry on the basis of the executive privilege under the constitutional doctrine of separation of powers.

It is the conclusion of this memorandum that the questions set forth in Chairman Strauss's letter come within the scope of the executive privilege, whereby information, papers, and communications which the President or the heads of the executive departments or agencies deem confidential in the public interest need not be disclosed to a congressional committee. It is the further conclusion of this memorandum that the questions are within the scope of the President's letter of

May 17, 1954 to the Secretary of Defense, setting forth the Administration's policy that, in the public interest, advisement on official matters between employees of the Executive Branch of the government is to be kept confidential, and any conversations, communications, documents, or reproductions concerning such advisement is not to be disclosed in congressional hearings. The President's letter to the Secretary of Defense states in part:

> Within this Constitutional framework each branch should cooperate fully with each other for the common good. However, throughout our history the President has withheld information whenever he found that what was sought was confidential or its disclosure would be incompatible with the public interest or jeopardize the safety of the Nation.
>
> Because it is essential to efficient and effective administration that employees of the Executive Branch be in a position to be completely candid in advising with each other on official matters, and because it is not in the public interest that any of their conversations or communications, or any documents or reproductions, concerning such advice be disclosed, you will instruct employees or your Department that in all of their appearances before the Subcommittee of the Senate Committee on Government Operations regarding the inquiry now before it they are not to testify to any such conversations or communications or to produce any such documents or reproductions. This principle must be maintained regardless of who would be benefited by such disclosures.

100 Cong. Rec. 6621 (1954); Letter to the Secretary of Defense Directing Him to Withhold Certain Information from the Senate Committee on Government Operations, *Pub. Papers of Pres. Dwight D. Eisenhower* 483, 483–84 (May 17, 1954).

I.

The President's letter to the Secretary of Defense is based on the constitutional doctrine of separation of powers. Article II, Section 1 of the Constitution states that "[t]he executive Power shall be vested in a President of the United States of America." Article II, Section 3 provides that the President "shall take care that the Laws be faithfully executed." And the President's oath of office requires that he "faithfully execute the Office of President of the United States," and to the best of his ability, "preserve, protect and defend the Constitution of the United States." U.S. Const. art. II, § 1. Attorney General Cushing, in discussing the application of the constitutional doctrine of separation of powers in order to determine the

legality of separate resolutions of the Senate and House of Representatives requiring the Secretary of the Interior to pay a certain claim, succinctly set forth the relationship between the Legislative and Executive Branches of the government, and the relationship between executive officials and of the government, and the relationship between executive officials and the President. It was stated in *Resolutions of Congress*, 6 Op. Att'y Gen. 680 (1854), that:

> The act of a Head of Department is, in effect, an act of the President. Now, the Constitution provides for co-ordinate powers acting in different and respective spheres of co-operation. The executive power is vested in the President, whilst all legislative powers are vested in Congress. It is for Congress to pass laws; but it cannot pass any law, which, in effect, coerces the discretion of the President, except with his approbation, unless by concurrent vote of two-thirds of both Houses, upon his previous refusal to sign a bill. And the Constitution expressly provides that orders and resolutions, and other votes of the two Houses, in order to have the effect of law, shall, in like manner, be presented to the President for his approval, and if not approved by him shall become law only by subsequent concurrence in vote of two-thirds of the Senate and House of Representatives.
>
> If, then, the President approves a law, which imperatively commands a thing to be done, ministerially, by a Head of Department, his approbation of the law, or its repassage after a veto, gives constitutionality to what would otherwise be the usurpation of executive power on the part of Congress.
>
> In a word, the authority of each Head of Department is a parcel of the executive power of the President. To coerce the Head of Department is to coerce the President. This can be accomplished in no other way than by a law, constitutional in its nature, enacted in accordance with the forms of the Constitution.

Id. at 682–83. It should be noted that Attorney General Cushing concludes in the above quotation that Congress can coerce the action of an executive officer only by a law which is constitutional in its nature and operation and enacted in accordance with the procedures provided for by the Constitution. There is no law of the United States requiring the disclosure of information pertaining to the executive function of the government of the United States when the President has, in his discretion, determined that such information should not be disclosed in the public interest. The enactment of such a law would, of course, raise a serious question of unconstitutional invasion by Congress of the powers of the Executive.

The right of the Executive Branch to withhold from congressional committees information which the President or the head of an executive department or agency thinks should be withheld for the public interest is a principle which was recognized and utilized by President Washington. For over 150 years since the establishment of our constitutional form of government, the Presidents have successively established, by precedent, that they, and members of their cabinet and other heads of executive departments and agencies, have a privilege and discretion to keep confidential, in the public interest, papers and information which require secrecy. These precedents are set forth in (1) an article by Herman Wolkinson, *Demands of Congressional Committees for Executive Papers*, 10 Fed. B.J. 103 (1948–49), (2) a memorandum prepared for the Department of Justice by Mr. Wolkinson, and (3) a May 17, 1954 memorandum to the President from the Attorney General, 100 Cong. Rec. 6621–23 (1954). Most of the precedents involve refusals by the President, cabinet officers, or officials of executive departments, acting pursuant to directions of the President or heads of departments. A few of the recent precedents involve the independent regulatory commissions.

There have been a number of judicial decisions, both in the Supreme Court and lower courts, establishing the rule that information and papers which the President and heads of executive departments consider confidential, in the public interest, need not be produced in court. These cases also hold that the decision as to whether the information is confidential is entirely within the discretion of the Executive. An excellent summary of the reasons which prevent disclosure of confidential information by the executive departments, both to the Judicial Branch and to the Legislative Branch, is contained in a well-documented speech of Senator Jackson (who became a justice of the Supreme Court in 1893), in the controversy which Cleveland's administration had with the Senate over the refusal to disclose confidential information. Senator Jackson stated:

> Sir, has this body, has the Congress of the United States any more authority over papers in the Executive Departments of this Government than the co-ordinate independent branch of the Government—the judiciary? The judicial department of this Government has as much power and authority over all papers in the hands of the Executive or in any Department as the entire Congress has. When the rights of individuals, affecting their life, liberty, or property, are pending before the courts, the judicial department has as much power over papers as the Senate or the whole Congress; and yet it has been universally recognized from the very foundation of this Government that the judicial department of the Government can not call for papers and procure them either from the President or the head of an Executive department at its own will, but that the discretion rests with the Executive and with the Departments how far and to what extend they will produce those pape[r]s.

17 Cong. Rec. 2623 (Mar. 22, 1886).

In the famous case of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), Chief Justice Marshall was presented with the problem of defining the limits at which the judiciary must stop when the head of an executive department invokes the privilege that the information sought from him is confidential information and therefore cannot be disclosed. The rule of law was stated by the Supreme Court as follows:

> By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.
>
> In such cases, their acts are his act; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.
>
> But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

Id. at 165–66. An examination of the facts surrounding the Mississippi Valley Generating Company matter clearly indicates that the conversations, if any, of the officials of the Atomic Energy Commission with the President and his White House assistants come within the category of those matters which Marshall termed "political" and concerning which the Executive has complete discretion as to whether such matters should be examined by the courts.

In regard to the intimate relationship between the President and his heads of departments, Marshall said:

> The intimate political relation subsisting between the president of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation. Impressions are often received without much reflection or examination and it is not wonderful, that in such a case as this, the assertion, by an individual, of his legal claims in a court of justice[,] to which claims it is the duty of that court to attend[,] should at first view be considered by some, as an attempt to intrude into the cabinet, and to intermeddle with the prerogatives of the executive.
>
> It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

Id. at 169.

Other decisions and trials in which the executive privilege to withhold confidential information from disclosure in a court was either recognized or successfully asserted are *United States v. Smith*, 27 F. Cas. 1192 (C.C.N.Y. 1806) (No. 16,342); *Mississippi v. Johnson*, 71 U.S. 475 (1866); *Totten v. United States,* 92 U.S. 105 (1875); *Appeal of Hartranft*, 85 Pa. 433 (1877); Trial of Thomas Cooper, for a Seditious Libel, in the Circuit Court of the United States for the Pennsylvania District (Philadelphia, 1800), *in* Francis Wharton, *State Trials of the United States During the Administrations of Washington and Adams* 659 (1849); 1 David Robertson, *Reports of the Trials of Colonel Aaron Burr* (1808). In the case of *Myers v. United States*, 272 U.S. 52 (1926), Chief Justice Taft, in analyzing the relationship between the President and the heads of executive departments, said in the majority opinion:

> This field is a very large one. It is sometimes described as political. . . . Each 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.

Id. at 132–33. It should be noted that there are no judicial precedents as to the existence or extent of the executive privilege in the area of congressional investigation. However, it is submitted that Senator Jackson's argument, set forth above,

to the effect that the executive privilege in a congressional inquiry is just as great, if not greater, than is the scope of the privilege in the courts, is a correct analysis of the law.

There are a number of opinions of the Attorney General which deal with the existence and extent of the executive privilege in the case of judicial and congressional inquiry. Attorney General Speed stated the principle to President Lincoln:

> Upon principles of public policy there are some kinds of evidence which the law excludes or dispenses with. Secrets of state, for instance, cannot be given in evidence, and those who are possessed of such secrets are not required to make disclosure of them. The official transactions between the heads of departments of the Government and their subordinate officers are, in general, treated as "privileged communications." The President of the United States, the heads of the great departments of the Government, and the Governors of the several States, it has been decided, are not bound to produce papers or disclose information communicated to them where, in their own judgment, the disclosure would, on public considerations, be inexpedient. These are familiar rules laid down by every author on the law of evidence.

Records of Courts-Martial, 11 Op. Att'y Gen. 137, 142–43 (1865). Other opinions dealing with the executive privilege in a court are to be found at *Civil Service Commission—Production of Records*, 20 Op. Att'y Gen. 557, 557–58 (1893); *Executive Department—Official Records—Testimony*, 25 Op. Att'y Gen. 326 (1905).

In President Theodore Roosevelt's administration, Attorney General Bonaparte stated that the head of the Bureau of Corporations was not obliged to deliver papers to a Senate committee, pursuant to a subpoena served upon him. Instead, the Attorney General counseled the head of the Bureau to deliver the records to President Roosevelt, who had the authority to determine the propriety of making public the information sought by the Senate. *Commissioner of Corporations—Right of Senate Committee to Ask for Information*, 27 Op. Att'y Gen. 150, 156 (1909). President Theodore Roosevelt decided that the Senate was not to see the papers, wrote a letter telling them so, and challenged the Senate to impeach him to get them. *The Letters of Archie Butt: Personal Aide to President Roosevelt* 305–06 (Lawrence F. Abbott ed., 1924); Edward S. Corwin, *The President: Office and Powers* 281, 428 n.45 (1st ed. 1940).

During President Franklin D. Roosevelt's administration, Attorney General Jackson, in a letter to Representative Carl Vinson, Chairman, House Committee on Naval Affairs, set forth the Justice Department's policy that all investigative reports are confidential documents of the executive department and that congressional access thereto was not in the public interest. The executive and legal

precedents behind the theory of executive privilege were set forth in some detail in the letter which is published in *Position of the Executive Department Regarding Investigative Reports*, 40 Op. Att'y Gen. 45 (1941).

A large number of eminent legal scholars and text writers have expressed the opinion that an executive privilege of secrecy exists as to confidential official documents, and for communications between government officials. *See* 8 *Wigmore on Evidence* § 2378(3) (3d ed. 1940); Edward Campbell Mason, *Congressional Demands Upon the Executive for Information*, *in* 5 *Papers of the American Historical Association* 367 (1891); John Philip Hill, *The Federal Executive* 55–56 (1916); 3 Westel Woodbury Willoughby, *The Constitutional Law of the United States* § 968, at 1488–91 (2d ed. 1929); John H. Finley & John F. Sanderson, *The American Executive and Executive Methods* 199–200, 264–65 (1908); Herman Finer, *Questions to the Cabinet in the British House of Commons: Their Applicability to the United States Congress*, *in* Staff of Joint Comm. on the Organization of Congress, 79th Cong., *The Organization of Congress: Suggestions for Strengthening Congress by Members of Congress and Others* 49, 56–57 (Comm. Print 1946); Ernest J. Eberling, *Congressional Investigations* 282 (1928).

Edward S. Corwin, in *The President: Office and Powers*, recognizes in the first edition of his book (1940) the existence of an executive privilege in the field of congressional investigations. However, the author states that, should a cabinet officer fail to respond to the subpoena of congressional committee, he saw no reason why Congress could not hold the officer in contempt. *Id.* at 281–82. In the third edition of his book (1948), Mr. Corwin leaves out the above observation and deals only with the precedents indicating the existence of an executive privilege in the field of congressional inquiry for not only the President, but cabinet officers and executive officers and employees when they act pursuant to the direction of the President or heads of departments in refusing to disclose confidential executive information. *Id.* at 136–43.

Philip R. Collins, in an article entitled *The Power of Congressional Committees of Investigation to Obtain Information from the Executive Branch: The Argument for the Legislative Branch*, 39 Geo. L.J. 563 (1950–51), presents an argument against the existence of an executive privilege, particularly for cabinet officers and executive employees when called as witnesses before congressional committees. The argument is based mainly on the congressional debates during Cleveland's and Truman's administrations, when the Executive was at logger-head with a Republican Congress. In both cases, much was said, but nothing was done by Congress.

At the request of Senator Langer, the Legislative Reference Service of the Library of Congress prepared a study entitled *Congressional Power of Investigation*, S. Doc. No. 83-99 (1954). On pages 20–27 the analysis deals with the question of investigation of the Executive Branch. The conclusion reached is that there is no categorical answer to the question how far Congress can go in requiring

information from the Executive Branch. It is recognized that the only precedents are historical ones.

II.

An argument may be made by the Senate subcommittee to the effect that the executive privilege and direction concerning the privilege in the President's letter of May 17, 1954, to the Secretary of Defense, apply only to the executive departments of the government and not to the independent regulatory commissions. An examination of the historical precedents and the President's letter concerning the exercises of the executive privilege clearly indicate that the precedents and letter apply to the entire Executive Branch and function of the government, and not alone to the ten executive departments. It should be noted that irrespective of a determination of the problem of the precise position of the Atomic Energy Commission within the framework of the federal government, it is clear that the Mississippi Valley Generating Company contract, with which the inquiry in question is concerned, was negotiated, cancelled and rescinded by the Atomic Energy Commission as an exercise of the executive function of government.

An examination of the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011–2281 (1952 Supp. II), indicates that the Atomic Energy Commission is an independent establishment of the government, in the sense that it is outside the ten executive departments, and is not subject to direct supervision or control by any Cabinet Secretary. An examination of the Act also indicates that the Commission primarily exercises a non-regulatory executive function, and only incidentally thereto, any regulatory power. The principal functions of the Atomic Energy Commission, as set forth in the Atomic Energy Act of 1954, 42 U.S.C. § 2013, are (1) the conducting, assisting, and fostering of research and development in order to encourage the maximum scientific and industrial progress in the field of atomic energy; (2) the formulation of a program for the dissemination of unclassified scientific and technical information, and the control, dissemination and declassification of restricted data, subject to appropriate safeguards, so as to encourage scientific and industrial progress in the field of atomic energy; (3) the conducting of a program of government control of the possession, use, and production of atomic energy and special nuclear material so as to make the maximum contribution to the common defense and welfare of the nation; (4) the development of a program to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and the health and safety of the public; (5) the conducting of a program of international cooperation to promote the common defense and security of the nation, and to make available to cooperating nations the benefits of the peaceful application of atomic energy; and (6) the administration of a program to carry out the above

policies, and to keep Congress currently informed so that it may take such further legislative action as may be necessary.

In carrying out the above functions, which are executive in nature, the Atomic Energy Commission has been given, by Congress, the power to regulate the production and use of atomic energy for commercial and medical purposes through a system of licenses issued pursuant to rules and regulations of the Commission. The Commission is also authorized to conduct hearings, make findings, and regulate the patent licensing of inventions or discoveries useful in the peaceful production and utilization of atomic energy. Such regulatory powers as the Commission has are incidental to the exercise by the Commission of its executive function of operating for the federal government a monopoly of the production and use of atomic energy. In this way, the Atomic Energy Commission differs basically from such regulatory commissions as the Interstate Commerce Commission, Securities and Exchange Commission, Federal Trade Commission, etc., which are agencies that exercise governmental control primarily by way of quasi-legislative or quasi-judicial procedures over otherwise federally uncontrolled private business affairs or property interests.

From an analysis of its functions, the Atomic Energy Commission appears to be an establishment, within the Executive Branch of the government which has been given quasi-legislative and quasi-judicial powers to be used incidentally in carrying out its principal executive functions. The granting of quasi-legislative or quasi-judicial powers to a governmental establishment which is primarily executive in nature is by no means novel. One example is the Secretary of Agriculture who, though clearly an executive officer within the Executive Branch of the government, has under the Packers and Stockyards Act, 7 U.S.C. §§ 181–231 (1952), been given quasi-legislative and quasi-judicial powers by Congress. Another excellent example is that of the Tennessee Valley Authority ("TVA"). In the case of *Morgan v. TVA*, 115 F.2d 990 (6th Cir. 1940), the issue concerned the power of the President to remove an officer of the TVA. In the case of *Myers v. United States*, 272 U.S. 52 (1926), the Supreme Court held that the President's removal powers were unrestrictable as to purely executive officers. However, in the case of *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Supreme Court decided that in the case of an agency such as the Federal Trade Commission, which the court held exercised primarily quasi-legislative and quasi-judicial powers and only incidentally thereto any executive function, Congress could constitutionally limit the President's removal powers. Therefore, to determine the issue in the *Morgan* case the Sixth Circuit had to determine what the position of the TVA was in the framework of the federal government. The court stated:

> It requires little to demonstrate that the Tennessee Valley Authority exercises predominantly an executive or administrative function. To

> it has been entrusted the carrying out of the dictates of the statute to construct dams, generate electricity, manage and develop government property. Many of these activities, prior to the setting up of the T.V.A., have rested with the several divisions of the executive branch of the government. True, it is, that in executing these administrative functions, the Board of Directors is obliged to enact by-laws, which is a legislative function, and to make decisions, which is an exercise of function judicial in character. In this respect its duties are, in no wise, different, except perhaps in degree, from the duties of any other administrative officers or agencies, or the duties of any other Board of Directors, either private or public. Whatever their character, they are but incidental to the carrying out of a great administrative project. The Board does not sit in judgment upon private controversies, or controversies between private citizens and the government, and there is no judicial review of its decisions, except as it may sue or be sued as may other corporations. It is not to be aligned with the Federal Trade Commission, the Interstate Commerce Commission, or other administrative bodies mainly exercising clearly quasi-legislative or quasi-judicial functions—it is predominantly an administrative arm of the executive department. The rule of the Humphrey case does not apply.

115 F.2d at 993–94. The court held that the doctrine of the *Myers* case applied, and that the President had unrestricted power to remove the officers of the TVA. It is submitted that the position of the Atomic Energy Commission within the framework of the federal government is closely analogous to that of the Tennessee Valley Authority.

It is clear, therefore, that the executive privilege and direction concerning said privilege, which was the subject of the President's letter of May 17, 1954 to the Secretary of Defense, apply to the questions which Chairman Strauss has referred to in his letter to the Attorney General because first the questions clearly involve the carrying out of the executive function by Chairman Strauss, and second because the officers of the Atomic Energy Commission, due to the nature of the Commission's functions, are officers of a governmental establishment within the Executive Branch of the government, and as such are subject to the President's direction concerning the exercise of the executive privilege.

However, even if it were conceded only for the purpose of argument that the Atomic Energy Commission is a typical independent regulatory commission, which is not in one branch of the government to the exclusion of others but straddles at least two branches so as to be part of each, there is historical precedent indicating that, as to the executive functions of such a commission, its officers and employees have a right, and, when directed by the President, a duty to invoke the

executive privilege. Such an historical precedent has been established in connection with a congressional investigation of the Federal Communications Commission. On January 19, 1943, the House of Representatives appointed a Select Committee to Investigate the Federal Communications Commission. The committee was authorized to require by subpoena the attendance of witnesses and the production of books and papers. James L. Fly, Chairman of the Federal Communications Commission and Chairman of the Board of War Communications, was subpoenaed as a witness to appear before the aforesaid committee. Mr. Fly appeared on July 9, 1943, but did not produce the records described in the subpoena. He told the committee that he was bound by the decision of the Board of War Communications, of which he was chairman, not to divulge the records in question; and that even if he had the documents in his custody, he would have no choice but to decline to hand them over to the committee. The records in question were in the possession of Mr. Denny, General Counsel of the Federal Communications Commission, who was present at the time Mr. Fly was testifying before the committee. Mr. Denny had also been subpoenaed. He advised the committee that he had possession of the papers called for. Neither Mr. Denny nor Mr. Fly exhibited the records to the committee. Both felt bound by the decision of the Board of War Communications. *Study and Investigation of the Federal Communications Commission: Hearings Before the Select H. Comm. to Investigate the Federal Communications Commission*, 78th Cong., pt. 1, at 46–67 (1943). It is submitted that the above rule and precedent have a firm legal basis in the constitutional doctrine of separation of powers and in the constitutional provisions that all executive power is vested in the President of the United States, and that the President shall take care that the laws be faithfully executed.

It may also be argued by the subcommittee that Congress occupies a special statutory position in relation to the Atomic Energy Commission, and that such relationship requires a disclosure by Chairman Strauss of the conversations in question. Title 42, section 2252 of the U.S. Code provides in part that:

> The Commission shall keep the Joint Committee fully and currently informed with respect to all of the Commission's activities. The Department of Defense shall keep the Joint Committee fully and currently informed with respect to all matters within the Department of Defense relating to the development, utilization, or application of atomic energy. Any Government agency shall furnish any information requested by the Joint Committee with respect to the activities or responsibilities of that agency in the field of atomic energy.

First of all, it should be noted that the above provisions relate to the Joint Committee of Congress on Atomic Energy and not the Antitrust and Monopoly Subcommittee of the Senate Judiciary Committee, which is the subcommittee that has made the inquiry in question. Second, and most important, from a reading of

42 U.S.C. § 2252 and an examination of the legislative history of the Atomic Energy Act of 1946, and the Atomic Energy Act of 1954, it appears that section 2252 requires the Commission to keep the Joint Committee advised of all the Commission's activities but not of each commissioner's individual activity in the line of official duty. In the committee report to the House of Representatives, H.R. Rep. No. 83-2181 (1954), which was submitted at the time the Atomic Energy Act of 1954 was considered by the House, it is stated that:

> The Commission and the Department of Defense are required to keep the joint committee fully and currently informed with respect to all atomic-energy matters. It is the intent of Congress that the joint committee be informed while matters are pending, rather than after action has been taken.

Id. at 29. The 1954 Act, as finally enacted, amended section 15 of the 1946 Act, 42 U.S.C. § 1815 (1952), by inserting the word "all" in the provision requiring the Commission to keep the Joint Committee advised of all the Commission's activities. The 1954 Act also included, for the first time, a similar provision in regard to the Department of Defense, and a requirement that all government agencies furnish to the Joint Committee, when requested, information concerning the agency's activities or responsibilities in the field of atomic energy.

Section 2252 appears to require the Commission to keep the Joint Committee currently advised of the action which the Commission, as a body, is taking in regard to atomic energy matters, but not of the conversations between the various commissioners, between the commissioners and the employees of the Atomic Energy Commission, or between the President or his officers and advisors, which may or may not lead to final collective action by the Commission itself. In other words, the section applies only to the action of the Commission as a collective body, and not to individual action by the commissioners. Such a position is further strengthened by the fact that section 2252 also requires the Defense Department, which is clearly within the Executive Branch, to keep the Joint Committee fully and currently informed with respect to all matters within that department relating to the development, utilization, or application of atomic energy. It is submitted that, if Congress were to require the Atomic Energy Commission or the Department of Defense to keep Congress or a committee thereof advised of those matters, which it is here asserted Congress has not required under section 2252 (particularly in regard to conferences with the President, or his personal advisors or cabinet officers), there would be presented a serious question whether Congress had exceeded the limit of its constitutional right to investigate the Executive Branch of the government for the purpose of aiding further legislation. In effect, such a sweeping congressional requirement of disclosure of normally confidential information from within the Executive Branch of the government might amount to an unconstitutional exercise of the executive power by Congress, and a usurpation

by Congress of the Executive's exclusive constitutional duty to take care that the laws are faithfully executed. This would be particularly true if, as previously pointed out, Congress should, by section 2252, attempt to coerce the disclosure from within the Executive Branch of information which the President has held to be confidential in the public interest. However, pursuant to the interpretation of section 2252 as set forth in this memorandum, there is presented no constitutional problem, and it is clear that the section does not curtail the right to invoke the executive privilege or affect the direction in the President's letter of May 17, 1954, that the executive privilege is to be asserted when Congress makes an inquiry in the nature of the questions reported by Chairman Strauss in his letter to the Attorney General.

It should be further noted that Chairman Strauss occupies a dual role. He is not only the Chairman of the Atomic Energy Commission, but also special advisor on atomic energy affairs to the President. It appears from a study of the Senate subcommittee hearings that Chairman Strauss was asked to testify as Chairman of the Atomic Energy Commission concerning conversations he may or may not have had with the President or his White House assistants. If it should appear that the inquiry was put to Chairman Strauss as the President's special advisor, or if it should develop that the conversations in question took place when Strauss was acting as the President's special advisor, there is absolutely no question that the precedents hold that the executive privilege and the President's direction concerning the exercise of the privilege apply to the subcommittee inquiry of Chairman Strauss.

III.

Chairman Strauss states in his letter to the Attorney General that a suggestion was made by the Senate Subcommittee that the executive privilege was not available, within the doctrine laid down by the Supreme Court in the Teapot Dome cases, because of possible fraud in connection with the contract. It is the conclusion of this memorandum that the Supreme Court cases referred to do not create any fraud exception to the executive privilege, nor do the historical precedents create any such exception. There is historical precedent to the effect that where the question of fraudulent conduct by a government official is involved in a congressional investigation, the President, in the exercise of his unlimited discretion, may waive the right of an official to invoke the executive privilege. However, it should be noted that in the particular case with which this memorandum deals, there appears to be no evidence in the record of the Senate Subcommittee's hearings, or elsewhere, indicating any acts of fraud by the President, the President's White House advisors, Chairman Strauss, or any other government official or employee, with the possible exception of Adolph Wenzell. The General Counsel of the Atomic Energy Commission, in his opinion to the Commission in regard to the

Mississippi Valley Generating Company contract, found that the contract should be rescinded because of possible violation by Adolph Wenzell of a statute or public policy against conflict of interests. There was no finding of fraud on the part of any other governmental official or employee. As to Adolph Wenzell, the Senate Subcommittee interrogated him at great length and no information demanded of him was refused. It would not seem logical, assuming only for the purpose of argument that the Subcommittee's position is valid, that because one official may have defrauded the government, *ipso facto*, the executive privilege may not be validly asserted by any other official of the Executive Branch where there is no evidence of fraud on the part of such official or other officials with whom he may or may not have discussed the matter.

As pointed out, however, the cases of *McGrain v. Daugherty*, 273 U.S. 135 (1927), and *Sinclair v. United States*, 279 U.S. 263 (1929), which the Senate Subcommittee evidently was referring to as the Teapot Dome cases, do not in any way create an exception to the right of an officer or employee of the Executive Branch of the government to invoke the executive privilege in a congressional investigation when directed to, simply because the investigation concerns alleged fraudulent conduct in the government. The case of *McGrain v. Daugherty* involved an action against a private citizen for contempt of the Senate. Charges of misfeasance and nonfeasance in the Department of Justice in regard to the Teapot Dome matter had been made in the Senate. As a result of the charges, both the Senate and House passed two measures taking the Teapot Dome litigation out of the control of the Department of Justice, and authorized a select committee of five Senators to investigate the alleged failure of the Attorney General to take certain legal action and to investigate and report to the Senate the activities of the Attorney General and any of his assistants which would in any manner tend to impair their efficiency of influence as representatives of the government. In the course of the investigation, Mally Daugherty, the brother of Attorney General Daugherty, was properly served with a subpoena to appear before the Senate Committee as a witness. Mally Daugherty refused to obey the subpoena and contempt action was brought against him. It was argued that the purpose for which the witness's testimony was sought was not to obtain information in aid of the legislative function, and that any evidence of such intention by the Senate was an afterthought in an attempt to legalize the investigation. The Court said at page 178 of its opinion that the only legitimate object the Senate could have in ordering the investigation was to aid it in legislating. The Court, however, found that the subject matter involved was such that the presumption should be indulged that legislation was the real object. The Court noted that the power and duties of the Attorney General and the duties of his assistants are all subject to regulation by congressional legislation, and that the department is maintained, and its activities carried on, by yearly appropriations by Congress. The case stands for the proposition that investigation of the executive

departments for the purpose of obtaining information in aid of legislation is a proper function of Congress.

The case of *Sinclair v. United States* involved an action against a private citizen for contempt of the Senate. The case arose out of an investigation by the Senate of alleged fraud in the execution of the lease of naval oil reserve lands to the Mammoth Oil Company and a contract with the Pan American Petroleum and Transport Company. The Senate Committee was to report its findings to the Senate and determine if additional legislation were advisable. Harry F. Sinclair was subpoenaed as a witness and interrogated as to certain matters. Sinclair refused to answer certain questions on the grounds that the questions pertained to issues involved in pending litigation. It was argued that the Senate, by the adoption of a joint resolution requiring the President to place the subject of the investigation in litigation, had thereby deliberately removed its jurisdiction. The Supreme Court, in rejecting Sinclair's contention, held that the investigation was in aid of legislation, that under Article IV, Section 3, Congress has plenary powers to dispose of and to make all needful rules and regulations concerning public lands, and that the latter point was in itself a legal basis for the investigation. The Court also held that the Joint Resolution requiring the President to place the matter in litigation did not divest the committee of authority to ask the questions in issue. It was stated at page 295 that Congress was without authority to compel disclosures for the purpose of aiding the prosecution of pending suits, but that its authority to require pertinent disclosures in aid of its own constitutional power was not abridged because the information sought might also be of use in a lawsuit.

In the last session of Congress, Senator Knowland had printed in the Congressional Record an analysis of the power of Congress to require testimony, papers, and documents from the President and the Executive Branch. 101 Cong. Rec. 11,458–62 (July 26, 1955). Senator Knowland's analysis takes the position that there is a privilege in the Executive Branch to withhold information from Congress which the President or heads of departments feel should be kept confidential in the public interest. However, the analysis found an exception to the above proposition to exist in "cases where circumstances strongly point to wrongdoing of specific department officials (as in the Teapot Dome case), or when wholesale corruption is uncovered." *Id.* at 11,458. Senator Knowland discussed the Teapot Dome case. *Id.* at 11,461. After stating the limited holding of *McGrain v. Daugherty*, the Senator's analysis set forth the following letter from President Coolidge to Attorney General Daugherty. This letter is apparently the precedent for the so-called fraud exception. The letter reads:

THE WHITE HOUSE
Washington, March 27, 1924

MY DEAR MR. ATTORNEY GENERAL: Since my conference with you I have examined the proposed reply you suggest making to

> the demand that you furnish the committee investigating the Department of Justice with files from that Department, relating to litigation and to the Bureau of Investigation. You represent to me and to the committee in your letter that it would not be compatible with the public interest to comply with the demand, and wish to conclude your letter with a statement that I approve that position. Certainly I approve the well-established principle that departments should not give out information or documents, for such a course would be detrimental to the public interest and this principle is always peculiarly applicable to your Department, which has such an intimate relation to the administration of justice. But you will readily perceive that I am unable to form an independent judgment in this instance without a long and intricate investigation of voluminous papers, which I cannot personally make, and so I should be compelled to follow the usual practice in such cases and rely upon your advice as Attorney General and head of the Department of Justice.
>
> But you will see at once that the committee is investigating your personal conduct, and hence you have become an interested party, and the committee wants these papers because of a claim that they disclose your personal conduct of the Department. Assuming that the request of the committee is appropriately limited to designated files, still the question will always be the same. In view of the fact that the inquiry related to your personal conduct, you are not in a position to give to me or the committee what would be disinterested advice as to the public interest. You have a personal interest in this investigation which is being made of the conduct of yourself and your office, which may be in conflict with your official interest as the Attorney General. I am not questioning your fairness or integrity. I am merely reciting the fact that you are placed in two positions, one your personal interest, the other your office of Attorney General, which may be in conflict. How can I satisfy a request for action in matters of this nature on the ground that you as Attorney General advise against it when you as the individual against whom the inquiry is directed necessarily have a personal interest in it? I do not see how you can be acting for your own defense in this matter and at the same time and on the same question acting as my adviser as Attorney General.

Id.

President Coolidge solved the above dilemma by asking for the resignation of his Attorney General, and the investigation proceeded from there. An examination of the cases and historical precedents indicates that there is no fraud exception to the executive privilege. Rather, there is historical precedent to the effect that the

President as Chief Executive can, in his sole discretion, direct that the executive privilege be waived in a case where he believes it is in the public interest. If the charges of fraud are directed against the President himself, the only way that Congress can constitutionally proceed is by way of impeachment. Even in this latter case there is no precedent to the effect that the executive privilege cannot validly be invoked.

IV.

It is therefore concluded that the questions of the Senate Subcommittee put to Chairman Strauss on December 5, 1955, which Chairman Strauss refused to answer, come within the scope of the executive privilege to withhold information from Congress which the President deems confidential in the public interest; and that the President's letter of May 17, 1954, to the Secretary of Defense is a determination, applicable in this particular case, that the questions asked by the Senate Subcommittee are deemed by the President to be confidential. It is further concluded that the so-called fraud exception to which the Senate Subcommittee referred does not exist. The precedent for the so-called exception really evidences the unlimited discretion of the President to determine whether the public interest requires that the executive privilege be invoked or waived in a particular case.

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Legal and Practical Consequences of a Blockade of Cuba

The President has the power to establish a blockade of Cuba under the laws of the United States without further congressional action.

A blockade may be unilaterally established by the United States under international law but its establishment may be questioned within the Organization of American States and the United Nations. In addition, such a blockade could be regarded by Cuba and other Soviet Bloc nations as an act of war.

October 19, 1962

MEMORANDUM[*]

This memorandum discusses the legality and practical consequences of a blockade of Cuba established unilaterally by the United States in response to the current buildup of a military potential in Cuba with clearly aggressive capabilities. It concludes that the President has the power to establish such a blockade under the laws of the United States without further congressional action; that it may be confined to surface vessels or include aircraft as well; that a blockade may be unilaterally established by the United States under international law but that its

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[*] Editor's Note: This unsigned, unaddressed memorandum appears in the daybooks of the Office of Legal Counsel and was cited in *The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them*, 25 Op. O.L.C. 188 (2001).

Prior to publishing the 2001 opinion, we consulted with officials at the Department of State to determine whether they had any record or evidence of authorship of this memorandum. Although they were unable to locate a copy of the memorandum itself, they pointed us to declassified records of a meeting held on October 19, 1962 (the same date as this memorandum) and attended by a number of top-level administration officials (including Secretary of State Dean Rusk, Attorney General Robert Kennedy, and National Security Advisor McGeorge Bundy). *See* U.S. Dep't of State, *Foreign Relations of the United States, 1961–1963: Volume XI, Cuban Missile Crisis and Aftermath*, doc. 31 (Edward C. Keefer et al., eds., 1998), *available at* http://history.state.gov/historicaldocuments/frus1961-63v11/d31 (last visited Aug. 3, 2012) (notes of October 19, 1962 meeting). These records suggest that the memorandum may have been prepared by Leonard Meeker, Deputy Legal Adviser for the Department of State, perhaps in consultation with Nicholas Katzenbach, Deputy Attorney General at the time and previously Assistant Attorney General for OLC. Mr. Meeker kept the notes that are collected in the declassified records of the October 19 meeting. According to Mr. Meeker, Mr. Katzenbach spoke first at the meeting and stated that "the President had ample constitutional and statutory authority to take any needed military measures." *Id.* Mr. Meeker recorded that "my analysis ran along much the same lines." *Id*.

Mr. Katzenbach's and Mr. Meeker's positions were thus consistent with that of this memorandum. They were also consistent with two other OLC opinions included in this volume—one signed by Robert Kramer, Assistant Attorney General for OLC, and addressed to Attorney General Kennedy (*Authority of the President to Blockade Cuba*, 1 Op. O.L.C. Supp. 195 (Jan. 25, 1961)); the other signed by Norbert Schlei, Assistant Attorney General for OLC, also addressed to Attorney General Kennedy (*Authority Under International Law to Take Action If the Soviet Union Establishes Missile Bases in Cuba*, 1 Op. O.L.C. Supp. 251 (Aug. 30, 1962)). This memorandum does not cite either of those opinions, however, which tends to suggest that it was not prepared by the Department of Justice.

establishment may be questioned within the Organization of American States ("OAS") and, perhaps, within the United Nations. In addition, it concludes that such a blockade could be regarded by Cuba and other Soviet Bloc nations as an act of war.

I. The Legal Requirements of a Blockade

The most authoritative definition of blockade reads as follows:

> Blockade is the blocking by men-of-war of the approach to the enemy coast, or a part of it, for the purpose of preventing ingress and egress of vessels or aircraft of all nations. . . . Although blockade is . . . a means of warfare against the enemy, it concerns neutrals as well, because the ingress and egress of neutral vessels are thereby interdicted, and may be punished.

2 L. Oppenheim, *International Law: A Treatise* 768 (H. Lauterpacht ed., 7th ed. 1952).

Historically, blockade has been associated with belligerent nations as a measure of war.

While the practical effectiveness of a blockade may be influenced by the failure to interdict aircraft or, presumably, submarines, the legal effectiveness of a blockade is not affected by the failure to do so. *Id.* at 781. Thus, a blockade may be declared against shipping alone, or against shipping and aircraft.

The formal requirements of a blockade have to do with the manner in which it is established and its existence made known. The declaration must state the date on which a blockade begins and must make clear its geographical limits. In addition, it must satisfy three conditions: (1) it must be effectively maintained; (2) it must not bar access to ports and coasts of countries not included within its objectives; and (3) it must be applied impartially to the shipping of all nations.

The reasons for these conditions are clear. The state declaring the blockade must be able to make it effective against all shipping to the extent that the risk of running the blockade is clear and apparent. Otherwise, a so-called "paper blockade" would exist and amount to a mere license to commit haphazard acts of privateering. The element of danger must be clearly understood since, as a matter of law, any shipping which seeks to run a blockade is liable to seizure and eventual condemnation by the blockading state.

A blockade may exclude all shipping and, therefore, all cargoes from the blockaded state. Alternatively, the blockading state may declare only certain cargoes contraband.

II. Blockade as an Act of War

There is a good deal of authority to the effect that a blockade assumes the existence of a state of war and that there is legally no such thing as a "pacific blockade" or "a blockade during time of peace." There are frequent statements by commentators that a blockade necessarily means war, or depends upon a pre-existing state of war, or in and of itself creates a state of war. The United States took such a position with respect to the Anglo-German Blockade of Venezuela in 1902, and again in 1919, with respect to the proposal that the Allied governments blockade Bolshevist Russia. Broad statements of this kind, however, require considerable qualification in the light both of history and of contemporary conditions.

A. History

During the nineteenth century, a lawyer's distinction between war and peace grew up. Since international law was divided between that which existed in *peacetime* and that which existed in *wartime*, it became important to lawyers to attempt to make a clear distinction. For example, the law of the high seas in peacetime forbade one nation to stop the shipping of another, but during time of war freedom of the seas could be heavily circumscribed through rights of blockade and search and seizure.

In practice, states never observed the clear-cut distinction between war and peace which lawyers insisted must exist. Whenever a state had a limited objective in its use of force, it customarily refrained from declaring war, which implied all-out hostilities rather than limited action. Often these were referred to as "acts short of war," "hostile measures short of war," or "reprisals short of war." The lawyers, however, kept insisting that as a matter of strict logic there could be no such thing.

There are numerous examples. On several occasions, the United States used armed force to protect American property abroad against the will of the state involved without a declaration of war. One such instance was the bombardment and occupation of Vera Cruz, which Mexico insisted was an act of war, though the United States maintained that no state of war existed. Other states engaged in similar practices; Corfu is another famous example.

In 1902, the British engaged in a blockade of Venezuela as a measure to enforce the collection of a debt. The United States insisted that a blockade required a declaration of war and demanded that the British either cease the blockade or declare war on Venezuela. Eventually the British did, and only after they had done so did the United States recognize the legality of the blockade.

The declaration of a state of war was helpful in ascertaining the rights and obligations of neutrals in a given situation. Apart from this, however, it served little function. War itself, whatever its reason, was legal self-help, and so were lesser measures if such could be said to exist.

Whether or not a nation declared a state of war it would be found by others to exist if that state were claiming rights, such as blockade, normally associated with war. Therefore, it seems to me that legal doctrine to the effect that blockade requires a state of war is utterly tautological. Blockade is a right that existed only during war since it was doctrinally related to wartime rather than peacetime. One could deduce a state of war from the existence of a blockade. And one could not conceptually claim rights of blockade without acknowledging its relationship to war. Thus the declaration of war really had no significance apart from clarification that one was claiming the rights normally associated with blockade under international law rather than exceptional rights which would have been unprecedented interference with freedom of the high seas during peacetime.

Applied to the current situation, one could say that if the United States declared a blockade and asserted the rights with respect to neutrals normally associated with it, there would be no need to declare a state of war as well. Other states might insist, as we did in the case of Venezuela, that we declare a state of war, but it is difficult to see the significance of this insistence in any realistic terms should we refuse to do so. Alternatively, they could state that war existed by virtue of the fact that we have declared a blockade, whether we affirmed the state of war or not.

In the light of these facts, what we say with respect to the existence or nonexistence of a state of war is largely a political judgment. I would recommend, therefore, that if we declare a blockade, we simply claim all the rights a blockading nation would have if a state of war existed. This clarifies our position sufficiently for legal purposes. A number of states will say this amounts to a declaration of war against Cuba, but that could scarcely be avoided under any circumstances.

B. Contemporary Conditions

In actuality the existence or non-existence of a state of war has always been a question of fact, not of law. If actual hostilities exist, then such parts of the law of war as treatment of prisoners, etc., exist irrespective of any formal declaration and irrespective of the legality or illegality of the hostilities themselves. Moreover, the distinction between war and peace, as it existed in the nineteenth century, has limited application today. Various acts are made unlawful by the U.N. Charter, a sharp distinction from the nineteenth century view that war was itself a lawful prerogative of states. The significance, therefore, from a legal point of view of a declaration of war is less important, since it does not make acts in violation of the Charter lawful.

One pertinent example of this state of affairs is the blockade of shipping instituted by Egypt against Israel. Egypt sought to invoke its declared state of war with Israel as a justification for the blockade. The Security Council, without questioning or commenting upon the existence of a state of war, declared the blockade to be unlawful under the Charter.

The legality today of a blockade unilaterally imposed by one state upon another depends upon its compatibility with the language and principles of the Charter. Ordinarily it, like other measures involving force, is reserved to the United Nations or to regional organizations such as the OAS. If imposed unilaterally without prior approval it must be considered a reasonable measure under the circumstances, proportional to the threat posed, and limited to a legitimate purpose. It does not become more or less lawful on the basis of declaration of war or a failure to declare war.

The irrelevancy of a declaration of war is further supported by the fact that institution of a blockade is a measure granted expressly to the United Nations and by inference to the OAS under their respective charters, but nothing is said about the right of these organizations to declare war. In point of fact, the United Nations authorized a blockade in the Korean "police action" and claimed all of the usual legal incidents of a blockade during a state of war. War, of course, was not declared by the United Nations or by nations participating.

III. Presidential Authority to Declare a Blockade

Both practice and authority support the proposition that the President, in the exercise of his constitutional power as Commander in Chief, can order a blockade without prior congressional sanction and without a declaration of war by Congress. President Lincoln took such action in 1861, and his authority was sustained by the Supreme Court in the *Prize Cases*. 67 U.S. (2 Black) 635 (1862). While the Supreme Court there found, in accordance with the doctrine discussed above, that a state of war existed as a matter of fact and as a result of the proclamation by the President of a blockade, the Court did not suggest that the President was remiss in failing to seek a declaration of war from Congress.

On April 20, 1898, a joint resolution of Congress directed the President to use the land and naval forces of the United States to compel the Government of Spain to relinquish its authority over Cuba. Pub. Res. No. 55-24, 30 Stat. 738. In accordance with this resolution, President McKinley, on April 22, issued a proclamation instituting a naval blockade of Cuba. 14 *Compilation of the Messages and Papers of the Presidents* 6472 (James D. Richardson ed., 1909). Subsequently, Congress declared that a state of war existed and that such state had existed since prior to the proclamation. Pub. L. No. 55-189, 30 Stat. 364 (Apr. 25, 1898). But it is clear that the President did not depend upon any congressional declaration of war, or even upon a future ratification of his proclamation, when he issued it.

Finally, President Truman, in 1950, issued an order blockading Korea. He stated that he did so in keeping with the Security Council's request for support, but he did not then seek congressional authorization for the act, nor did he seek a declaration of war. White House Statement Following a Meeting Between the President and Top Congressional and Military Leaders to Review the Situation in Korea, *Pub. Papers of Pres. Harry S. Truman* 513 (1950).

I believe with or without the congressional resolution of October 3, 1962, Pub. L. No. 87-733, 76 Stat. 697, the President could declare a blockade of Cuba, and it is doubtful if Congress could circumscribe this right. The instant resolution, however, tends to support the proposed action, and thus serves a purpose analogous to that of the 1898 Resolution and the 1950 action of the Security Council.

It should be noted that even if one were to assume that international law requires a state of war to exist before one can invoke the right of blockade, this international rule is not pertinent to the President's authority under the Constitution. There are numerous examples of American Presidents taking measures which could internationally be regarded as acts of war without first seeking congressional authority. And no foreign state could argue that a state of war did or did not exist because American constitutional procedures were or were not followed in a particular instance.

IV. Unilaterally Declared Blockade Under the U.N. Charter

The most difficult legal problem is to justify a unilateral declaration of blockade in the face of the U.N. Charter. The Charter appears to reserve to the United Nations, or to regional organizations, most measures involving the use of force. But, at the same time, it explicitly precludes the use of force only against the "territorial integrity" or "political independence" of another state (Article 2), and even this is qualified by recognizing the right of a state to act in self-defense (under Article 51) against an armed attack. In addition, the Charter forbids other actions which breach the peace or are inimical to the purposes of the United Nations.

Three justifications of a unilateral blockade are possible: (1) self-defense; (2) that it is necessary to preserve the peace; and (3) that it is not forbidden by the Charter.

Self-defense is a difficult argument in view of the requirement for an "armed attack." Some writers, however, take the realistic view that a state need not wait so long if, in fact, to do so would so jeopardize its security position as to render it helpless.

An easier argument, in my judgment, is to assert the right to preserve the peace by acting in an emergency on behalf of a regional organization, promptly submitting the matter to the organization for ratification. Acting without prior approval could be justified on the basis of urgency and lack of time. In the case of U.S. action against Cuba it could be further bolstered by prior findings of the organization and the long history of U.S. protection of Latin America against threats of foreign domination.

This latter argument would be difficult to maintain if the United States were actually to mount an assault on Cuba. But a blockade is not an action which is irreversible if subsequently it fails of ratification, and is correspondingly more defensible as a unilateral step.

The third argument in justification is closely related to the second. I believe one could successfully contend that a state has the right unilaterally to prevent a change in the status quo adverse to its security and itself a threat to the peace pending action by the OAS (or United Nations), provided the action it takes is essentially non-violent and designed to protect rather than irrevocably change the pre-existing situation. This, of course, would be true of blockade. Thus, until the OAS either supported or renounced the U.S. blockade, I believe we would be justified in maintaining it as a measure preserving a pre-existing state of affairs and preventing a situation which might require more drastic action to overturn or even lead to full-scale war.

V. Blockade and Marine Insurance

The effect of a blockade on marine insurance can be viewed from several standpoints. First, from the standpoint of the blockading state it is illegal for insurance companies to write insurance on cargoes destined to the ports of the blockaded state. This would, of course, under the historic view be prohibited trading with an enemy. On the other hand, it would not be illegal for an English insurance company to write policies on cargoes destined to a blockade country where England was not the blockading state. *See* 2 Joseph Arnould, *Arnould on the Law of Marine Insurance and Average* § 760, at 681 (Robert S. Chorley ed., 14th ed. 1954). As a practical matter, however, it is obvious that British companies will not write policies on cargoes destined to Cuba because of the risk of loss involved.

A second insurance problem relates to neutral ships on the high seas bound for a blockaded port before the institution of the blockade or caught in such a port with a cargo taken on before the blockade has been instituted. This situation involves the application of the usual clause in marine insurance policies covering loss arising from "arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality whatsoever." Under American law, this clause protects a neutral vessel in the situation described. *Olivera v. Union Ins. Co.*, 16 U.S. (3 Wheat.) 183 (1818) (Marshall, C.J.); *Vigers v. Ocean Ins. Co.*, 12 La. 362 (1838). Apparently this is also the law in continental European countries. On the other hand, in England "it has been repeatedly decided, and must now be taken as clear insurance law, that neither interdiction of trade at the port of destination after risk commenced, nor interception of the voyage by blockade, or by the imminent and palpable danger of capture or seizure, amounts to a risk for which English underwriters are answerable under the common form of policy, either as an 'arrest, restraint, and detention,' or in any other way whatever." 2 Arnould, *Marine Insurance* § 804, at 727.

Use of Marshals, Troops, and Other Federal Personnel for Law Enforcement in Mississippi

The problems of using large numbers of federal civilian law enforcement personnel in Mississippi are more practical than legal. So long as they confine themselves to investigation and prosecution of federal crimes, there is no legal problem. The practical problem is whether their presence serves to aggravate the emotions of the populace or alienate local law enforcement officials.

On the factual assumption that there is a complete breakdown of state law enforcement as a result of Klan activity and Klan connections with local sheriffs and deputies, the President could, as a legal matter, invoke the authority of sections 332 and 333 of title 10 to use military troops in Mississippi. There is considerable information available that could be used to support that assumption as to some areas in Mississippi. But in view of the extreme seriousness of the use of those sections, the government should have more evidence than it presently has of the inability of state and local officials to maintain law and order—as a matter of wisdom as well as of law.

July 1, 1964

MEMORANDUM FOR THE PRESIDENT*

There are considerable pressures from civil rights groups and from some members of Congress to station federal personnel in Mississippi as a method of preventing further acts of violence against civil rights workers there. These proposals range from those which urge, in effect, the occupation of Mississippi by federal troops to those which suggest that a modest number of United States marshals or FBI agents be strategically placed to help protect civil rights workers.

All of these proposals raise mixed problems of law, policy, and practicality. The purpose of this memorandum is to clarify those problems.

I. The Legal Background

In general, federal law enforcement efforts have traditionally been designed to supplement and support the efforts of state law enforcement personnel rather than to replace them. Under the Constitution, the states have exclusive jurisdiction over most aspects of law enforcement. While there are many federal criminal statutes, they deal for the most part with specialized matters and have little relevance to the basic problem of maintaining order in the community in the sense of preventing violence. It is state and local law which defines and punishes crimes such as

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* Editor's Note: This memorandum was accompanied by a cover memorandum of that same date for Lee White, the Special Assistant to the President, from Deputy Attorney General Katzenbach, stating as follows:

> Here is the memorandum for the President which he requested. I am transmitting it through you so you will have an opportunity to read it first and explain anything in it that is not clear, or express any views which you may have which differ from these. As the memorandum indicates, I think it is unwise for the President to publicly state that there is a lack of legal authority, since this forces disputes on the wrong issues.

murder, assault, rioting, disturbing the peace, vandalism, and so on, which seldom also involve violations of federal law. As a result, in part because of this traditional allocation of responsibilities, and in part because of the historic policy against the development of a federal police force, the federal government is ill equipped—in terms both of laws and of personnel—to perform ordinary police functions.

Federal law enforcement personnel have authority only to enforce federal law, and the statutes available to them for use in the Mississippi situation present some technical difficulties. The two statutes most likely to be involved are 18 U.S.C. § 241 (conspiracy against rights of citizens) and 18 U.S.C. § 242 (deprivation of rights under color of law). Both statutes have been narrowly construed by the Supreme Court. Although it was possible to use section 241 to make the recent arrests in Itta Bena, Mississippi, that was a case involving threats where the threats themselves showed the intent to interfere with the right to vote which is an element of the offense. In the usual case involving an act of violence, such evidence can usually be secured only by painstaking investigation. The second statute, section 242, applies to acts of state or local officials, done "under color of law," and requires a showing that the act was done with a "specific intent" to deprive the victim of a constitutional right. It is, therefore, difficult to secure the necessary evidence to gain a conviction under section 242 even in what seem to be flagrant cases.

What has been said does not mean that there would be any specific legal objection to sending federal civilian personnel to guard against possible violations of federal law. Both United States marshals and agents of the FBI are authorized by statute to carry firearms and to make arrests without warrant where there is "probable cause" to believe that a federal offense has been committed. And while the prospect is that few convictions could be obtained, it is likely that in many or most instances of violence directed against civil rights workers there would be sufficient cause to investigate and probably enough evidence of a violation of federal law to justify making an arrest.

II. Use of Civilian Personnel for Police or Guard Duties

There are in the federal service approximately 600 deputy marshals assigned to the 93 judicial districts of the United States. Although they have broad authority to execute federal laws, as noted above, their normal duties are to maintain order in federal courts, serve subpoenas and other documents, maintain custody of federal prisoners undergoing trial, and occasionally to make arrests pursuant to an arrest or indictment.

The Attorney General has the authority to deputize additional persons to serve as federal deputy marshals. He can, therefore, deputize members of the Border Patrol, the Bureau of Prisons, the Alcohol and Tobacco Tax Units of the Internal Revenue Service, or others with law enforcement training. The only limitation on this authority is that he may not deputize personnel of the Army or Air Force.

(Oddly, by legislative oversight, this restriction does not technically apply to personnel of the Navy or Marine Corps.)

With respect to the regular deputy marshals, their limited number and the fact that they do not routinely work together as a force in law enforcement activity limit their usefulness for any broad-scale assumption of responsibility for maintaining order. The use of 130 deputy marshals for a period of several days in Oxford, Mississippi placed a severe strain on the marshal service throughout the nation and was not notably effective from a law-enforcement point of view. Simply in terms of the number of men required, it would not be feasible to provide protection by marshals to any substantial number of civil rights workers comparable to that provided to James Meredith during the period when he was in Oxford.

For a period of several days during the Oxford crisis the force of deputy marshals on the scene amounted to approximately 400. Some 270 of these were specially deputized prison guards and members of the Border Patrol.

In general, the effectiveness of all marshals in Mississippi would be hampered by their unfamiliarity with the geography and the population of the area. Also, they would be hampered by the absence of power to enforce local law. Local law enforcement personnel are aided in breaking up dangerous situations by their ability to round up groups of people and arrest them on such charges as loitering, disturbing the peace, obstructing traffic, etc. This technique would not, of course, be available to marshals and the fact that conviction is so unlikely under federal law would undermine the effectiveness of arrests generally. Aside from these considerations, there is a whole range of practical problems as to what the marshals' responsibilities would be in various situations, particularly if the civil rights workers who are being protected should insist upon engaging in activities which are regarded by federal authorities as unwise or improper. If federal personnel accompany civil rights workers wherever they go, the federal government will undoubtedly be held responsible by the local population for whatever the civil rights workers see fit to do, regardless of whether the federal government approves or is in a position to control what is done.

There is another practical problem, however, which is the crux of the matter. The experience of the Department in the Oxford, Mississippi crisis and in the several disturbances in Alabama convinced all those who participated that the most crucial factor in maintaining law and order in a community gripped by racial crisis is the support of state and local law enforcement officers. If they are clearly determined to support law and order, the prospects of violence are considerably reduced. If they encourage violence or abdicate responsibility for law enforcement functions, violence on a substantial scale is virtually certain to occur and the possibility of maintaining order by any means short of the use of federal troops becomes negligible. Once local law enforcement ceases to function in any sizable area, the number of personnel required to maintain control without the actual use of weapons exceeds the manpower resources of every branch of the federal service except the military. It is essential, therefore, to encourage state and local law

enforcement agencies to carry out their responsibilities and, if at all possible, to avoid using federal personnel in such a way so as to provide an excuse for abandonment of responsibility by such agencies.

If marshals or agents of the Bureau are used in any obvious way as guards in Mississippi, without the active support and cooperation of local officials, local law enforcement will tend to break down. This is not merely because local officials resent the intervention of outsiders, although that is an obvious factor. The fact is that in Mississippi the use of federal law enforcement personnel, particularly marshals, is regarded by the public as provocative and might well give rise to more breaches of the peace than would otherwise occur. Particularly if the civil rights workers involved engage in demonstrations and other mass activities while accompanied by marshals, their function will soon cease to be one of preventing clandestine violence and become one of maintaining public order among considerable numbers of people over a large area. In that situation, our experience is that without the support of local officials the maintenance of order requires the use of troops.

III. Use of Troops

The federal statutes relevant to the use of military force in connection with civil disturbances are 10 U.S.C. §§ 331–34. Section 331 authorizes the President to supply armed forces at the call of a state legislature or governor to suppress an insurrection. Sections 332 and 333 authorize the President to use the armed forces without a request by state or local authorities in order to enforce federal law. Section 334 provides that whenever the President considers it necessary to use the armed forces pursuant to the three preceding sections of the Code, "he shall, by proclamation, immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time."

The purpose of section 331, following the pattern of federal criminal law generally, obviously is to supplement and support state and local law enforcement. Sections 332 and 333, which are quoted in full at the end of this memorandum at Tabs A and B, are designed to deal with situations where state and local law enforcement have completely broken down, either because local officials are themselves opposing and obstructing federal law or because they are unable or unwilling to control private groups that are in command of the situation.

Sections 332 and 333 appear on their face to confer broad authority to use troops to enforce federal law generally, whenever the President deems it necessary. They are limited, however, by the Constitution and by tradition. Thus the principal constitutional basis for the use of sections 332 and 333 in connection with racial disturbances is the Fourteenth Amendment, for the only federal law involved in such disturbances is that Amendment and federal statutes or court orders which are directly or indirectly based upon it. The Amendment is, of course, directed against "state action" and does not normally apply to the acts of

private persons. Aside from this consideration, the use of military force to execute the laws has traditionally been regarded with disfavor—as a course of action that can be lawfully and properly pursued only as a last resort. Bennett Milton Rich, in *The Presidents and Civil Disorder* (1941), summarized many precedents as well as much legislative history, policy, and tradition when he said:

> Unless there is some special reason which seems to make imperative the immediate use of the troops, or until all efforts to effect a peaceful settlement have failed and violence threatens of a nature beyond the ability of the local and state governments to control, the president is wise to avoid recourse to force. To use the troops only when no other solution seems possible has been the most frequent presidential practice—a practice the value of which is attested by the fact that it has met with complete success.

Id. at 219.

For the foregoing reasons, sections 332 and 333 have always been interpreted as requiring, as a prerequisite to action by the President, the conditions described above: that state authorities are either directly involved, by acting or failing to act, in denials of federal rights of a dimension requiring federal military action, or are so helpless in the face of private violence that the private activity has taken on the character of state action. The degree of breakdown in state authority that is required undoubtedly is less where a federal court order is involved, for there the power of the federal government is asserted not simply to enforce the Fourteenth Amendment, but to defend the authority and integrity of the federal courts under the Supremacy Clause of the Constitution. But where no court order is involved, reliance must be placed on the premise that those engaging in violence are either acting with the approval of state authorities or have, like the Klan in the 1870s, taken over effective control of the area involved.

In every recent use of authority under sections 332 and 333, a court order has been involved. Moreover, the President has noted either that the duly constituted authorities of the state were themselves opposing and obstructing the enforcement of federal law or had declined to provide adequate assurances that law and order would be maintained. Should these conditions not be present, we think the situation must be one which, in the judgment of the President, involves a serious and general breakdown of the authority of state and local government in the area affected.

There are, of course, immense practical problems involved in the use of troops, of which possibly the worst one is that it becomes difficult to find a way to withdraw. Local authorities tend to abdicate all law enforcement responsibility, leaving the troops without adequate legal tools—short of a declaration of martial law—to perform routine law enforcement functions for which they have little training.

IV. Conclusion

The group of professors which has publicly taken issue with the statement attributed (inaccurately) to the Attorney General that there was no adequate legal basis for federal law enforcement in Mississippi is hard to dispute. They assume the complete breakdown of state law enforcement as a result of Klan activity and Klan connections with local sheriffs and deputies. On that factual assumption the President could, as a legal matter, invoke the authority of sections 332 and 333. There is, of course, considerable information available that could be used to support that assumption as to some areas in Mississippi. But in view of the extreme seriousness of the use of those sections, I believe that the government should have more evidence than it presently has of the inability of state and local officials to maintain law and order—as a matter of wisdom as well as of law. Furthermore, vigorous investigation and prosecution where federal crimes are involved may serve, in conjunction with state police action, to forestall the serious breakdown which those sections of the statute contemplate.

As indicated above, the problems of using large numbers of federal civilian law enforcement personnel are more practical than legal. So long as they confine themselves to investigation and prosecution of federal crimes, there is no legal problem. The practical problem is whether their presence serves to aggravate the emotions of the populace or alienate local law enforcement officials. Marshals, in addition to problems of availability and training, would likely aggravate the problem. Increase of FBI personnel, along the lines previously followed, is not likely to have the same result and constitutes the more effective course of action that can be followed at the present time.

NICHOLAS deB. KATZENBACH
Deputy Attorney General

Effect of a Repeal of the Tonkin Gulf Resolution

Because the President's inherent constitutional authority to employ military force abroad depends to a very considerable extent on the circumstances of the case, and, in particular, the extent to which such use of force is deemed essential for the preservation of American lives and property or the protection of American security interests, it is impossible to state in concrete terms the legal effect of a repeal of the Tonkin Gulf Resolution.

Such a repeal standing alone would not only throw into question the legal basis for certain actions the President might deem it desirable to take in the national interest, but would also demonstrate to foreign powers lack of firm national support for the carrying out of the policies set forth in the joint resolutions.

January 15, 1970

MEMORANDUM FOR THE DIRECTOR
BUREAU OF THE BUDGET

This is in response to your request for the views of the Department of Justice on S.J. Res. 166, to repeal legislation relating to the use of the armed forces of the United States in certain areas outside the United States and to express the sense of the Congress on certain matters relating to the war in Vietnam, and for other purposes.

Section 1 of S.J. Res. 166 would repeal four joint resolutions which have specifically or impliedly authorized the use of the armed forces at the discretion of the President in circumstances not involving a declaration of war by the United States:

1. The joint resolution of January 29, 1955, Pub. L. No. 84-4, 69 Stat. 7, which authorizes the President "to employ the Armed Forces of the United States as he deems necessary for the specific purpose of securing and protecting Formosa and the Pescadores against armed attack."

2. The joint resolution of March 9, 1957, Pub. L. No. 85-7, 71 Stat. 5, "[t]o promote peace and stability in the Middle East." This resolution authorizes the President to undertake military assistance programs in the general area of the Middle East and states further that "if the President determines the necessity thereof, the United States is prepared to use armed forces to assist" any Middle Eastern nation or group of nations "against armed aggression from any country controlled by international communism." *Id.* § 2. (S.J. Res. 166 would repeal only section 2 of the joint resolution; however, the other provisions of the resolution have either been executed or depend for their effect on the continued effectiveness of section 2.)

3. The joint resolution of October 3, 1962, Pub. L. No. 87-733, 76 Stat. 697, "expressing the determination of the United States with respect to the situation in Cuba."

4. The joint resolution of August 10, 1964, the "Tonkin Gulf Resolution," Pub. L. No. 88-408, 78 Stat. 384, which "approves and supports the determination of

the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression," *id.*, and states further that the United States is prepared, "as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom," *id.* § 2.

It should be noted that the repeal would not be effective upon the enactment of S.J. Res. 166, but upon the sine die adjournment of the 91st Congress.

The proposal to repeal these various statements of policy and grants of authority raises the question what would be the President's authority to use the armed forces in the absence of the legal support provided by these resolutions. No simple answer can be given. While the Constitution reserves to Congress the authority to declare war, Presidents have frequently employed military and naval forces abroad in the absence of a declaration of war, sometimes with and sometimes without an expression of congressional approval such as those contained in the joint resolutions listed above. To cite a few examples, President Truman's action in sending American troops to Korea in 1950 and President Johnson's action in sending troops to the Dominican Republic in 1965 were taken without the benefit of any specific congressional grant of authority. On the other hand, the authority to conduct the Vietnam War derives, at least in part, from the Tonkin Gulf Resolution. President Eisenhower's action in landing troops in Lebanon in 1958 was not explicitly based on the joint resolution of March 9, 1957, but the existence of the resolution undoubtedly strengthened the legal and political case for such action.

Presidents have traditionally sought this sort of congressional authority not only to avoid legal questions in a somewhat shadowy area of constitutional law, but also to demonstrate to present and prospective antagonists the American people's unity of purpose. Thus, in requesting from Congress a resolution regarding the defense of Formosa, President Eisenhower stated that authority for some of the actions he might find it necessary to take would be "inherent in the authority of the Commander-in-Chief," and that he would not hesitate, in the absence of authority from Congress, to take emergency action "to protect the rights and security of the United States." Special Message to the Congress Regarding United States Policy for the Defense of Formosa, *Pub. Papers of Pres. Dwight D. Eisenhower* 207, 209, 210 (Jan. 24, 1955). He added:

> However, a suitable Congressional resolution would clearly and publicly establish the authority of the President as Commander-in-Chief to employ the armed forces of this nation promptly and effectively for the purposes indicated if in his judgment it became necessary. It would make clear the unified and serious intentions of our Government, our Congress, and our people.

Id. at 210.

Since the President's inherent constitutional authority to employ military force abroad depends to a very considerable extent on the circumstances of the case, and, in particular, the extent to which such use of force is deemed essential for the preservation of American lives and property or the protection of American security interests, it is impossible to state in concrete terms the legal effect of the repeals proposed by S.J. Res. 166. Then, too, much would depend on whether Congress, by other policy statements or grants of authority, attempted to fill the gaps left by the repeals. It seems safe to conclude, however, that the repeals standing alone would not only throw into question the legal basis for certain actions the President might deem it desirable to take in the national interest, but would also demonstrate to foreign powers lack of firm national support for the carrying out of the policies set forth in the joint resolutions.

Section 2 of S.J. Res. 166 would establish a joint Senate-House committee to study the matter of terminating the national emergency proclaimed by the President on December 16, 1950 (Proclamation No. 2914, 64 Stat. A454, 3 C.F.R. 99 (1949–1953)). This proclamation of a national emergency is still in effect and as a result of the continued existence of this national emergency certain broad statutory powers are available to the President. For example, the emergency powers available under section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. § 5(b)) have furnished the basis for restrictions on trade with Mainland China, the freezing of Cuban-owned assets, and the Foreign Direct Investment Program established by Executive Order 11387 of January 1, 1968, 33 Fed. Reg. 47. *See Validity of Executive Order Authorizing Program Restricting Transfers of Capital to Foreign Countries by Substantial Investors in the United States and Requiring Repatriation by Such Investors of Portions of Their Foreign Earnings and Short-Term Financial Assets Held Abroad*, 42 Op. Att'y Gen. 363 (1968).

We are doubtful that the time is ripe for a termination of the national emergency declared in 1950. However, S.J. Res. 166 provides only for a study of the question by a congressional committee, a proposal to which we have no objection and which, in any event, appears exclusively for Congress to pass upon.

Sections 3, 4 and 5 of S.J. Res. 166 are expressions of policy with regard to Vietnam and Southeast Asia. They do not involve the responsibilities of this Department, and we defer to the views of the agencies more directly concerned.

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Constitutionality of the Federal Advisory Committee Act

Without reaching definitive conclusions, this memorandum considers three constitutional questions raised by the Federal Advisory Committee Act.

First, is it within Congress's constitutional powers to regulate advisory committees in general and presidential advisory committees in particular?

Second, even if Congress can regulate advisory committees, may it regulate those committees giving advice to the President without violating the separation of powers?

Third, even if Congress may regulate those committees giving advice to the President, may the President except certain committees from certain regulations because of executive privilege?

December 1, 1974

MEMORANDUM

I. Outline

Is the Federal Advisory Committee Act unconstitutional?

1. Is it beyond Congress's power to legislate?

   a. Not as to committees created or funded by Congress.

   b. Not as to agencies created by Congress in their use of advisory committees.

   c. Perhaps, as to private committees advising the President generally.

   d. Most likely, as to private committees advising the President about a matter expressly vested in the executive, e.g., pardoning.

   e. No case law on point.

      i. Trend is to find almost anything within the scope of Congress's power to legislate.

2. Does the Act unconstitutionally violate the separation of powers?

   a. Yes, because it attempts to regulate a power impliedly vested exclusively in the President—the power to seek and obtain advice where he wishes.

      i. Argument by analogy from *Myers*.

b. The Act limits the advice the President will be able to receive.

c. Such a limitation impinges on the executive's inherent power.

i. The limitation is unconstitutional no matter what the subject of the advice is.

d. The power to limit committees' advice is not constitutionally distinguishable from the advice from any person.

e. Subordinates to the President exercising powers delegated to them may also be protected.

3. Certain committees may be relieved from certain requirements of the Act on the basis of executive privilege.

a. Supreme Court has acknowledged the existence of executive privilege.

b. The privilege should prevail against an unparticularized call for publicizing the contents of a meeting.

c. Executive privilege would not void the Act but merely relieve some committees of some requirements—notably the requirement that the meeting be open.

i. Question as to the exemption in the Act itself for keeping meetings closed.

d. Executive privilege might be claimed with regard to meetings of even committees created by Congress.

e. Courts' dislike of exemption 5 under the FOI Act might augur poorly for the executive privilege claim unless rarely invoked.

II. Text

The Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified at 5 U.S.C. app. I (Supp. II 1973)), regulates advisory committees "established or utilized by the President" as well as those established or utilized by agencies and those established by statute or reorganization plan.

Three separable, if not altogether distinct, constitutional questions are raised by the Act. First, is it within Congress's constitutional powers to regulate advisory committees in general and presidential advisory committees in particular? Second, even if Congress can regulate advisory committees, may it regulate those committees giving advice to the President without violating the separation of powers?

Third, even if Congress may regulate those committees giving advice to the President, may the President except certain committees from certain regulations because of executive privilege?

A.

Whatever power Congress has to regulate advisory committees would seem to stem from the Necessary and Proper Clause. Moreover, to the extent that Congress creates an advisory committee by statute (e.g., the Air Quality Advisory Board, 42 U.S.C. § 1857e), there would seem no question as to its power to regulate its existence or the means by which it functions. It would also seem justified for Congress to regulate committees not created by it, but which are funded by its appropriations, for it would seem within Congress's power to insure that committees utilizing its monies be constituted and function in accord with its regulations. Most advisory committees, as defined by the Act, would presumably fit within these two categories. Nevertheless, private committees utilized by the government for advice without any form of compensation would not be covered (e.g., the ABA Committee on the Federal Judiciary). To the extent that such committees were utilized by statutory agencies, again Congress would seem to have the power to regulate, not the committees themselves, but the means by which they might advise agencies created by Congress. That is, it would be within Congress's power to regulate the means by which agencies created by it might be advised, so as to diminish the likelihood of private rather than public interests being served by its creations.

Still, however, private committees advising the President would not be within these theoretical frameworks, and thus it might be argued that the Act's attempt to regulate such committees is beyond Congress's power. The counterargument, and it is not without force, is that to the extent that the advice relates to the execution of laws passed by Congress, Congress has an interest, and consequently a power, in seeing that advice concerning the administration of its laws is given in such a manner as to lessen the likelihood of private interests being served. As for private advisory committees, not funded by Congress, advising the President on matters entrusted solely to him by the Constitution, there would seem no justification for congressional regulation of the manner of their giving advice to the President.

Authority for the proposition that regulation of presidential advisory committees is beyond the powers of Congress to legislate is very meager. Courts rarely find laws unconstitutional solely on this basis, and then only with difficulty. *See, e.g.*, *Oregon v. Mitchell*, 400 U.S. 112 (1970). The tendency, and especially the modern tendency, is to read broadly the power of Congress to legislate.

B.

Even if the regulation of advisory committees generally and presidential advisory committees in particular is within the subject area of Congress's power to legislate, that regulation might be unconstitutional as a violation of the separation of powers. Thus, in *Myers v. United States*, 272 U.S. 52 (1926), the Supreme Court held unconstitutional a law requiring the President to obtain the approval of the Senate to remove an officer appointed by him with the advice and consent of the Senate. This requirement was considered to violate the separation of powers between the Executive and Legislative Branches. So also in *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867), and *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), the Supreme Court struck down congressional enactments which tended to undercut the effect of presidential pardons as unconstitutional infringements on executive powers.

Most struggles between the Executive and Legislative Branches do not result in court decisions, often because they are considered political questions, so again case authority for the unconstitutional legislative infringement of the Executive Branch is meager. Both *Garland* and *Klein* dealt with restrictions on an express presidential power and hence are distinguishable from the Federal Advisory Committee Act which, at best, limits an implied right to unrestricted advice. *Myers* involved a power implied by the words of Article II, Section 1, Clause 1, that the executive power shall be vested in a President, and the words of Article II, Section 3, that the President shall take care that the laws be faithfully executed. While *Myers* has been severely limited by *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), and *Wiener v. United States*, 357 U.S. 349 (1958), it still remains true that removal of executive officers, at least those appointed by the President with the advice and consent of the Senate, cannot be restricted or regulated by Congress.

The Federal Advisory Committee Act regulates, as well as other committees, committees which advise the President, and thereby restricts to some degree his ability to seek and obtain advice. The restrictions, indeed, may be great if meetings must be open to the public (*id.* § 10(a)(1)). *See Gates v. Schlesinger*, 366 F. Supp. 797 (D.D.C. 1973) (suggesting that exemption 5 of the Freedom of Information Act—dealing with interagency memoranda—is not available as an exemption from the requirement to have open meetings under the Federal Advisory Committee Act). *See also Nader v. Dunlop*, 370 F. Supp. 177 (D.D.C. 1973) (following *Gates*). Or the restrictions may be fairly minor—e.g., charter requirements (FACA § 9(c)) and requirement of a federal employee attending all meetings (*id.* § 10(e)). In any case, these restrictions may be presumed to limit the ability of the President to receive advice from whom he seeks it, for private committees faced with certain of these requirements might well decline to become involved in an advisory capacity with the President, thus limiting the President's ability to inform himself.

Opposed to this restriction and consequent limitation of the power to seek and obtain advice would be the implied power to seek and obtain advice from whomever the President deemed necessary in order to faithfully execute the laws. This would be a power lodged exclusively and inherently in the Executive Branch. While inherent executive powers may be strictly construed when they conflict with congressional enactments, *cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 639–40 (1952) (Jackson, J. concurring), certain powers must exist inherently in an executive in order for him to execute. In *Myers* that was understood to include the power to remove officers under his direction, for unless he could remove them, they would not be under his direction. In *United States v. Nixon*, 418 U.S. 683 (1974), the Court recognized an inherent executive power to keep confidential the discussions of persons attempting to decide questions. Again, the discussion by the court of the practical considerations involved reinforces the idea that in order to fulfill the duties of the executive, certain powers are necessary. The same compelling practical considerations suggest that the power to seek advice anywhere is also such an inherent power of the Executive. To the extent that the Federal Advisory Committee Act restricts that power it would be void.

It is arguable perhaps that the subject about which the President or his agency is receiving advice should have some bearing on the ability of Congress to regulate the advice. Thus, where the advice bears on a power granted expressly to the President, Congress would have the least justification for regulation. Where the advice involves how best to execute a law of Congress, Congress would have the greatest interest, and consequently power. Nevertheless, it is suggested that the subject of the advice is not a substantial consideration, for in either case the President is exercising his exclusive power—in one case, for example, the pardoning power, and in the other the power to execute the laws. Congress may leave a greater or lesser area of discretion or flexibility to the President in the execution of its laws by the inclusion of standards or safeguards by which the President is bound. But within the area left to the President to execute, it is his power which is and must be exercised.

The purpose of the Federal Advisory Committee Act was to guard against private interests having an inside track to advising the government, but whether it be a presidential advisor, not subject to congressional confirmation, a private individual like David Rockefeller, or a private committee of persons like David Rockefeller, the President must have the freedom to seek out whom he wishes for advice. The Act would restrict only advice from a "committee," but there is no constitutional distinction between the advice of a committee and that of an individual; if Congress can regulate the one, it may regulate the other.

In short, however Congress wishes to regulate its own advisory committees and its own agencies to insure that the public's viewpoint is adequately represented, it cannot legislate to require the President to hear all sides of an issue before he makes a decision.

The above argument assumed private committees, not funded by Congress. A committee might be formed by the President but paid from appropriations (e.g., the Clemency Board). Here both Congress and the President have legitimate interests, and Congress's interest in regulation is substantial because its funds are utilized. How a court might decide this conflict is hard to determine.

Important also would be the availability of such a claim of unconstitutionality by officers subordinate to the President with respect to committees advising them. A clear distinction would be that all such officers hold positions created by Congress, which presumably reduces their ability to claim invasion of their offices by the branch which created them. A policy argument to support the constitutionality of an inclusion of all officers within the Act, moreover, is that they, unlike the President, are not directly responsible to the electorate, so that, while the check on the President against serving private rather than public interests is the ballot box, his officers are not so checked. Nevertheless, to the extent that the officer is exercising presidential powers delegated to him, the same policy arguments can be made with respect to his need for unfettered advice. A good example is an agency head entrusted by the President with the responsibility for suggesting names of persons to be nominated by the President to the Senate for confirmation (e.g., the Attorney General with regard to federal judges). Here the officer is acting solely as an agent of the President and not in respect to any statutory power given him. When he receives advice from some committee, that advice is similarly outside the scope of legitimate congressional inquiry. This should be especially true because, in such a case, Congress (through the Senate) will, or should, independently pass on the fitness of the nominee.

C.

The third constitutional question is whether the President may except certain committees from certain of the Act's requirements on the basis of executive privilege. The Supreme Court has decided that a constitutional executive privilege exists, even if its parameters are not clear. *United States v. Nixon*, 418 U.S. 683 (1974). While the privilege may not prevail against a particularized need for evidence in a criminal trial, it certainly should prevail against a general requirement for open advisory meetings. The practical considerations which compel the need for some sort of executive privilege were recognized by the Supreme Court in *Nixon*, and those considerations would be undermined by applications of the Act's requirements in all cases covered by its definitions. Some of the confidentiality that might be required may be provided by the Act itself, but if courts are prepared to read those exceptions out of the Act, as suggested by *Gates* and *Nader*, then reliance on executive privilege may be called for.

Executive privilege, unlike the first two constitutional objections, discussed above, would probably not void the regulation of the President's advisory committees, but rather would only limit it. Thus, the charter requirement would

remain as well as the requirement of notice in the Federal Register. So also, most probably, would the requirement of a federal employee attending all meetings of the committee.

It might be argued that private committees discussing matters without the presence of the President would not be deserving of executive privilege. First, however, discussions by executive officers without the presence of the President are sufficient for executive privilege. Second, if the committee's meeting is sufficiently imbued with presidential considerations to bring it within the Act, it is sufficiently connected to bring it within executive privilege. Third, the considerations justifying executive privilege mentioned by the Court in *Nixon* would apply equally to a private group advising the President as well as to his own advisers.

A claim of executive privilege might be extended to meetings of advisory groups created and/or funded by Congress as well. Executive officers, by analogy, hold positions created by Congress and are paid from appropriations but are able to invoke executive privilege, when allowed by the President.

Executive privilege could also be a basis for claiming confidentiality of advisory committees advising executive officers as opposed to the President (e.g., the ABA Committee on the Federal Judiciary). Thus, since an executive officer can claim executive privilege with relation to advice or recommendations of staff members, so by analogy should he be able to claim privilege with relation to private committees, or for that matter committees created and funded by Congress.

Case law support for the extension of this privilege is lacking, although it is settled practice. It is a conflict between Congress and the President which has not been put to the courts to decide, although with relation to the Federal Advisory Committee Act it would be decided by a court because a private party would be the one precluded by executive privilege. The courts' reactions to attempts by agencies to withhold information under the Freedom of Information Act might indicate a reluctance to sanction equivalent withholdings under a claim of executive privilege.

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