

OPINIONS
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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
LEON ULMAN

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Attorney General

Griffin B. Bell

Assistant Attorney General

Office of Legal Counsel

John M. Harmon

Deputy Assistant Attorneys General

Office of Legal Counsel

Larry A. Hammond

Leon Ulman

Mary C. Lawton

OFFICE OF LEGAL COUNSEL

Attorney-Advisers

(1978)

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Foreword

The Attorney General has directed the Office of Legal Counsel to publish selected opinions on an annual basis for the convenience of the executive, legislative, and judicial branches of the Government, and for the convenience of the professional bar and the general public.* Only opinions as to which the addressee has agreed to publication are included. The first volume of opinions covers the year 1977. This volume includes selected opinions issued during 1978, and, as a separate section, selected opinions issued to the White House Office during 1977 and 1978.

The authority of the Office of Legal Counsel and its predecessors to render legal opinions is derived from the authority of the Attorney General. Under the Judiciary Act of 1789 the Attorney General was authorized to render opinions on questions of law when requested by the President and the heads of executive departments. This authority is now codified at 28 U.S.C. §§ 511-513. In 1924 the Attorney General was authorized to render opinions requested by the Administrator of Veterans' Affairs. 39 U.S.C. § 211 (b). Opinions signed by the Attorney General are called formal opinions and are printed and published in the 42 volumes designated as Opinions of the Attorneys General. *See* 28 U.S.C. § 521.

Pursuant to 28 U.S.C. § 510 the Attorney General has delegated to the Office of Legal Counsel the following duties: preparing the formal opinions of the Attorney General, rendering informal opinions to the various Federal agencies, assisting the Attorney General in the performance of his function as legal adviser to the President, and rendering opinions to the Attorney General and the heads of the various organizational units of the Department of Justice, 28 CFR § 0.25.

The duties of the Office of Legal Counsel originated in 1925, at which time the Attorney General assigned to the Office of the Solicitor General the task of preparing his opinions. This arrangement continued until 1933, when the Office of Assistant Solicitor General was established. In 1950 a new Assistant Attorney General was added to replace the Assistant Solicitor General. For a brief period the office was known as the Executive Adjudications Division. Later, its title was changed to Office of Legal Counsel. *See, generally, Cummings and McFarland, Federal Justice, at 514; and Deener, the United States Attorneys General and International Law, at 73.*

*The Editor acknowledges the assistance of Joseph Foote, Esq., in preparing these opinions for publication.

The establishment of the Office of Legal Counsel and its predecessors resulted from necessity. Over the years, the functions of the Attorney General as head of the Department of Justice (established as an executive department in 1870) underwent a rapid expansion so that he required assistance in the performance of his opinion function. Nor could he personally review and sign each opinion. Moreover, many opinions did not require his personal attention. The number of so-called informal opinions has greatly exceeded those signed by the Attorney General, but until now they have never been printed and published generally. Attorney General Bell, shortly after taking office in January 1977, believed that their value as precedents and as a body of executive law on important matters would be enormously enhanced by publication and distribution in a manner similar to those of the formal opinions of the Attorneys General.

Office of Legal Counsel
United States Department of Justice
Washington, D.C. 20530

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January 11, 1978

**78-1 MEMORANDUM OPINION FOR THE
GENERAL COUNSEL, CONSUMER
PRODUCT SAFETY COMMISSION**

**Consumer Product Safety Commission—
Former Officers and Employees—Accepting
Private Employment**

This is in response to your inquiry whether § 4(g)(2) of the Consumer Product Safety Act, 86 Stat. 1210-11, as amended, 15 U.S.C. § 2053(g)(2) (1977 Supp.), bars a Consumer Product Safety Commission employee from accepting a position with Montgomery Ward Company.

Section 4(g)(2) provides in pertinent part that:

No regular officer or employee of the Commission who was at any time during the 12 months preceding the termination of his employment with the Commission compensated at a rate in excess of the annual rate of basic pay in effect for grade GS-14 of the General Schedule, shall accept employment or compensation from any manufacturer subject to this chapter, for a period of 12 months after terminating employment with the Commission.

As we understand the situation, the employee has been offered a position with Montgomery Ward handling credit-related matters. Montgomery Ward stated that the position entails no Commission-related work in the consumer area. The employee's grade level is GS-15 and she has been with the Commission for over 3 years. She states that during this time she has had no dealings with Montgomery Ward in her capacity as a Commission employee.

We understand further that Montgomery Ward is generally known as one of the largest retailers in the country and is not engaged in manufacturing in the sense that it makes any of its products. Montgomery Ward, does, however, import approximately 8–10 percent of its retail consumer products for sale in its department stores. This importation gives rise to the problem.

Section 4(g)(2) only prohibits post-Commission employment with manufacturers; and although Montgomery Ward is not a manufacturer in the usual meaning of that term, § 3(a)(4), 15 U.S.C. § 2052(a)(4), of the Act defines a

“manufacturer” to include “any person who manufactures or imports a consumer product.” Therefore, a literal interpretation of the language of § 3(a)(4) would result in Montgomery Ward’s classification as a “manufacturer” for purposes of the Act. On that basis the employee would be barred from accepting the position with Montgomery Ward. We believe, however, that the postemployment bar of § 4(g)(2) was not intended to be construed in this manner.

Section 3(a)(4), by including importers within the definition of manufacturers, sought to insure that consumer products would not escape regulation of the Commission merely because they were manufactured abroad and imported into the United States. H. Rept. No. 92-1153, 92d Cong., 2d sess. (1972), at 28, states:

. . . to assure parity of regulation, importers are made subject to the same responsibilities as domestic manufacturers.

Importers are thus subject to the regulatory authority of the Commission as are manufacturers. Therefore, a Commission employee could theoretically abuse his or her position to secure the improper advantages condemned in H. Rept. No. 1153, *supra*, with importers as well as with traditional manufacturers. Consequently, § 4(g)(2) applies to importer-employers with the same force that it applies to manufacturers-employers.

Montgomery Ward, however, is only incidentally involved in importation. It is in business primarily as a retailer. If a retailer imported but one item, it would technically fall within the definition of a manufacturer under § 3(a)(4). To bar employment of a former Commission employee with a retail company that imported one insubstantial item would not effectuate the intent behind § 4(g)(2); it would be absurd to assume that a Commission employee could so use his position in this insignificant case as leverage to secure subsequent employment with that company. When the application of a statute’s literal language leads to an absurd result, it is generally safe to assume that the result is inconsistent with Congress’ purpose in enacting the statute. *United States v. Bryan*, 339 U.S. 323, 338 (1950). *Cf. United States v. Brown*, 333 U.S. 18, 25-26 (1948) (penal statutes), and *Glickstein v. United States*, 222 U.S. 139, 142-43 (1911). Application of the literal language of the Act to the above hypothetical would lead to such a result.

Nonetheless, there necessarily comes a point when a growing importation business of a retail company reaches a level of importation such that the company must be considered an importer, and thus a manufacturer for the purposes of § 4(g)(2). Given the particular facts of this case, we believe that Montgomery Ward has not yet reached that point.¹

¹We think it important to note that in the present case the employee has no dealings with Montgomery Ward in her capacity as a Commission employee. Further, she will not be working with the importing arm of that company. Given these facts, we believe that she would be working for Montgomery Ward-the-retailer and not Montgomery Ward-the-importer. This distinction, which we think meaningful in the case at hand, might become artificial and impracticable if the importation business increased so that it were no longer incidental to the retail business.

Apart from the above, it has been suggested that the failure of § 4(g)(2) to make explicit reference to retailers was inadvertent, because the legislative intent was to prevent persons from using a Commission position to secure employment or future clients from the “regulated industry,” and because the term “regulated industry” in its common usage encompasses retailers as well as manufacturers.² We disagree. The pertinent legislative history of § 4(g)(2) states that the section was designed to

. . . assure that persons will not seek employment with the agency or use their Federal office as a means of subsequently gaining employment in the regulated industry or as a means of acquiring members of industry as future clients. H. Rept. No. 92-1153, *supra*, at 30.

A fair reading of the legislative history reveals that the term “industry” was intended to include only manufacturers. In H. Rept. No. 1153, *supra*, at 26, the House Committee on Interstate and Foreign Commerce stated:

In addition to the need to establish comprehensive and effective regulation over the safety of unreasonably hazardous consumer products, there is a need to insure that the procedures relating to consumer products are fair to both *industry* and consumers. The Committee heard extensive testimony from *manufacturers* and trade associations documenting some of the potential difficulties that might be faced in complying with the regulations of a product safety agency. This testimony convinces the Committee that it is essential to establish both an effective and fair product safety program, *impacting to the minimum practicable on the manufacturing process*. In addition, an effective consumer safety program must insure an adequate opportunity for participation and judicial review by consumers and *regulated industries*. [Emphasis added.]³

The above quotation indicates that manufacturers were the relevant entities in the “regulated industry” to which the Committee refers. Therefore, we can discover no inconsistency in the legislative history in Congress’ clear intent to omit “retailers” from the coverage of § 4(g)(2).

A review of the language of the Act itself is also helpful in ascertaining congressional intent on this point. The Act refers to both “retailers” and “manufacturers” in other provisions⁴ while § 4(g)(2) omits any reference to retailers. Thus, we can infer that retailers were not intended to be covered by that section. This view of statutory construction has found expression in the

²The Commissioner has expressed this view. Although he is of the opinion that § 4(g)(2) intended to extend the postemployment bar to those who engage in any importing he would not enforce this provision in this case for equitable reasons. While it is clear that § 4(g)(2) cannot apply to retailers since they are not referred to in that section, we understand the Commissioner’s argument to be that any retailer who may technically come within the definition of “manufacturer” in § 3(a)(4) should be considered a barred employer because Congress intended to include retailers in the prohibition of § 4(g)(2).

³See also H. Rept. No. 1153, *supra*, pp. 22, 23.

⁴See, e.g., 15 U.S.C. §§ 2055(b)(1), 2064(b) through 2064(e) (§ 2064(d) amended by Pub. L. No. 94-284, 90 Stat. 508, as codified in 15 U.S.C. § 2064(d)).

maxim expressio unius est exclusio alterius. Sutherland, *Statutory Construction*, § 47.23 (4th ed., 1973), in explaining this maxim, states:

As the maxim is applied to statutory interpretation where a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are designated, there is an inference that all omissions should be understood as exclusions

The force of the maxim is strengthened by contrast where a thing is provided in one part of the statute and omitted in another.

This maxim is particularly appropriate in the present situation. Thus, the inference necessarily is that the omission of retailers from § 4(g)(2) was intentional.

As further evidence of congressional intent respecting § 4(g)(2), the term “manufacturer” is used, without any reference to “retailers,” throughout the legislative history of that section.⁵ This consistency of omission bolsters the argument that those entities were intentionally left out of § 4(g)(2).

In light of the foregoing, it is our opinion that Congress had no intention of applying the prohibition of § 4(g)(2), to retailers.

Therefore, since Montgomery Ward is primarily in business as a retailer—an entity not subject to the postemployment bar of § 4(g)(2)—the mere fact that it engages in the modest amount of importing as exists here does not automatically transform it into a barred employer under § 4(g)(2).

In our opinion, the employee may accept the position with Montgomery Ward since § 4(g)(2) does not apply to the facts of this particular case.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

⁵See H. Rept. No. 92-1153, *supra* (1972), at 4, 30; H. Conf. Rept. No. 92-1593, 92d Cong., 2d sess. (1972), pp. 4-6.

January 19, 1978

**78-2 MEMORANDUM OPINION FOR THE
ASSISTANT ATTORNEY GENERAL, CRIMINAL
DIVISION**

**Rebates in Violation of Shipping Act—Applicability
of Conspiracy Statute (18 U.S.C. § 371)**

This responds to your inquiry concerning a group of cases involving ocean freight rebating. The question is whether the 1972 amendment to § 16 of the Shipping Act of 1916 precludes conspiracy prosecutions under 18 U.S.C. § 371 in these cases. The Fraud Section of the Criminal Division has taken the position that the cases may be prosecuted under the conspiracy statute; the Government Regulations and Labor Sections disagree.

Our conclusions may be summarized as follows:

As a general matter, a statutory prohibition the violation of which is subject only to a civil penalty may be an "offense against the United States" for purposes of the conspiracy statute. The 1972 amendment to § 16 does not rule out the possibility of prosecuting a corporate shipper and a corporate carrier for conspiring to violate paragraph Second of § 16. Congress' action, as well as principles analogous to those underlying the Wharton rule, indicate, however, that any such prosecution must be based upon more than a minimal or ordinary violation of the provisions of the Shipping Act. That is, the prosecution must be able to show, that because of its nature or extent, the conduct contemplated by the conspiracy agreement involved harm to society beyond that ordinarily presented by the substantive offense itself. Similarly, depending upon the particular circumstances, cases of the present type may constitute a conspiracy to defraud the Federal Maritime Commission.

We are, however, not familiar enough with the facts of the present cases to make specific recommendations.

Background

1. Section 16 of the Shipping Act of 1916, as amended, 46 U.S.C. § 815 (1975 Supp.), reads as follows:

It shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly —

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, as is granted to such carrier or other person subject to this chapter.

Whoever violates any provision of this section other than paragraphs First and Third hereof shall be subject to a civil penalty of not more than \$5,000 for each such violation.

Whoever violates paragraphs First and Third hereof shall be guilty of a misdemeanor punishable by a fine of not more than \$5,000 for each offense. [Emphasis added.]

The principal provision discussed herein is paragraph Second.

2. Investigations of ocean freight rebate practices are being conducted by the U.S. Attorneys (regarding several carriers, including United States Lines and Sealand Services, Inc. and Seatrain Lines, Inc.). As a result of one of these investigations, Sealand has made extensive disclosures to the Federal Maritime Commission concerning rebates amounting to some \$19 million and has agreed to pay a civil penalty of almost \$5 million. The U.S. Attorney in Newark has forwarded to some 53 other U.S. Attorneys cases involving more than 300 shippers that received the rebates.

Your memorandum indicates that:

The investigations have disclosed that employees of the carriers would obtain freight business by agreeing with employees or officers of the shippers to pay freight rate rebates. Books and records of the carriers were falsified by identifying rebate payments as, *inter alia*,

“promotional expenses.” Rebate payments were made by laundering the funds through both domestic and overseas subsidiaries of the carriers, obviously with the assistance and knowledge of employees of the subsidiaries.

Discussion

1. This inquiry relates to the possibility of prosecution under the general conspiracy statute. That statute, 18 U.S.C. § 371, provides as follows:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

It is established that, for purposes of 18 U.S.C. § 371, the term “offense against the United States” is not limited to crimes.¹ It also encompasses conduct prohibited by a Federal statute and “made punishable only by a civil suit for a statutory penalty.” *Hunsaker v. United States*, *infra*, at 112. Thus, it may follow that violation of paragraph Second of § 16 as amended, which is punishable by civil penalty, is an “offense” within the meaning of 18 U.S.C. § 371.² The first issue is whether that result is foreclosed, because of the 1972 amendment to § 16.

2. Section 16 of the Shipping Act prohibits several types of practices by shippers, common carriers by water, and others. Before the 1972 amendment of § 16, violation of any of those prohibitions was a misdemeanor punishable by a fine of not more than \$5,000.³ The principal effect of the 1972 legislation is to provide, with respect to paragraph Second and all other provisions except paragraphs First and Third, that a violation thereof is no longer a crime, but is subject to a civil penalty.⁴

The legislative history of the 1972 amendment is brief and contains no

¹See *United States v. Hutto*, 256 U.S. 524, 529 (1921) (offense of Federal official's having financial interest in Indian trade); *Hunsaker v. United States*, 279 F. (2d) 111, 112 (9th Cir. 1960), cert. denied, 464 U.S. 819 (1960) (Gold Reserve Act); *United States v. Weisner*, 216 F. (2d) 739, 742 (2d Cir. 1954) (Gold Reserve Act). In *Weisner*, the court rejected the argument that 18 U.S.C. § 1, which deals with the classification of criminal offenses, governed the meaning of “offense” for purposes of 18 U.S.C. § 371.

²It should be noted that § 16, as amended, refers to a civil penalty for each “violation” of paragraph Second. In contrast, with regard to paragraph First and Third, the statute refers to a fine for each “offense.” There is no reason, however, to treat this difference in terminology as decisive regarding the applicability of 18 U.S.C. § 371.

³See 46 U.S.C. § 815 (1970).

⁴See Pub. L. No. 92-416 (1972), § 1(b).

mention of the possibility of prosecutions under the conspiracy statute. Thus, an effort must be made to infer Congress' intent.

The bill which was ultimately enacted differed in certain respects from the version introduced and initially passed by the House of Representatives. As enacted, the law provides that the civil penalties for violation of the Shipping Act "may be compromised by the Federal Maritime Commission, or may be recovered by the United States in a civil action."⁵ The original House bill contained the change from criminal to civil sanctions, but under that bill ⁶ the Federal Maritime Commission would have been empowered to assess the civil penalties, subject to review of its action in the courts of appeals.

The purpose of the House bill was to strengthen the ability of the Commission to carry out its regulatory functions under the Shipping Act, in part by amending the penalty provisions in the "areas that give the Commission most of its enforcement problems in day-to-day operations."⁷ The House report stated that the then-existing situation (*i.e.*, investigation of matters by the Commission and referral to the Department of Justice for prosecution) was unsatisfactory because it involved delay and also overlapping of effort on the part of the Commission and the Department.⁸ Another disadvantage cited in the House report was that frequently (because of the time elapsed between the occurrence of the infraction and the criminal trial) the sentence imposed by the courts was too light and was insufficient to deter future violations.⁹

Although the House report stressed that the amendments would mean more effective regulation by the Commission, it also said that the proposed procedure (assessment of penalties by the Commission, with review in the courts of appeals) "would, in most instances, reduce the total litigation expenses to both the Government and private parties [and] relieve the overburdened Federal courts"¹⁰

The Senate, however, amended the bill so as to restrict the authority of the Commission to seeking to compromise a civil penalty. Thus, under the Senate bill (which was enacted), absent such a compromise, the Commission may refer the matter to the Department of Justice for the bringing of a civil action to recover a penalty.

Evidently, the basis for the Senate amendment to the House bill was industry opposition to granting the Commission authority to assess civil penalties.¹¹ The Senate report referred to "contentions" that such a procedure would be contrary to due process, because the "nature of the administrative agency process necessarily makes the agency . . . ill-suited for the imposition of punitive sanctions."¹²

⁵*Id.*, § 3; 46 U.S.C. 814 note (1975 Supp.).

⁶See 117 Cong. Rec. 32415 (1971).

⁷H. Rept. No. 92-478, 92d Cong., 1st sess. (1971), p. 1.

⁸*Id.*, p. 2.

⁹*Id.*, p. 3.

¹⁰*Id.*, p. 4.

¹¹See S. Rept. No. 92-1014, 92d Cong., 2d sess. (1972), p. 3.

¹²*Id.*, p. 2.

In explaining the shift from criminal sanctions to civil, the Senate report noted, as did the House report, the unsatisfactory, time-consuming nature of the then-existing means of enforcement.¹³ Furthermore, the Senate report stated:

To change the penalties for violations of these provisions from criminal to civil should make the documentation of violations simpler, thereby expediting final consideration by the Commission, or the Department of Justice and the courts. Since proving a violation would be easier, the threat of imposition of the prescribed penalty should act as a more effective deterrent to further violations.

Continuing, the Senate report stated¹⁴ that enactment of the bill

. . . should provide the Federal Maritime Commission with needed additional authority to more effectively discharge its statutory responsibilities, encourage compromised settlements for violations of the shipping statutes, and help to avoid needless litigation in our over-crowded [sic] Federal courts.

The legislative history indicates that Congress' main purpose in substituting civil sanctions was to enhance enforcement by the Commission. The possibility of bringing conspiracy prosecutions seems consistent with the main purpose of the 1972 amendments. Such prosecutions need not interfere with enforcement by the Commission and, indeed, could be a useful supplement. Still, consideration must be given to other objectives mentioned in the congressional reports.

The House report and, to a lesser extent, the Senate report expressed concern regarding duplication of effort by the Commission and the Department. This problem could be exacerbated if, for example, there should be a conspiracy prosecution in regard to a matter that had already been the subject of a Commission investigation and a civil action for recovery of a penalty.

Both of the reports indicated a desire to avoid increasing the backlog of cases in the Federal courts. This may be some evidence that, except for the means provided in § 16, Congress did not contemplate Federal enforcement in this area.

As the Fifth Circuit has pointed out,¹⁵ the 1972 amendments were clearly not based upon a belief that criminal punishment was too severe. Both committee reports stressed the need for a more effective deterrent. Nonetheless, Congress was also concerned with fairness to the regulated firms and, in particular, with reducing their litigation expense (as well as that of the Government). This is another aspect of congressional intent that casts doubt on the availability of conspiracy prosecutions.

Finally, it must be noted that Congress could have provided for both civil and

¹³S. Rept., p. 2.

¹⁴*Id.*, p. 3.

¹⁵*United States v. Blue Sea Line*, 553 F. (2d) 445, 450 (5th Cir. 1977) (upholding the dismissal of indictments charging pre-1972 rebates in violation of § 16, paragraph Second).

criminal sanctions for violation of the provisions in question, but did not do so.¹⁶

The basic conclusion we draw from the legislative history is that there is no absolute conflict between Congress' intent in amending § 16 and the bringing of conspiracy prosecutions in this area. On the other hand, the concerns expressed by the congressional committees with regard to avoiding overlap between the Commission and the Department, fairness to regulated entities, and reducing the burden on the courts are entitled to some weight. Those concerns suggest that if there are to be conspiracy prosecutions related to violations of § 16 great care must be used in selecting the cases. For reasons discussed below, the same conclusions are suggested by principles analogous to those underlying the Wharton rule.

3. The nature of the Wharton rule was thoroughly considered by the Supreme Court in *Iannelli v. United States*, 420 U.S. 770 (1975).¹⁷ The Court described the rule by quoting from its original source, Wharton's treatise on criminal law:¹⁸

When to the idea of an offense [*e.g.*, dueling] plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a character that it is aggravated by a plurality of agents, cannot be maintained

Had the present issues arisen before the 1972 amendment of § 16—that is, when criminal sanctions were prescribed for conduct such as rebating—it would have been necessary to determine the applicability of the Wharton rule. In our opinion, however, because the substantive violations are no longer crimes, the Wharton rule as such does not apply.¹⁹

Nonetheless, since the substantive violations are “offenses” for the purpose of 18 U.S.C. § 371, it should be proper to consider principles similar to those underlying the Wharton rule. In *Iannelli*, the Court stated, 420 U.S., at 782, that the Wharton rule does not rest on principles of double jeopardy,²⁰ but is merely a “judicial presumption, to be applied in the absence of legislative intent to the contrary.” The rule was explained as follows (420 U.S. at 785-86, footnotes omitted):

¹⁶For example, willful violations might have been made subject to criminal sanctions.

The Department of Justice sent a report on the House bill to both the House and the Senate committees. *See* H. Rept., p. 10; S. Rept., p. 6. The Department stated that it had no objection to enactment of the bill. Its report did not suggest the need to retain criminal sanctions and did not mention the possibility of prosecutions under 18 U.S.C. § 371.

¹⁷In *Iannelli*, the Court, in a five-to-four decision, sustained convictions for violation of 18 U.S.C. § 1955, prohibiting large-scale gambling activities, and for conspiring to commit that offense.

¹⁸420 U.S. at 773, quoting 2 F. Wharton, *Criminal Law* § 1604 (12th ed., 1932) p. 1862.

¹⁹One indication that the rule applies only when the substantive offense is a crime is the discussion in *Iannelli* of the procedural effect of the rule. The Court stated, 420 U.S. at 786, footnote 18, that in cases covered by the rule dismissal of the conspiracy charge is not required. The Court added, “When both charges are considered at a single trial, the real problem is the avoidance of dual punishment. This problem is analogous to that presented by the threat of conviction for a greater and a lesser included offense, and should be treated in a similar manner.”

²⁰*But see* footnote 19, *supra*.

Wharton's Rule applies only to offenses that *require* concerted criminal activity, a plurality of criminal agents. In such cases, a closer relationship exists between the conspiracy and the substantive offense because *both* require collective criminal activity. The substantive offense therefore presents some of the same threats that the law of conspiracy normally is thought to guard against, and it cannot automatically be assumed that the Legislature intended the conspiracy and the substantive offense to remain as discrete crimes upon consummation of the latter. Thus, absent legislative intent to the contrary, the Rule supports a presumption that the two merge when the substantive offense is proved. [Emphasis as in original.]

Here, the question raised is whether violation of § 16, paragraph Second, *requires* concerted activity. If so, it could be argued, by analogy to the Wharton rule, that Congress did not intend any separate sanction for a two-party conspiracy to commit that offense.²¹

Under paragraph Second, it is "unlawful for any common carrier by water . . . alone or in conjunction with any other person, directly or indirectly . . . [to] allow any person to obtain transportation for property at less than the regular rates . . . by means of false billing . . . [or] any other unjust . . . means." If this provision is read literally, the minimum number required for violation is one—the carrier.²² (A shipper who knowingly and willfully obtains or attempts to obtain below-standard rates by such false means violates another provision, the initial paragraph of § 16.) In our opinion, however, such analysis is not entirely satisfactory.

Logically, it is possible that a carrier could provide transportation at less than the regular rate without the shipper's realizing that any false or unfair means had been used. Still, it seems reasonable to assume that often the violation would involve concerted action, *e.g.*, an agreement that the carrier will pay a rebate to the shipper. If so, it may be asserted that the mere existence of some concerted action is not a basis for going beyond the civil penalties prescribed by Congress; this supports our conclusion (derived from the legislative history) that special care should be used in selecting cases to be prosecuted under 18 U.S.C. § 371.

4. Our recommendation is that a distinction be drawn between what might

²¹The Wharton rule is subject to several exceptions. One is that a conspiracy prosecution is permissible when the number of conspirators exceeded the minimum number of persons required for commission of the substantive offense. *See, Iannelli v. United States, supra*, 420 U.S., at 782, footnote 15.

²²The phrase "alone or in conjunction with any other person" does not alter our conclusion regarding the *minimum*.

Cf. May v. United States, 175 F. (2d) 994, 1003 (D.C. Cir., 1949), cert. denied, 338 U.S. 830 (1949) (conspiracy to commit offense of Congressman's accepting payment for services regarding a claim against the Government); *Ex parte O'Leary*, 53 F. (2d) 956, 957 (7th Cir., 1931), cert. denied, 283 U.S. 830 (1931) (conspiracy to commit offense of Federal officer's receiving a bribe). These cases applied an exception to the Wharton rule; this exception permits a conspiracy prosecution where the substantive offense (*e.g.*, accepting a bribe) is such that only one of the parties could commit it.

be called "ordinary" violations of § 16, paragraph Second, and aggravated cases. Such determinations depend of course upon the particular facts.

Particular care must be given to the bases for treating a conspiracy and a completed substantive offense as separate, that is, the "distinct kinds of threats to society that the law of conspiracy seeks to avert."²³

Factors to be considered include the nature and extent of the conspiracy and the number of parties. For example, whether the agreement relates to an isolated transaction or to a long-continuing series of transactions.

There is no violation of paragraph Second unless false billing or some other unfair means is used. Thus, ordinarily, some concealment will be involved. When, however, the parties go to unusual lengths to conceal their conduct (e.g., the use of foreign subsidiaries²⁴), there may be special risks to society. Moreover, where such a scheme is agreed upon, there may also be a sound basis for charging a conspiracy to defraud the Federal Maritime Commission.²⁵

Because Congress gave primary responsibility for enforcement to the Commission, consideration should be given to the action (or the position) taken by the Commission. For example, if the question of defrauding the Commission is raised, what is its view regarding the matter?

In terms of fairness, it may be more difficult to justify proceeding with a conspiracy charge if, with regard to the underlying conduct, a civil penalty has been paid.

Our approach may be illustrated by the following hypothetical cases:

a. In the first hypothetical situation, a carrier and a shipper agree, with respect to a particular shipment or a series of shipments, that the carrier will pay a rebate to the shipper. It is understood that the rebate will be paid in cash and that the carrier's books will not disclose the true nature of the payment. The amounts involved are relatively small, and there is no history of such practices on the part of the parties involved.

We question whether a conspiracy prosecution would be appropriate in a case of this type. The parties could argue, with some force, that their conduct is at most an ordinary violation of § 16 and that Congress intended use of the sanction of civil penalties and nothing more.

b. In the second hypothetical situation, the Federal Maritime Commission obtains evidence that a carrier may be engaged in paying improper rebates. It warns the carrier that such practices are illegal. Then, the carrier and the shipper enter into a secret agreement for the payment of rebates. The agreement includes use of an elaborate scheme for making the payments—that is, several stages of laundering are effected, in part, by foreign subsidiaries of the carrier.

²³*Jannelli v. United States*, *supra*, 420 U.S., at 783 (footnote omitted).

²⁴Because of our basic conclusion, it is not necessary to discuss the question whether a carrier can conspire with one (or more) of its subsidiaries. See, *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968) (treble-damage action under Sherman Act may be based on a conspiracy between corporate entities with common ownership); Note, *Developments in the Law-Criminal Conspiracy*, 72 Harv. L. Rev. 920, 1000 (1959). See also Department of Justice, "Antitrust Guide for International Operations," (January 26, 1977), p. 12.

²⁵See, *Hunsaker v. United States*, *supra*, 279 F. (2d), at 114.

Concerted action of this type would seem to pose special risks of harm to society, *e.g.*, the risk that the laundering scheme will be used to effect violations of other Federal laws. The action of the shipper and the carrier could properly be regarded as a conspiracy (1) to violate § 16, paragraph Second, and (2) to defraud the Commission.

We do not have detailed information regarding the present cases and, accordingly, are unable to make specific recommendations concerning them. We hope that the above discussion will assist you in determining how to proceed.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

January 25, 1978

**78-3 MEMORANDUM OPINION FOR THE
ATTORNEY GENERAL**

**Warrantless Foreign Intelligence Surveillance—Use
of Television—Beepers**

This responds to your request for our opinion on the legality of warrantless foreign intelligence surveillance using certain specific techniques: (1) television surveillance; and (2) location detection using "beepers." We conclude that the President may, in a proper case, invoke his constitutional powers to regulate foreign affairs and thereby authorize such surveillance. He may delegate that power to the Attorney General for case-by-case approval of such surveillance.

I. The Techniques Involved

The techniques discussed in this memorandum differ in technical terms, but they share a feature that gives rise to the legal issue and constitutes a means whereby the Government can surreptitiously obtain information without the knowledge or consent of the person being surveilled. The first technique involves the use of concealed television cameras to observe and/or record what occurs in a particular place. In some instances the use of such a camera without the subject's consent may be entirely lawful without the necessity of a warrant. For example, a concealed camera might not require a warrant where it is installed to record only what a person who is present at the surveilled site and has consented to the surveillance can see. When there has been no consent, or when the camera records sights not visible to a human eye, its use amounts to an intrusion; the technique may not be utilized without a warrant or its constitutional equivalent—invocation of Presidential powers in a proper case. *Cf., United States v. KIM*, 415 F. Supp. 1252 (D. Ha. 1976) (warrant required for observation using binoculars where unaided vision is impossible).

The second technique, use of "beepers," involves installation of an electronic device on the chassis of an automobile. The device emits a signal that can be received within a half-mile radius. By tracking the source of the signal, the beeper's location can be monitored. Installation of the beeper can, in some cases, be performed by affixation without intrusion into the car itself. In other cases, "technical trespass," such as opening a hood or trunk, may be

necessary. The use of beepers has been the subject of much litigation. The law is somewhat unsettled, but courts are in agreement that if installation of the device requires that the car be seized temporarily or a compartment opened, a warrant is required. See, *United States v. Holmes*, 521 F. (2d) 859 (5th Cir. 1975); *aff'd* by an equally divided court, 537 F. (2d) 227 (5th Cir. 1976); *United States v. Pretzinger*, 542 F. (2d) 517 (9th Cir. 1976); *United States v. Hufford*, 539 F. (2d) 32 (9th Cir. 1976); and the cases discussed in *Tracking Katz: Beepers, Privacy, and the Fourth Amendment*, 86 Yale L. J. 1461 (1977). A panel decision in the Fifth Circuit held that use of the device, regardless of the method of installation, required a warrant (*Holmes, supra*).

II. Applicable Legal Considerations

Use of these techniques can raise Fourth Amendment issues, either because of the surveillance itself or the method of installation. While the issue is not settled, the President can authorize warrantless electronic surveillance of an agent of a foreign power, pursuant to his constitutional power to gather foreign intelligence. This Office has taken the position that the same constitutional power authorizes limited physical entries and seizures incident to installation of such devices. Office of Legal Counsel Memorandum for the Attorney General, "Physical Intrusion for Foreign Intelligence Purposes," August 19, 1975. The rationale of that memorandum covers these surveillance techniques as well. It is our opinion that the President has the power to authorize the warrantless installation and use of these devices for the purpose of gathering foreign intelligence (or counterintelligence) in a proper case, and that he can also authorize minimal trespasses or seizures incident to installation of the devices; however, invocation of that power must be explicit.

III. Conclusion

The President can constitutionally authorize use of television surveillance and "beepers" in certain narrow circumstances. He can also authorize those minimal "technical trespasses" and seizures incident to installation of these devices.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

January 25, 1978

**78-4 MEMORANDUM OPINION FOR THE
GENERAL COUNSEL, DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT**

**Fair Housing—Civil Rights Act—Civil
Penalties—Application of Seventh
Amendment—Jury Trial**

This is in response to your request for our opinion concerning the constitutionality of the civil damages provisions of the Edwards-Drinan bill (H.R. 3504). Specifically, you have inquired whether the bill's administrative complaint procedure offends the Seventh Amendment guarantee that "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved" For the reasons that follow, it is our opinion that the provisions in question are suspect under the recent Supreme Court decisions interpreting the Seventh Amendment. The issue is a close one and almost certainly will be litigated. With these considerations in mind, we have suggested several ways in which the language of the provision could be altered to improve its chances of withstanding scrutiny.

I.

H.R. 3504, 95th Cong., 1st sess. (1977), would amend Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 *et seq.*, by creating three alternative mechanisms for enforcement of its fair housing provisions. Section 812 preserves private enforcement by means of civil suit; § 811 provides for "pattern or practice" actions by the Attorney General. Most importantly, for purposes of this discussion, § 810 of the bill authorizes the Secretary of Housing and Urban Development (HUD), either in response to a private complaint or on his or her own initiative, to investigate allegations of discriminatory housing practices. If he finds reasonable cause to believe the charges to be true, he is required either to refer the matter to the Attorney General for the filing of a civil action against the offender, or to file an administrative complaint. If the administrative procedure is followed, the respondent is entitled to notice and to the opportunity for a hearing on the

record; the person conducting the hearing may also allow any aggrieved person to intervene. The hearing officer, after making findings of fact and conclusions of law, may award various forms of relief including money damages, equitable and declaratory relief, and punitive damages up to \$10,000; temporary or preliminary relief is also available pending final disposition of the complaint. Review is in the courts of appeal using a "substantial evidence" standard. The bill also authorizes the Secretary to assess a civil penalty of \$1,000 for each day during which a violation continues after the date on which the administrative order becomes unreviewable. Section 811(b) empowers the Attorney General, at the request of the Secretary, to institute civil proceedings to enforce either final orders or civil penalties of this sort.

In applying the Seventh Amendment to this statutory scheme, two principles are immediately clear. First, it is firmly established that the Seventh Amendment "does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." *Curtis v. Loether*, 415 U.S. 189, 194 (1974). Thus, the Supreme Court has held that a jury may be demanded in suits in the Federal courts for actual and punitive damages under § 812 of the Civil Rights Act of 1968. *Id.* Similarly, in *Pernell v. Southall Realty*, 416 U.S. 363 (1974), the Court held that the Seventh Amendment applied in civil suits in the District of Columbia courts for recovery of possession of real property.

A second principle also has emerged—the Seventh Amendment does not apply where Congress has properly assigned the functions of factfinding and initial adjudication to an administrative tribunal where the use of a jury would be inappropriate. Thus, in *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, 430 U.S. 442 (1977), the Supreme Court upheld Congress' choice of a specialized administrative body to ascertain whether employers were maintaining unsafe working conditions and to impose civil penalties. The Court found no constitutional right to a jury under such circumstances:

. . . when Congress creates new statutory "public rights," it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be "preserved" in "suits at common law." Congress is not required by the Seventh Amendment to choke the already crowded federal courts with new types of litigation or prevented from committing some new types of litigation to administrative agencies with special competence in the relevant field. This is the case even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a

federal court of law instead of an administrative agency, 430 U.S., at 455.¹

While it is, therefore, clear that juries need not be imported into administrative proceedings designed by Congress to give effect to agency expertise, it is also apparent that Congress may not be altogether free to elect such administrative forums under all circumstances. Thus, in *Atlas Roofing*, the Court was careful to go no further than to approve a jury-free administrative proceeding where "public rights" were involved. 430 U.S. at 458. Unfortunately, this talismanic phrase was not well defined. Instead, the Court spoke somewhat circularly in terms of examples—"e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact" (*id.*, at 450); "e.g., where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights" (*id.*, at 458).

The sovereign's prerogative to sue and to be sued as it deems appropriate was recognized and discussed at length in *Murray's Lessee v. Hoboken Land Co.*, 18 How. 272, 284 (1855): "[T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States as it may deem proper." See also, *Ex Parte Bakelite*, 279 U.S. 438, 451 (1929): "Legislative courts also may be created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible to it. The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals." Accordingly, Congress' choice of administrative forums as means for collecting civil penalties to be deposited into the public treasury has repeatedly been upheld. See, e.g., *Helvering v. Mitchell*, 303 U.S. 391 (1938).

So, too, has the use of administrative bodies which, in the course of enforcing public policy, incidentally provide relief to private citizens. Thus, in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Court upheld agency action under the National Labor Relations Act in requiring a private employer to reinstate an employee with back pay following an unfair labor practice. Likewise, in *Block v. Hirsh*, 256 U.S. 135 (1921), the Court rejected a Seventh Amendment challenge to a statute temporarily suspending the legal remedy of ejectment and establishing an administrative tribunal to determine

¹In reaching this broad conclusion, the Court recharacterized the holding of an earlier case, *Kachen v. Landy*, 382 U.S. 323 (1966), which had upheld the power of a bankruptcy court, exercising summary jurisdiction without a jury, to adjudicate the otherwise legal issue of voidable preferences. Rather than treating this holding as compelled by the traditional distinction between courts of law and courts of equity, the Court observed that this specialized court of equity "constituted a forum before which a jury would be out of place and would go far to dismantle the statutory scheme." 430 U.S. at 454, n.11.

fair rents at which tenants would be allowed to hold over despite the expiration of their leases.

Nevertheless, it cannot be concluded, based on these rather limited precedents, that administrative proceedings initiated by a public agency but providing the full panoply of judicial relief to private parties are necessarily permitted under the Seventh Amendment. The proceedings before the NLRB at issue in *Jones & Laughlin* were spurred by private complaint, yet the relief available—reinstatement with back pay or an award of back pay alone—was basically equitable in nature. Cf., *Slack v. Havens*, 522 F. (2d) 1091, 1094 (9th Cir. 1975) (Title VII). Moreover, the Government agency authorized to hear and decide private complaints, not private individuals who might receive relief in the administrative forum, was alone empowered to trigger proceedings with respect to unfair employment practices and to seek enforcement of its orders in subsequent court proceedings. See, *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261 (1940). The holding of *Block v. Hirsh*, *supra*, also appears to be narrow. Although the result in that case subsequently has been characterized broadly,² the Court's reasoning may be misunderstood unless seen in its context. Mr. Justice Holmes, writing for the Court, spoke specifically in terms of Government regulation of the wartime housing industry. Thus, he emphasized that "[i]f the power of the Commission established by the statute to regulate the relation is established, as we think it is . . . this objection [concerning the unavailability of trial by jury] amounts to little. To regulate the relation and to decide the facts affecting it are hardly separable." 256 U.S., at 158. [Emphasis added.] In *Block*, therefore, the rent commission played a role comparable to that of the Interstate Commerce Commission or other Federal agencies which control the prices charged by private entrepreneurs and thereby incidentally benefit members of the public by requiring those regulated to comply with certain Government standards. The Commission did not afford all-purpose relief to complaining private parties.

An even more important warning is found in *Crowell v. Benson*, 285 U.S. 22 (1932), which, while sustaining the role of an administrative tribunal in finding facts and awarding relief under the Longshoremen's and Harbor Workers' Compensation Act, characterized the case at bar as "one of private right, that is, of the liability of one individual to another under the law as defined," *id.*, at 51. Thus, although the role of the administrative tribunal in *Crowell* was solely adjudicatory rather than prosecutorial, the Court did not dwell on this distinction but focused instead on the nature of the liability created. While the proceedings in *Crowell* were deemed to be adjunct to the admiralty jurisdiction of the Federal courts and therefore to present no Seventh Amendment problem, two conclusions relevant to our consideration here are suggested by this statement: (1) more than a simple "public interest" sufficient to sustain congressional legislation is necessary to come within the phrase "public right"

² We may assume that the Seventh Amendment would not be a bar to a congressional effort to entrust landlord-tenant disputes, including those over the right to possession, to an administrative agency." *Pernell v. Southall Realty*, *supra*, 416 U.S., at 383.

as used in *Atlas Roofing*; and (2) the nature of relief afforded by an administrative tribunal may not necessarily be irrelevant for Seventh Amendment purposes merely because a government agency plays a formal role in instituting those administrative proceedings.

The constitutionality of the administrative proceedings envisioned by the Edwards-Drinan bill must be tested against these rather inconclusive standards. Because the proposal and the context in which it arises differ sufficiently from administrative procedures approved under existing case law, at the very least, it leaves some room for doubt. Although HUD, rather than a private plaintiff, would actually be responsible for filing the administrative complaint, and would do so only if it found a charge to be supported by reasonable cause, it would not be the sole enforcer of the statutorily created guarantee of fair housing practices as was true in *NLRB v. Jones & Laughlin*. Nor would it act in a regulatory capacity akin to that of the rent commission in *Block v. Hirsh*. Moreover, the Department would enter the fray, not at the outset, but nearly 10 years after the creation of a private cause of action in the district court which provides for identical remedies, and nearly 4 years after the Supreme Court expressly ruled that under such circumstances trial by jury must be available on demand. It is therefore unlikely that removing the obvious cross-reference from § 810 to § 812—civil cause of action or the adoption of cosmetic changes in nomenclature—would suffice to obviate the potential constitutional questions inherent in the proposal.

It may well be that the courts, when asked to apply the Seventh Amendment in this context, would adopt a broad rule based on the specialized forum approach taken in *Atlas Roofing*³ and the sovereign prerogative analysis of *Murray's Lessee*. If so, as long as an administrative agency, and not simply private parties, played a prosecutorial as well as adjudicatory role in administrative proceedings, the Seventh Amendment would not apply. The existence of a related private right of action need not undercut the legitimacy of Congress' choice in this regard; rather, the continued availability of such a judicial forum merely provides alternative means by which private citizens can vindicate the public interest also enforced by the sovereign.

Different reasoning could, however, dictate a different result. It could be argued that Congress should not be able, under the vague rubric "public right," to circumvent the Seventh Amendment completely by creating a chain of administrative courts capable of giving traditional common law remedies to private litigants seeking relief from wrongs (such as dignitary torts) traditionally regarded as private in character. Plainly, the Seventh Amendment question here is a close and difficult one. Were we to opine one way or the other, our conclusion would probably favor a finding that § 810 is unconstitutional.

Rather than conclude on this equivocal note, we have considered whether it might be possible to modify § 810 to improve its chances of withstanding

³Such a ruling could also rest on the expansive dictum in Mr. Justice White's opinion in that case, emphasizing the breadth of Congress' prerogative to select the manner in which it will go about resolving important "public" issues. 430 U.S. at 455.

constitutional attack. It should be understood, at the outset, that we do not profess to share your Department's expertise on and sensitivity to the policy and administrative considerations that would inevitably come into play here. Our advice should be seen as merely suggestive of ways in which the constitutional hurdles could be reduced.

II.

First, private actions in a district court seeking actual and punitive damages and other relief might be preserved, but the nature of the proposed administrative proceedings altered. Use of an administrative forum to impose civil penalties without recourse to trial by jury was expressly approved in *Atlas Roofing*. Provision for equitable relief in the form of temporary or permanent injunctions in no way offends the Seventh Amendment's preservation of juries in "Suits at common law." It could be contended that thus to limit the administrative relief available, by omitting any provision for awards of actual or punitive damages, would not seriously undercut the efficacy of the proposal. Actual damages resulting from a dignitary tort are difficult to prove, and the threat of a civil penalty due the government would do as much to encourage compliance with the law as would the possible imposition of punitive damages.⁴ This option would seem almost certainly to avoid any possible problem under the Seventh Amendment.

Second, the private action in a district court might be eliminated, and the remedies now available in that forum instead provided in the course of administrative proceedings. The development of legislative history demonstrating a belief by Congress in the necessity for a strong governmental role in order to vindicate the public interest in nondiscriminatory housing practices would provide added support for the claim that the choice of an administrative forum was more than a ruse to eliminate Seventh Amendment rights incident to the existing civil cause of action. This option would be strengthened if the provision for punitive damages were eliminated and civil penalties imposed to run in favor of the government rather than the private complainant.

Third, the bill's treatment of the mechanism by which administrative awards are to be enforced could be modified. Section 811(b) indicates that the Secretary may request the Attorney General to institute civil proceedings for this purpose; it may be inferred that no power to sue for enforcement is meant to lie in the private complainant. Express language disallowing such claims by other than the Attorney General could enhance the claim that a public right, not a private right, is being vindicated. Consideration also might be given to vesting the reviewing circuit court of appeals with the power to enforce such awards (*see, e.g.*, 15 U.S.C. § 45(d) (the review provision applicable to orders of the

⁴Moreover, the bill as presently drafted seems to invite money-minded plaintiffs to bring charges in the administrative forum, then to return to the district court if their initial efforts prove unsuccessful. The resulting duplicative effort by administrative and judicial officers, costs to defendants, and problems of *res judicata* would seemingly be at least somewhat reduced if injunctive relief were the only remedy available in both forums.

Federal Trade Commission under § 5 of the Federal Trade Commission Act)), instead of simply incorporating the provision authorizing such courts to enjoin, set aside, suspend, or determine the validity of orders as set forth in 28 U.S.C. § 2342. The awkward asymmetry of a civil suit in which jury trial is guaranteed pursuant to *Curtis*, and an enforcement action also in the district court, which provides absolutely identical relief, would therefore be avoided.⁵

Finally, a requirement that the Secretary determine that administrative proceedings are in the public interest, as is the case in FTC proceedings under 15 U.S.C. § 45, would enhance the emphasis upon the "public right" (as opposed to "private right") aspects of this bill, which are now left to be inferred from the statutory scheme. Although such a change is unlikely to be determinative in a court's interpretation of the measure, it may weigh the balance in favor of sustaining the proposed administrative procedure.

As stated above, we are not in a position to judge the practical merits of any of these options. Nor are we able to assure you that the adoption of any alterations would obviate the possibility of a successful challenge to the administrative procedures contemplated here. We would urge that, whatever course you follow, steps be taken during the legislative process to underline wherever possible the public benefit aspects of this bill.

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

⁵While such an enforcement action is arguably merely an extension of the administrative proceedings, and would not, therefore, trigger a right to a jury determination of the underlying facts, a contrary rule has, in the past, been adopted by at least one court with regard to suits to enforce the imposition of civil penalties under the Federal Trade Commission Act. *See, United States v. J.B. Williams, Co., Inc.*, 498 F. (2d) 414 (2d Cir. 1974). A court faced with the incongruous availability of jury trials in suits by private plaintiffs, but not in actions brought by HUD to provide private complainants with identical relief, might well determine that jury trials should be afforded in both cases. Such a result could significantly limit the efficacy of the administrative tribunal as a means of speeding the disposition of housing discrimination cases.

January 27, 1978

**78-5 MEMORANDUM OPINION FOR THE
ADMINISTRATOR, DRUG ENFORCEMENT
ADMINISTRATION**

**Drug Enforcement Administration—
Supergrade Positions—Exemption From
Competitive Service**

This is in response to your inquiry raising four questions involving the interpretation of certain aspects of the Percy amendment to the Crime Control Act of 1976.

The main import of the Percy amendment, § 201 of the Crime Control Act of 1976 (Public Law 94-503; 90 Stat. 2425; 28 U.S.C. 509 note), is to exempt from the competitive service all positions in the Drug Enforcement Administration (DEA) which are at levels GS-16, 17, and 18 of the General Schedule, and certain positions at GS-15 ("subsection (a) positions"). Subsection (c)(2) of § 201 provides:

(2) Effective beginning one year after the date of the enactment of this Act, an individual in a position described in subsection (a) may be reduced in rank or pay by the Administrator within the Drug Enforcement Administration if—

(A) Such individual has been continuously employed in such position since the date of the enactment of this Act, and

(B) The administrator determines, in his discretion, that such action would promote the efficiency of the service.

Any individual reduced in rank or pay under this paragraph shall be paid in accordance with subsection (d).

Under subsection (d), an employee reduced in rank or pay pursuant to subsection (c)(2) is to receive the basic pay he was receiving immediately before such reduction in rank or pay; under subsection (c)(3), however, he is denied the benefits of the veterans' preference provisions of 5 U.S.C. §§ 7512, 7701.

Questions 1 and 2 address themselves to the following issue presented by subsection (c)(2). Pursuant to that subsection the Administrator, effective 1

year after the approval of the statute (October 15, 1976), may reduce in rank or pay an individual in a subsection (a) position if such individual has been *continuously employed in such position* since the date of the enactment of the Act. The problem raised by Questions 1 and 2 is whether the phrase "continuously employed in such position" refers to the specific position which the employee holds at the time at which the reduction in rank or pay is effectuated, or to any subsection (a) position. In other words, does subsection (c)(2) apply to an employee only if he has been continuously employed in the same position since the date of the approval of the Act, or is it sufficient if he has been continuously employed in any subsection (a) position?

The legislative history of the Act is of little help in solving this problem. What is now § 201 was introduced by Senator Percy as an amendment to the bill during the debate on the floor of the Senate, 122 Cong. Rec. S 12434 (Daily ed., July 26, 1976). Senator Percy's explanation of the amendment contained the following statement as to its purpose:

. . . It [the amendment] would place these DEA supervisory positions on a basis comparable to those at the FBI. Certainly there is a need for greater managerial flexibility and for the ability to move people about at one policy-making level in a law enforcement agency of this kind. *Id.*

The bill passed by the House did not contain a corresponding provision. The Conference Committee modified the text of the Percy amendment. The conference report, however, does not give any reasons for action taken by the conference except to state:

Drug Enforcement Administration

The Senate bill would make certain DEA positions now in the competitive service into excepted service positions.

The House amendment had no parallel provisions.

The conference substitute adopts a modified and more restrictive version of the Senate bill provisions. H. Conf. Rept. 94-1723, p.32.

It is our opinion that subsection (c)(2) applies if the employee has served continuously since the approval of the Act in any subsection (a) position, and he need not have served continuously in the same position. If it were otherwise, the Administrator could totally deprive an employee of his salary retention rights under subsection (d) by the expedient of transferring him from one position to another or by promoting or demoting him. As shown above, the purpose of § 201 is to enable the Administrator to exercise greater control over the policymaking positions in his agency, and to protect the salary status of those who at the time of the approval of the Act were already serving in a subsection (a) position. This does require that the employee remain frozen in the position he held at the time of the enactment of the statute if he is to keep his retention rights. Indeed, the very managerial flexibility which the Act is designed to achieve would be jeopardized by the contrary view. A considerate

Administrator may well hesitate to reassign or promote an employee if that action would result in the loss of the employee's salary retention rights.¹

For those reasons we conclude that the requirements of paragraph (c)(2) are met if the employee held any—but not necessarily the same—subsection (a) position since the enactment of the statute.

Question 3 asks for an interpretation of paragraph (c)(3), in particular the phrase “any reduction in rank or pay (under paragraph (2) or otherwise).”

Paragraph (c)(3) reads:

(3) The provisions of sections 7512 and 7701 of title 5, United States Code, and otherwise applicable Executive orders, shall not apply with respect to actions taken by the Administrator under paragraph (1) or any reduction in rank or pay (under paragraph (2) or otherwise) of any individual in a position described in subsection(a).

Paragraph (c)(3) removes from the protection of the Veterans Preference Act (5 U.S.C. §§ 7512, 7701) certain employees of DEA serving in subsection (a) positions. The first clause exempts actions taken under paragraph (c)(1), that is, all adverse personnel actions—removal, suspensions for more than 30 days, furloughs without pay, or reductions in rank or pay—affecting those who have served in subsection (a) positions for less than a year. Clause 2 removes from the application of the Veterans Preference Act any reduction in pay or rank (under paragraph 2 or otherwise) of any person serving in a subsection (a) position. Reductions in rank or pay under paragraph 2 affect those who have served continuously in a subsection (a) position since the approval of the Act. If the words “or otherwise” were lacking, paragraph (c)(3) would remove from the protection of the Veterans Preference Act those employees holding a subsection (a) position who have served less than a year and those who have served continuously since the approval of the Act. Veterans' preference, however, would be continued for the intermediary group, *i.e.*, those who have served for more than a year, but not since the approval of the statute. There appears to be no rational basis for retaining veterans' preference for that group but to deny it to those who have served for shorter or longer periods. Nor is there anything to indicate that Congress intended to achieve that result. It must be assumed that the words “or otherwise” were designed to extend the denial of veterans' preference protection to those who fall into that intermediary group. The import of the second clause of paragraph (c)(3), therefore, is to deny veterans' preference to any subsection (a) employee who is reduced in rank or pay, regardless of his length of service.²

Question 4 asks whether the requirement of continuous employment in subsection (a) position within the meaning of paragraph (c)(2) has been met where a person has been selected for such a position by the Administrator and has been acting in that position prior to the approval of the Act, but where the

¹Indeed, he might even be reluctant to demote if that action would have the additional result of depriving the employee of his retention rights.

²We realize that there is a certain overlap between clauses (1) and (2) of paragraph (c)(3) since clause (1) also covers the reduction in rank or pay of those who have served for less than a year.

approval of the Civil Service Commission to the appointment was given after that date. The answer to this question affects the employee's entitlement to retention pay, which presupposes that he has served continuously in a subsection (a) position since the approval of the Act.

This question must be answered in the negative. Pursuant to 5 U.S.C. § 3324, an appointment to a position in grades GS-16, 17, or 18 may be made by an agency only on the approval of the qualifications of the proposed appointee by the Civil Service Commission. An official therefore cannot be employed in such a position prior to that date. Service in an acting capacity is merely a "detail" (see 5 U.S.C. Ch. 33, Subchapter III), and a person cannot receive the compensation in addition to that of his regular pay for serving in an acting capacity in another position. 5 U.S.C. § 5535. We conclude that formal appointment to a position in GS-16, 17, or 18 pursuant to Civil Service Commission approval is a prerequisite for fulfilling the requirement of continuous employment since the date of the approval of the Act and the concomitant entitlement to retention pay.

Appointment to a position in the SR category³ and in GS-15 does not require prior approval by the Civil Service Commission; hence, there would appear to be no need for "acting" details in connection with those positions. We therefore assume that the fourth question does not arise with respect to such appointments. If it does, the answer will depend on the specific circumstances involved.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

³The SR category covers the four supergrade positions created by § 3(b) of Reorganization Plan No. 1 of 1968.

January 27, 1978

**78-6 MEMORANDUM OPINION FOR THE
ADMINISTRATOR, DRUG ENFORCEMENT
ADMINISTRATION**

**Drug Enforcement Administration—
Supergrade Positions Created by
Reorganization Plan—Exemption From
Competitive Service**

This is in response to your oral request for our opinion on the question whether § 201(a) of the Crime Control Act of 1976 (Public Law 94-503; 90 Stat. 2425; 28 U.S.C. § 509, note) which exempts certain positions in the Drug Enforcement Administration (DEA) from the competitive service,¹ also applies to four positions in your Agency established by § 3(b) of Reorganization Plan No. 1 of 1968, 3 CFR 1063 (1966-1970 Compilation), creating the Bureau of Narcotics and Dangerous Drugs, the predecessor to DEA. Section 3(b) provides:

There are hereby established in the Department of Justice, in addition to the positions transferred to that Department by this Plan, four new positions, appointment to which shall be made by the Attorney General in the competitive service. Two of those positions shall have compensation at the rate now or hereafter provided for GS-18 positions of the General Schedule and the other two shall have compensation at the rate now or hereafter provided for GS-16

¹Section 201(a) provides as follows:

(a) Effective beginning one year after date of the enactment of this Act, the following positions in the Drug Enforcement Administration (and individuals holding such positions) are hereby excepted from the competitive service:

(1) positions at GS-16, 17, and 18 of the General Schedule under section 5332(a) of Title 5, United States Code, and

(2) positions at GS-15 of the General Schedule which are designated as—

(A) regional directors,

(B) office heads, or

(C) executive assistants (or equivalent positions) under the immediate supervision of the Administrator (or the Deputy Administrator) of the Drug Enforcement Administration.

positions of the General Schedule (5 U.S.C. 5332). Each such position shall have such title and duties as the Attorney General shall prescribe.

The positions created by the Reorganization Plan are generally referred to as "SR" or "Supergrade-Equivalent" positions.

The former Administrative Counsel in the Office of Management and Finance, in a meticulous textual analysis of the pertinent statutes, concluded that the four SR positions are not subject to § 201(a) and that they consequently remain in the competitive service. His conclusion was based to a large extent on the language of § 201(a), which exempts from the competitive service "positions at GS-16, 17, and 18 of the General Schedules under Section 5332(a) of title 5, United States Code." The memorandum points out that, technically, the GS-16 and 18 positions established by the Reorganization Plan are not under 5 U.S.C. § 5332(a). It also concludes that according to the language of the Reorganization Plan the four positions are in the Department of Justice, while § 201(a) is limited to positions in DEA. The final argument is that while the four SR positions were textually covered by the language of § 201(a) as it was originally introduced in the Senate,² the statute as finally enacted is less precise. In view of the pertinent provisions of the conference report that the conference substitute "adopts a modified and more restrictive version of the Senate bill provisions" (H. Conf. Rept. No. 94-1723, 94th Cong., 2d sess. 32, 1976), the memorandum takes the position that § 201(a) is to be narrowly construed; hence, since there are doubts as to the coverage of the four SR positions by the 1976 Act, they should be excluded from its operation.

Our difficulty with this approach is that it makes distinctions in the application of the legislation having no relevance to its purpose. That purpose, in the words of Senator Percy, the sponsor of the amendment on which § 201 is based, was to

. . . place these DEA supervisory positions on a basis comparable to those of the FBI. Certainly there is a need for greater managerial flexibility and for the ability to move people about at one policy-making level in a law enforcement agency of this kind. (122 Cong. Rec. S 12434 (Daily ed., July 26, 1976)).

According to the conference report, the final bill adopts a more restrictive version. That version, however, consists essentially of providing that the bill would not apply to all DEA employees in GS-15, but only to those now listed in § 201(a)(2), thereby giving greater protection under the Veterans Preference Act to those who have served with the DEA for more than a year. In other words, the bill, as finally enacted, exempts certain classes of employees from the impact of the original amendment, based apparently on the congressional determination that GS-15 employees who are not regional directors, office heads, or executive assistants do not hold policymaking positions, and that the

²The pertinent language was "positions . . . to which grades GS-15 or above of the General Schedule under section 5332(a) of title 5, United States Code, apply . . ." (122 Cong. Rec. S 12434 (Daily ed. July 26, 1976)).

purpose of the amendment can be carried out even if policymaking employees who served for more than a year would continue to enjoy the benefits of the Veterans Preference Act with respect to personnel actions other than reductions in rank or pay.

An interpretation of the statute excepting SR positions from its operation would be contrary to that purpose. To begin with, we doubt that Congress was aware of the existence of SR positions as opposed to the GS classification. Moreover, the four SR positions do not represent any particular class of positions which would render it rational to except them from the congressional determination that the Administrator should have greater flexibility over policymaking positions. Thus, while some of the Assistant Administrators in DEA have a GS rating, one is an SR; the same applies to the positions of Director and division heads. The determination as to whether a position should be in the GS or SR classification apparently was not made on the basis of the consideration that it involved less policymaking than a GS position, but at random, possibly on the basis of available slots in either classification. Similarly, we have been advised that at least one of the present top officials at DEA was moved from an SR to a GS position when he received a new assignment.

We therefore conclude that a distinction between a GS position and its SR equivalent is not consistent with the statutory purpose; hence, § 201(a) is to be read as being applicable to SR as well as to GS positions.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

January 30, 1978

**78-7 MEMORANDUM OPINION FOR THE
ATTORNEY GENERAL**

**Applicability of Antilobbying Statute
(18 U.S.C. § 1913)—Federal Judges**

This responds to your request that we address the issue whether the antilobbying statute, 18 U.S.C. § 1913, prohibits sitting Federal judges from using resources associated with their official position (telephone, stationery, staff, and personal work time) to communicate with individual Members of Congress concerning pending or proposed legislation. We outline below what we believe to be the pertinent considerations and conclude that the issue is one that can only be resolved through the independent deliberations of the judicial branch.

18 U.S.C. § 1913 reads as follows:

No part of the money appropriated by an enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to Members of Congress on the request of any Member or to Congress, through the proper official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business.

Whoever, being an officer or employee of the United States or of any department or agency thereof, violates or attempts to violate this section, shall be fined not more than \$500 or imprisoned not more than one year, or both; and after notice and hearing by the superior officer vested with the power of removing him, shall be removed from office or employment.

This provision first appeared in 1919 as a rider to an appropriations bill. Act of July 11, 1919, ch. 6, § 6, 41 Stat. 68. It was one of a series of measures designed to check the expanding activities of the Federal bureaucracy not directly related to any statutory mission.¹

No criminal prosecutions have been undertaken pursuant to this provision. The only relevant judicial interpretations of this measure provide rather superficial analyses. See, *American Public Gas Association v. Federal Energy Administration*, 408 F. Supp. 640 (D.D.C. 1976); *National Association for Community Development v. Hodgson*, 356 F. Supp. 1399 (D.D.C. 1973). The limited legislative history demonstrates that its enactment was spurred by a single, particularly egregious instance of official abuse—the use of Federal funds to pay for telegrams urging selected citizens to contact their congressional representatives in support of legislation of interest to the instigating agency. See 58 Cong. Rec. 403 (1919). The provision was intended to bar the use of official funds to underwrite agency public relations campaigns urging the public to pressure Congress in support of agency views.

This interpretation is bolstered by the inclusion in the measure of the following savings clause:

. . . 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.

The clause provides assurance that, in keeping with well-established traditions of ongoing communication between the executive and the legislative branches (see N. Small, *Some Presidential Interpretations of the Presidency*, 164-166 (1970)), and the constitutional principle of separation of powers, direct communications by “officers or employees of the United States” to Congress will not be disturbed. The qualification “to Members of Congress on the request of any Member or to Congress” seems designed more to stress the individual Member’s prerogative of addressing communications to non-legislative branch officials than, by virtue of the apparent dichotomy between “Members of Congress” and “Congress,” to limit communications from such officials to situations in which they address Congress as a whole, or in which replies to individual Members of Congress have been authorized by a Representative’s request.

The clause does indicate that such communication is to take place “through the proper official channels.” Statements made in the course of the congressional debate on a proposed, but unsuccessful, amendment to the provision

¹See, e.g., Act of October 22, 1913, ch. 32, § 1; 38 Stat. 212; 5 U.S.C. § 3107 (prohibition of expenditures for unauthorized “publicity experts”); Act of August 2, 1939, ch. 410; 53 Stat. 1148; 5 U.S.C. § 7324 *et al.* (Political Activity Act); Act of August 31, 1951, § 408; 65 Stat. 247 (Department of Agriculture Appropriation Act, 1952) (prohibition of unauthorized expenditures for “publicity or propaganda purposes”).

suggest that this limitation was meant to assure that communications to Congress from nonlegislative officials be cleared through “their superiors, or whoever it might be,” 58 Cong. Rec. 425 (1919). In effect, this would screen out communications that did not represent the views of the agency. At the same time, the right of officers and employees to petition Congress in their individual capacities, codified in the Act of August 24, 1912, ch. 389, § 6 (37 Stat. 555; 5 U.S.C. § 7102) was preserved.

The thrust of this language is to recognize the danger of *ultra vires* expressions of individual views in the guise of official statements. Congress did not define the scope of the term “official channels”; rather, it recognized the need for monitoring the opinions expressed under color of office in order to insure a consistent agency position. This difficulty is not removed by a direct solicitation of an individual official’s views by a Member of Congress.

In light of the context in which the language was adopted, it is particularly inappropriate to engage in legalistic arguments as to whether a Federal judge, who lacks any direct superior, speaks “through proper official channels” whenever the judge takes a position with respect to matters of judicial concern. Instead, it must be recognized that Congress’ intent was to leave to the other branches of government the determination of what internal checks and methods of clearance would be appropriate.

A number of constraints peculiar to the judicial branch may bear on that determination. Canon 4 of the American Bar Association’s Code of Judicial Conduct provides, in pertinent part:

A judge, subject to the proper performance of his judicial duties, may engage in the following quasi-judicial activities, if in doing so he does not cast doubt on his capacity to decide impartially any issue that may come before him:

B. He may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and he may otherwise consult with an executive or legislative body or official, but only on matters concerning the administration of justice.

While Canon 4 appears to authorize certain activities, it does so only as to “matters concerning the administration of justice,” and only if the judge “does not cast doubt on his capacity to decide impartially any issue that may come before him.”

Constitutional constraints also need to be taken into account. The Framers considered, and rejected, several proposals that members of the judiciary serve as advisers on a “council of revision” designed, in effect, to veto improper laws, reasoning that “the Judges ought to be able to expound the law as it should come before them free from the bias of having participated in its formation.” See 1 M. Farrand, *The Records of the Federal Convention of 1787* (rev. ed., 1966), at 98; see also 1 *id.* 108-110, 138-140; 2 *id.* 73-80, 298. Early in the Nation’s history, the Supreme Court refused a request by President Washington for advice concerning certain legal issues growing out of American

neutrality during the war in Europe. See I C. Warren, *The Supreme Court in United States History* (Boston rev. ed., 1937), 108-111. A related concern, that the constitutional principle of separation of powers be preserved, arises in connection with the facts posed by this inquiry. Moreover, the judiciary traditionally refuses to render advisory opinions or opinions that are not final but subject to revision by the executive or legislative branches. See, e.g., *Hayburn's Case* 2 Dall., 409 (1792).

Thus, even if a judge is not acting as a judge in rendering informal advice to Members of Congress, his insistence on doing so in his official capacity may be ill-advised in light of other, more practical considerations. Just as with an executive agency, there is a need that the judiciary not be divided into a number of camps based on their varying advice to various Members of Congress. Judges must be especially careful not to be drawn into political disputes; they must remain impartial. Appearances at hearings may present different problems from those that arise in giving advice to individual Members of Congress. The result of such joint consideration of particular issues is in most instances a merger of ideas into a single, public product. A provision for more informal advice may give a judge a vested interest in the way that a particular statute is formulated, but provide no obvious identification of his connection with the provision sufficient to allow a litigating party, including the United States, to ask that he recuse himself.

Congress recognizes that only limited access to the judiciary for purposes of advice on legislation is appropriate. The statute creating the Judicial Conference of the United States, 28 U.S.C. § 331, which established a procedure for making budget estimates, 28 U.S.C. § 605, and the statute establishing a mechanism for raising problems concerning the operation of the Speedy Trial Act, 18 U.S.C. § 3165(c), all contemplate the funneling of ideas relating to legislation through that single forum. In light of Congress' own reluctance to intrude in this realm, it is particularly ill-advised for an executive agency, such as the Department of Justice, to do more than suggest that the question presented here raises issues that must of necessity be resolved internally within the judicial branch.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

February 9, 1978

**78-8 MEMORANDUM FOR THE GENERAL
COUNSEL, NATIONAL ENDOWMENT FOR
THE HUMANITIES**

**Arts and Artifacts Indemnity Act (20 U.S.C.
§ 972)—Statutory Limits—Dresden Exhibit**

This responds to your request for our opinion concerning a disputed interpretation of the Arts and Artifacts Indemnity Act, 20 U.S.C. §§ 971-977 (1975 Supp.).

The Act provides for indemnification by the United States against loss or damage to certain works of art, artifacts, printed materials, and audio and video recorded materials made available for exhibit in the United States. Indemnification agreements under the Act are negotiated and entered into by the Federal Council on the Arts and Humanities on behalf of the United States. 20 U.S.C. § 972. Limits on the amounts of indemnity are set forth in 20 U.S.C. § 974(b)-(d), which reads as follows:

(b) The aggregate of loss or damage covered by indemnity agreements made under this chapter shall not exceed \$250,000,000 at any one time.

(c) No indemnity agreement for a single exhibition shall cover loss or damage in excess of \$50,000,000.

(d) Coverage under this chapter shall only extend to loss or damage in excess of the first \$15,000 of loss or damage resulting from a single exhibition.

The Council proposes to indemnify a planned East German exhibit called "The Splendor of Dresden" as follows: the first \$50 million of loss or damage to the objects in the exhibit is to be covered by indemnification; however, only one-third of the total value of the porcelains and one-fourth of the total value of the panel paintings in the exhibit are to be included. The total value of the porcelains and the panel paintings is well below the \$50 million statutory limit. The Council intends that the applicants, the National Gallery of Art and others, supplement the indemnification agreement with commercial insurance that would cover:

- a. Claims for loss or damage over and above \$50 million, to a limit of \$18 million;
- b. Claims for loss or damage to porcelains in excess of one-third of the aggregate value thereof; and
- c. Claims for loss or damage to panel paintings in excess of one-fourth of the aggregate value thereof.

As we understand it, you believe that the Council lacks the statutory authority to enter into the agreement as it now stands. You state that the porcelains and the panel paintings, if indemnified, must be covered for their full values.¹ In explaining the proposed agreement to illustrate your contention, you argue that if the porcelains had a value of \$3 million and all were destroyed, the indemnity to be paid by the United States would be limited to \$1 million. In challenging the Council's authority, you assert that Congress intended that the agreements, within the range of statutory indemnification limits, must cover the full value of the items indemnified. Therefore, if the Council should adhere to its current offer to indemnify the porcelains for only \$1 million, it could only include porcelains valued at \$1 million. The result would be that the applicants for indemnity would be obligated to secure insurance on the remaining \$2 million. Premiums on such a policy would be substantially higher than under the Council's proposal because the commercial insurance carrier would be responsible for the full value of the unindemnified porcelains, whereas in the Council's proposal the insurer would only be liable for damages in excess of \$1 million. Thus, the insurer would have a \$1 million buffer before its liability for loss attached.

The language of the Act does not expressly deal with this problem, and as we understand it, you do not contend otherwise. However, an argument can be made that 20 U.S.C. § 974(a) (1975 Supp.) supports your position. The provision states that:

Upon receipt of an application meeting the requirements of subsections (a) and (b) of section 973 of this title, the Council shall review the estimated value of the items for which coverage by an indemnity agreement is sought. *If the Council agrees with such estimated value, for the purposes of this chapter, the Council shall, after approval of the application as provided in subsection (c) of section 973 of this title, make an indemnity agreement.* [Emphasis added.]

Arguably, based on the above language, when the Council agrees with the estimated value of particular items, the indemnification must be in the amount of that value. However, in our opinion, a fair reading of the provision indicates that its purpose was merely to specify the procedures required before an agreement could be made. The emphasized language only provides that the

¹Since these two classes of items are together valued at approximately \$5 million, there is no problem with the statutory \$50 million limit per exhibition.

Council and the applicant, among other things, must agree on the value of the covered items before the Council can enter into an indemnity agreement.

You find support for your view in the Act's legislative history. The specific language upon which you rely appears in S. Rept. No. 94-289, 94th Cong., 1st sess. 4 (1975), which reads as follows:

The amount of the indemnity agreement is set by the Federal Council on the Arts and the Humanities after reviewing the value of the items as set by the owner thereof. If the Council disagrees with the value set by the owner, and the owner disagrees with the value set by the Council, no indemnity agreement shall be issued. It is contemplated that the Council shall make liberal use of consultants, both with regard to the valuation and estimation of the article to be covered, and with regard to the packaging, transportation, and exhibition of that article.

Nowhere in the legislation is there found a definition of loss. It is understood that a loss under the indemnity agreement covers partial damage to covered articles as well as loss or complete destruction.

Should a claim of loss be filed under the indemnity agreement where there is a complete loss—where the item has been totally destroyed—the total amount shall be paid.

Almost identical language was used in H. Rept. No. 94-680, 94th Cong., 1st sess. 8 (1975).

The Department of State and the National Gallery of Art both disagree with your position. They are of the opinion that the Council does have the authority to enter into the proposed agreement. The Department of State's argument, referring to the excerpt from the committee reports, is as follows:

We note your reliance on certain language appearing in the Committee Reports on this legislation as a basis for a different conclusion. This language, we believe, just as it does not debar insuring, say, an 80 million dollar exhibit but limiting the amount of recovery to 50 million dollars, likewise does not, in our view, debar insuring three million dollars in value of porcelain objects but limiting the amount of recovery [under the indemnity agreement] to one million dollars. We consider that the language in the Reports is to be read along the lines put forward by Mr. Amory, General Counsel of the National Gallery of Art, namely, that if the Council agrees to cover the full value of objects, then of course if the objects are completely lost or destroyed, the total value should be paid. On the other hand, if the Council agrees to cover a three million dollar group of objects but limits itself to one million dollars in payments if the objects are completely lost or destroyed, the one million dollars would be the limit of liability. In our view Congress, by the wording of the Reports, did not mean to preclude this result. (January 25, 1978)

We concur. The excerpt, as we see it, does not suggest that when the Government enters into an indemnification agreement it must do so for the full value of the covered items. Its last paragraph states that:

Should a claim of loss be filed under the indemnity agreement where there is a complete loss—where the item has been totally destroyed—the total amount shall be paid [Emphasis added.]

This statement assumes that full payment for any total loss would be made pursuant to the terms of the agreement when it so provided. It cannot be reasonably inferred from this that the amount of indemnification must always equal the value of the covered items.

The Department of State and the National Gallery, in asserting that the Council is empowered to enter into the proposed agreement, cite 20 U.S.C. § 971(a)(2) (1975 Supp.) as authority. That section provides that the Council is authorized to make indemnification agreements

on such terms and conditions as the Council shall prescribe, by regulation, in order to achieve the purposes of this chapter and, consistent with such purposes, to protect the financial interest of the United States.

Pursuant to this provision the Council may set the terms and conditions of indemnification agreements. In the hearing on the Act, Senator Pell, one of its sponsors, stated:

As I see this legislation functioning, the Federal Government would, for this purpose, become an agency under the Federal Government, with the authority to hire personnel. I would expect that the staff itself would be a very small one, whose initial function would simply be to issue the regulations necessary for implementation of the program. *The legislation has been broadly drafted to give the agency as wide a scope as possible within which to issue those regulations.*² [Emphasis added.]

It would appear that, pursuant to § 971(a)(2), the Council could, in the face of an unacceptable risk, refuse any indemnity coverage of certain items. Such a precaution would seem to be warranted in light of the Council's statutory duty "to protect the financial interest of the United States." Since the Council may refuse indemnification, or indemnify for the full value of covered items, it follows that its evaluation of the risks of a particular situation can justify an intermediate position under a limited indemnification agreement. Section 971(a)(2) provides that the Council is authorized to set such terms and conditions in indemnification agreements so as to achieve the purposes of the Act. The Council's proposal would result in substantially lower insurance premiums than under your interpretation. The Senate and House Reports'

²*Arts and Artifacts Indemnity Act: Joint Hearing on S. 1800 Before the Special Subcommittee on Arts and Humanities of the Senate Committee on Labor and Public Welfare, and the Select Subcommittee on Education of the House Committee on Education and Labor, 94th Cong., 1st sess. 36 (1975).*

primary theme is that the high cost of insurance unduly impedes the desirable practice of loaning and receiving artistic treasures. The Act was intended to meet this problem. Thus, the Council's proposal would further the Act's policy of alleviating the problems caused by high insurance rates. In addition, as the Department of State indicates, the Council's approach of indemnifying in certain cases for less than the value of the covered items

. . . protects the 250 million dollar limitation on the obligational authority from depletion and permits the stretching of the 250 million dollar limitation to cover more foreign exhibits.

For these reasons we believe that the Council's authority to make the disputed agreement is included in its broad powers under the Act.

Finally, we think it noteworthy that the proposed agreement entails no realistic possibility of loss to any concerned party. The lender of the covered items receives the same degree of protection as it would under your proposal. The Council and the applicants would actually benefit. The Council can encourage the exhibition of valuable items, while limiting the exposure of the United States to an amount less than the items' full value; and, the applicants' insurance costs would be reduced, thus enhancing the possibility that further exhibitions would result. Moreover, the public would also benefit by such a result.

For the foregoing reasons it is our opinion that the Council is empowered to enter into the proposed indemnification agreement.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

February 14, 1978

**78-9 MEMORANDUM OPINION FOR THE
DEPUTY ASSISTANT DIRECTOR FOR
LEGISLATIVE REFERENCE, OFFICE OF
MANAGEMENT AND BUDGET**

**Corporation for Public Broadcasting—
Grants—Monitoring Administration of (47
U.S.C. § 392)**

This memorandum is in response to your request for our opinion concerning the question of administration of existing public educational television or radio broadcasting facilities grants. The question has been raised in connection with proposed legislation now being reviewed by your Office. The issue presented is whether compliance with conditions contained in existing grants previously awarded under the present law should be monitored in the future by the Department of Health, Education, and Welfare (HEW), by the Corporation for Public Broadcasting (CPB), or by some third agency such as the Department of Justice.

Under current law, if, within 10 years after completion of a project for which a grant has been awarded, certain conditions no longer continue to be met, the United States is entitled to recover a proportionate amount of the value of the facilities, determined either pursuant to agreement as to that amount or by judicial action (47 U.S.C. § 392(f)). Although this provision gives the Government a continuing right to seek to recover such amounts, as a practical matter, unless the grantee voluntarily tenders an agreed-upon sum, recourse to a judicial proceeding will be necessary. In future administration of existing grants a key role will continue to be played by the agency charged with monitoring the status of grantees (currently HEW), for only it will become aware of noncompliance with required conditions and be in a position to take steps to recover funds due.

It therefore appears that the potential for recapturing funds cannot realistically be regarded simply as property which can be treated without concern for any trailing strings. The sort of administrative role necessarily required in these circumstances clearly cannot be played by a litigating agency such as the Department of Justice. We question whether CPB should be called upon to

assume authority to monitor these grants where the Corporation's anticipated role with respect to existing grants would be much the same as that currently played by HEW. CPB's carefully preserved nongovernmental status might be legally jeopardized by following so closely in the steps of a government agency. Whether that step should be taken is, of course, a question of policy as to which we express no opinion.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

February 23, 1978

**78-10 MEMORANDUM OPINION FOR THE DEPUTY
GENERAL COUNSEL, DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT**

**Flood Disaster Prevention Act (42 U.S.C. § 4106)—
Mortgage Loans—Effect of Statute on Executive
Order**

This is our response to your request for our opinion on the relationship between Executive Order No. 11988 and § 703(a) of the Housing and Community Development Act of 1977 (Pub. L. No. 95-128; 91 Stat. 1111). Section 703(a) has replaced § 202(b) of the Flood Disaster Prevention Act of 1973 (87 Stat. 975).

Your General Counsel's opinion reaches the following five conclusions: (1) Executive Order No. 11988 applies to the Federal agencies regulating financial institutions; (2) it requires them to minimize harmful results of their activities in flood plains; (3) this result is not contrary to the intent of § 703(a); (4) this result is consistent with the Flood Disaster Protection Act of 1973 and other statutes; and (5) the order is therefore valid and has the force of law. More specifically, the opinion concludes that Executive Order No. 11988, 42 F. R. 26951 (1977), requires the agencies regulating banking to minimize flood damage by prohibiting regulated institutions from making loans secured by real property within a flood plain unless flood insurance is available.

After a careful examination of § 703(a), the Flood Disaster Prevention Act, and their legislative histories, we conclude that § 703(a) was intended to deny the Federal Government authority to prohibit federally regulated private lenders from making mortgage loans in a flood plain. The statute takes precedence over Executive Order No. 11988 to the extent of any conflict. Thus, the Executive order may not require regulatory agencies to prohibit those lenders from making such loans.

As enacted in 1973, § 202(b) of the Flood Disaster Prevention Act (Act) (42 U.S.C. § 4106(b)), provided as follows:

(b) Each Federal instrumentality responsible for the supervision, approval, regulation, or insuring of banks, savings and loan associations, or similar institutions shall by regulation prohibit such institutions on and after July 1, 1975, from making, increasing, extending, or renewing any loan secured by improved real estate or a mobile home located or to be located in an area that has been identified by the Secretary as an area having special flood hazards, unless the community in which such area is situated is then participating in the national flood insurance program.¹

This section was part of a comprehensive scheme to utilize the Federal flood insurance program as a means of limiting flood losses by controlling housing development in flood plains. Thus, in addition to the provision set forth above, the Act barred Federal financial assistance for construction in flood plains in communities where flood insurance was not available.² It also prohibited Federal assistance or private loans for real property not covered by available flood insurance.³ For a community to be eligible for flood insurance, it must have a land use code that restricts development in areas vulnerable to flooding.⁴ By limiting the availability of Federal or private funds for construction in communities ineligible for flood insurance, these provisions served the statutory purpose of inducing States and localities "to participate in the flood insurance program and to adopt adequate flood plain ordinances with effective enforcement provisions consistent with Federal standards to reduce or avoid future flood losses."⁵

In October 1977, § 703(a) of the Housing and Community Development Act amended § 202(b) of the Flood Disaster and Prevention Act to read as follows:

(b) In addition to the requirements of section 1364 of the National Flood Insurance Act of 1968, each Federal instrumentality described in such section shall by regulation require the institutions described in such section to notify (as a condition of making, increasing, extending, or renewing any loan secured by property described in such section) the purchaser or lessee of such property of whether, in the event of a disaster caused by flood to such property, Federal disaster relief assistance will be available to such property.

¹Subsequently enacted exceptions are immaterial for the purpose of this opinion.

Section 3(a)(5) of the Act, 42 U.S.C. § 4003(a)(5), defines "federal instrumentality responsible for the supervision, approval, regulation, or insuring of banks, saving and loan associations, or similar institutions" to mean the Federal Reserve Board of Governors, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, the Federal Home Loan Bank Board, and the National Credit Union Administration.

²42 U.S.C. § 4106(a).

³42 U.S.C. §§ 4012(a)(b).

⁴See National Flood Insurance Act of 1968, as amended, §§ 1315, 1361; 42 U.S.C. §§ 4022, 4102.

⁵42 U.S.C. § 4002(b)(3). See also S. Rept. 93-583, 93d Cong., 1st sess. (1973), at 18-19.

Thus, it deleted the express requirement that bank regulatory agencies prohibit lenders from making secured loans on flood plain real estate in communities where flood insurance is not available. Instead, the agencies were directed to require lenders to notify borrowers whether disaster relief would be available.⁶ It does not, however, contain an explicit requirement that agencies either permit or prohibit the making of real estate loans by regulated lenders in flood plain areas not covered by the Federal insurance program. We think that the legislative history of the amendment removes any serious question as to what was intended by the modification.

Section 703(a) was introduced as a floor amendment by Senator Eagleton, who stated that its purpose was to permit localities to reject land use controls and develop flood plains with mortgage loans from private lenders.⁷ He clarified this point in the following colloquy with Senator Danforth:⁸

Mr. DANFORTH. . . . As I understand this amendment, and I ask Senator EAGLETON if he will bear me out in this, he is not objecting to the Federal Government conditioning the offering of Federal flood insurance or Federal grants or Federal loans or what amounts to land use planning.

What he is objecting to, as I understand it, is the Federal Government purporting to tell banks with no connection at all other than, for example, FDIC coverage, banks that are located in a community, people who have lived in the community all their lives, that they are not able to make loans in flood plain areas.

Mr. EAGLETON. The Senator is absolutely correct.

Just permitted to fit the loan money to a business deriving in that area if they think it is a good, prudent loan, the bank is permitted to make the loan [sic]. That is all the amendment does.

Mr. DANFORTH. Under the law as written now, if a Federal bureaucrat designates an area as being within a flood plain, then a bank which is FDIC-covered, or insured, is prohibited by the present law from making a loan to a business located in that flood plain.

Mr. EAGLETON. The Senator is exactly correct.

Mr. DANFORTH. And this is exactly the kind of overreach by the Federal bureaucracy that we were objecting to in offering this amendment.

Mr. EAGLETON. I thank my colleague. I think he has summed it up very convincingly.

Even the opponents of the measure agreed that it would remove the Federal Government's ability to prohibit such loans as a means of compelling the

⁶See also National Flood Insurance Act of 1968, § 1364 (88 Stat. 739; 42 U.S.C. § 4104(a)).

⁷123 Cong. Rec. S. 8971-72 (June 6, 1977).

⁸123 Cong. Rec. S. 8972 (June 6, 1977).

adoption of local flood plain use ordinances.⁹ This discussion is the only legislative history pertinent to § 703(a).

The legislative history is unequivocal. Both the sponsor and the opponents of § 703(a) understood that the existing law cut off private regulated mortgage financing in order to compel localities to adopt your Department's approved land use controls on flood plain development. Both understood that the effect of § 703(a) would be to permit private mortgage loans in flood plains despite the lack of acceptable land use controls. The explanation of the sponsor of a floor amendment is strong evidence of legislative intent. *United States v. Dickerson*, 310 U.S. 554, 557 (1940); *Richbourg Mfg. Co. v. United States*, 281 U.S. 528, 536 (1930). Indeed, in this instance it is unrefuted. Hence, it is apparent that by amending § 202(b) of the Flood Disaster Prevention Act, Congress intended to prevent Federal restrictions on private mortgage lending from being used as a method for achieving the Act's purposes.¹⁰

Executive Order No. 11988 was promulgated in May 1977, nearly 4 months before the enactment of the Housing and Community Development Act. The preamble cites that it is issued in furtherance of the National Environmental Policy Act (42 U.S.C. § 4321 *et seq.*), the National Flood Insurance Act of 1968 (42 U.S.C. § 4001 *et seq.*), and the Flood Disaster Prevention Act. Section 1 of the order, in pertinent part, directs each Federal agency to act "to reduce the risk of flood loss, to minimize the impact of floods on human safety, health, and welfare, and to restore and preserve the natural and beneficial values served by flood plains in carrying out its responsibilities for . . . (2) providing Federally . . . assisted construction or improvements; and (3) conducting Federal activities and programs affecting land use, including, but not limited to water and related land use planning, regulating, and licensing activities." Under § 2(a)(2), agencies allowing an "action" to occur in a flood plain must consider alternatives to avoid "adverse effects and incompatible developments" in flood plains. Section 2(d) requires each agency, "as allowed by law," to amend its regulations to conform to the order.

Although the Executive order does not, on its face, prohibit the making of these types of loans, we agree, for purposes of this discussion, that the order may be read to require bank regulatory agencies to prohibit mortgage loans in flood plains that are not governed by a federally approved land use code. The preamble of the order cites the Flood Disaster Protection Act as authority, and it furthers the congressional policies and purposes in § 2 of that Act (42 U.S.C. § 4002). The Act's and the order's definition of "agency" extends to the bank regulatory agencies. Moreover, this interpretation of the order would be com-

⁹See 123 Cong. Rec. S. 8973-74 (Senator Proxmire); S. 8974-75 (Senator Brooke); S. 8975-76 (Senator Williams).

¹⁰The congressional statements of policy and purpose in § 2 of the Flood Disaster Prevention Act, 42 U.S.C. § 4002, were not amended. However, later specific amendments to a statute modify earlier general statements of purpose. See generally, *Int'l. Longshoremen's Warehousemen's Union v. Wirtz*, 170 F. (2d) 183 (9th Cir. 1948); *Callahan v. United States*, 122 F. (2d) 216 (D.C. Cir. 1941).

pletely consistent with § 202(b) of the Act at the time the order was promulgated.

Thus, its application would in our view be contrary to the intent of Congress manifested in the subsequent amendment of § 202(b). In such a conflict, the statute controls. Both the provision of flood insurance and disaster relief and the regulation of lending institutions are normally subjects of domestic legislation.¹¹ The Constitution, of course, has vested "all legislative powers" over these subjects in Congress. The President can ordinarily regulate the affairs of private persons by Executive order only on the basis of some express or implicit statutory authority. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 587-89 (1952); *United States v. Guy W. Capps, Inc.*, 204 F. (2d) 655, 658-60 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955); *Independent Meat Packers Assn. v. Butz*, 526 F. (2d) 228, 234-36 (8th Cir. 1975); *United States v. Yoshida International*, 526 F. (2d) 560, 583 (C.C.P.A. 1975).¹² By revising § 202(b), it is our opinion that Congress clearly intended to prohibit the bank regulatory agencies from using their powers to prevent unregulated development in flood plains. While it retained the objections of the Flood Disaster Protection Act, Congress nevertheless intended to withdraw the Executive's power to use that method of attaining them. *See, Youngstown Sheet and Tube Co. v. Sawyer, supra*, 343 U.S., at 587-89, 599-604 (Frankfurter, J., concurring).¹³

Basically, the question turns on congressional intent in replacing § 202(b) with § 703(a) of the Housing and Community Development Act. Your General Counsel concluded that the amendment simply resurrected the *status quo* before passage of § 202(b) in 1973. If this were all that could fairly be concluded from the 1977 amendment, we would agree that the President has the power to prohibit altogether the making of these types of loans. It would be clearly appropriate for the Executive to fill in the details of a program which Congress has defined only in its broad outline. We do not think, however, for the reasons stated above, that § 703(a), when read as it must be with its legislative history, can fairly be understood to have left to executive discretion the question of prohibiting regulated institutions from approving loans in these circumstances.

¹¹See U.S. Constitution, Art. I, § 8, cl. 1, 3, 18.

¹²The cases cited in your opinion are not to the contrary. Most involve Executive orders for which the courts found underlying statutory authority. *E.g., Letter Carriers v. Austin*, 418 U.S. 273 (1974); *Gnotta v. United States*, 415 F. (2d) 1271 (8th Cir. 1969); *Farkas v. Texas Instrument, Inc.*, 375 F. (2d) 629 (5th Cir. 1967); *Farmer v. Philadelphia Electric Co.*, 329 F. (2d) 3 (3d Cir. 1964). *Porter v. United States*, 473 F. (2d) 1329 (5th Cir. 1973), involved the Executive order creating the Warren Commission. Although the point was not discussed, authority to create the Commission can be found in the President's constitutional duty to "take care that the laws be faithfully executed." See U.S. Constitution, Art. II, § 3. None involves an order contrary to a statute.

¹³We are aware of the cases that state that the Executive order requiring nondiscrimination by Government contractors is valid despite the repeated failure of Congress to confer such authority by statute. *E.g., Farmer v. Philadelphia Electric Co.*, 329 F. (2d) 3, 7-9 (3d Cir. 1964). In the case you have brought us, however, Congress first granted express statutory authority and then withdrew it, and the legislative intent to deny the authority is sufficiently clear to prevent the action contemplated under the Executive order.

Insofar, then, as Executive Order No. 11988 is read as imposing such a prohibition, we do not think it may be enforced.

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

February 24, 1978

**78-11 MEMORANDUM OPINION FOR THE
DIRECTOR, FEDERAL BUREAU OF
INVESTIGATION**

**Federal Bureau of Investigation—Statutory
Jurisdiction—Authority of Agents
Concerning Non-Federal Offenses**

This is in response to your request for our opinion concerning the responsibility and authority of FBI agents to respond to criminal offenses outside the statutory jurisdiction of the FBI. Your inquiry raises several issues which require separate treatment.

I.

Specifically, the first question raised is whether an FBI agent has an official responsibility and lawful authority to respond to criminal activities which are not violations of Federal law. The context in which you raise this question relates to a situation in which an FBI agent witnesses, or is in the immediate vicinity of, such a crime, and immediate action is required to detain or arrest the offender. Our conclusion is that FBI agents have no Federal authority to take action in such a situation. However, we believe that in these cases FBI agents have authority, and in some situations a legal obligation under State law, to act in response to local criminal offenses.

A.

We think it clear that the FBI has no Federal authority to take action with respect to violations of State law, even in exigent circumstances. The FBI's statutory jurisdiction in every respect—*i.e.*, that of investigation, the execution of search or arrest warrants, or its authority to make arrests without a warrant—is limited to acts concerning violations of the laws of the United States (28 U.S.C. § 553(1); 18 U.S.C. §§ 3052, 3107). *See also* 28 CFR § 0.85. Any action taken with respect to the violation of State or local law would thus be beyond the FBI's explicit statutory authority.

We realize that this conclusion is based on a restrictive construction of the FBI's jurisdictional statutes and Congress' intent underlying them. However, we are reluctant to go beyond the explicit terms of these statutes, at least in the absence of some clear evidence of contrary congressional intent. We have been able to find no indication of any such intent. In fact, we believe that both the case law and Congress' intent concerning the FBI's power to arrest without a warrant—the action really in question here—bolsters our conclusion. Several courts have noted that, in the absence of a congressional mandate, Federal agents have no power under Federal law to arrest for State offenses. *United States v. Carter*, 523 F. (2d) 476, 478 n. 3 (8th Cir. 1975); *United States v. Unverzagt*, 424 F. (2d) 396, 398 n. 1 (8th Cir. 1970). Rather, if no Federal statute authorizes arrests in a particular situation, State law governs. *United States v. Di Re*, 332 U.S. 581, 589 (1948); *United States v. Viale*, 312 F. (2d) 595, 599 (2d Cir. 1963). These decisions make clear that where no explicit Federal statute authorizes arrest for State offenses, FBI agents cannot act under Federal authority and must rely instead on State law.

The legislative history underlying 18 U.S.C. § 3052, the statute prescribing the FBI's authority to arrest, is to this same effect. Prior to 1934 no statute conferred on the FBI any powers to arrest, with or without warrant; Congress was content to allow the FBI's powers in this regard to be subject to State law. *See, Coplton v. United States*, 191 F. (2d) 749, 753-54 (D.C. Cir. 1951). Recognizing that this situation hampered FBI operations by producing confusion and delay, in 1934 Congress gave the FBI authority to make warrantless arrests in certain situations for offenses against the United States. Act of June 18, 1934, ch. 595; 48 Stat. 1008. Its legislative history demonstrates that all the FBI was granted was Federal authority to "make arrests in emergency situations where laws of the United States are violated." H. Rept. No. 1824, 73d Cong., 2d sess. 2 (1934); S. Rept. No. 1434, 73d Cong., 2d sess. 2 (1934). The FBI's Federal authority, even in emergency situations, was intended to extend only to violations of Federal law. Congress did not alter the FBI's authority to act in other situations, *e.g.*, those involving violations of State law. The FBI's authority to arrest in these situations was unaffected by 18 U.S.C. § 3052. That authority must be based in State law.

We recognize that *United States v. Reid*, 517 F. (2d) 953, (2d Cir. 1975), could be read to lead to an opposite result. That case held that a Drug Enforcement Administration agent was assaulted "while engaged in or on account of the performance of his official duties" within the meaning of 18 U.S.C. § 111, even though the crime the agent attempted to stop was not a Federal one. The decision, however, was based on an expansive interpretation of 18 U.S.C. § 111. The court regarded that section as an attempt by Congress to protect Federal agents who "do what they are properly expected to do in the enforcement of State criminal laws." 517 F. (2d) at 964. The court did not, and in our view could not, predicate its decision in any way on the DEA agent's statutory authority to intervene in local offenses. We thus do not believe that the decision enhances the FBI's statutory authority in such instances.

B.

Even though FBI agents may be without Federal authority to intervene in State offenses, they are not without authority or responsibilities in this regard. First, FBI agents should intervene in State offenses under the authority vested in them by State law. Moreover, an FBI agent may be obliged by State law to intervene in a local offense if he is called upon to do so by a local law enforcement officer.

As we noted above, FBI agents would in certain instances have authority under State law to arrest those who have violated State or local law. If the State considers FBI agents to be peace officers within that State, they can arrest offenders of State law in any instance where State officers could do so. Even if the State does not consider FBI agents to be peace officers, the FBI agents would still have the authority granted by the State to private citizens to arrest local offenders. The courts have in numerous instances upheld Federal agents' authority to make arrests as private citizens under State law (*see, e.g., Ward v. United States*, 316 F. (2d) 113 (9th Cir. 1963)), even with respect to State offenses. *See, United States v. Carter, supra.*

The authority granted by the States to peace officers and private citizens to arrest without warrant may, of course, vary from State to State. However, the common law, and in many instances State statutes, allows a peace officer to make a warrantless arrest when he has reasonable grounds to believe that a felony has been committed and that the person arrested committed it. A private person may make a warrantless arrest where a felony in fact has been committed and where he has reasonable grounds to believe that the person arrested had committed that felony. *See* 1 Wharton's *Criminal Procedure* § 62, at 165-66 (12th ed., 1974); Restatement (Second) of Torts §§ 119(b), 121(b) (1965). The situation is somewhat different for a misdemeanor. At common law, a peace officer or private citizen could make a warrantless arrest when an offense involved a breach of the peace and was committed in his presence. *See, Carroll v. United States*, 267 U.S. 132, 156-57 (1925). This rule remains largely true today under a number of State statutes, but other States have departed from this rule in some respects. *See* 1 Wharton's *Criminal Procedure* § 63 (12th ed., 1974).¹

An FBI agent's intervention in a State offense may subject him to more risk than is usually the case with respect to his action concerning a Federal violation. For example, his conduct in intervening in a State felony as a private citizen may—depending on the exact limits of the particular State's laws—be privileged only if a felony in fact has occurred. Risks also could arise with respect to a misdemeanor if there is no "breach of the peace" involved. Despite these risks, we believe that FBI agents should not be discouraged from intervening in local crimes of a serious nature—*i.e.*, felonies and violent

¹A particular State's different rules concerning arrest for a felony and for a misdemeanor constitute the only way in which a Federal agent's authority may differ due to the exigencies of a particular situation.

misdeemeanors. At common law, it was considered the duty of every citizen to try to prevent the commission of a felony. *See, Backun v. United States*, 112 F. (2d) 635, 637 (4th Cir. 1940); *Babington v. Yellow Taxi Corporation*, 164 N.E. 726, 727 (N.Y. Ct. App. 1928); *see also, United States v. New York Telephone Co.*, 98 S. Ct. 364, 374 n. 24 (1977). While this notion seems to have subsided in recent years, perhaps because of the dangers inherent whenever nonprofessionals engage in law enforcement, *see* 1 Wharton's *Criminal Procedure* § 62, at 167 (12th ed., 1974), peace officers still appear to have a responsibility in this regard, even if the crime is not within their official cognizance. *Id.*; *United States v. Reid, supra*, at 964.

A different situation is presented where a local law enforcement officer calls upon an FBI agent to aid him in apprehending one who has violated local law. At common law, a constable or sheriff had a right to summon bystanders to aid him in apprehending a felon, and those summoned were obliged to respond. *See, Elrod v. Moss*, 278 F. 123, 129 (4th Cir. 1921). This rule retains some vitality today, *see, Scott v. Vandiver*, 476 F. (2d) 238, 240-41 (4th Cir. 1973), and is enforced in many States by statutes requiring, under pain of criminal penalty, private persons to obey the call of an officer to assist in making an arrest. *See, e.g., Williams v. State*, 490 S.W. (2d) 117 (Ark. 1973); 1 Wharton's *Criminal Procedure* § 52, at 146 (12th ed., 1974). Federal law enforcement officials would appear to be subject to this same rule, *Elrod v. Moss, supra*, perhaps to an even greater extent than an ordinary citizen (*cf. United States v. Reid, supra*, at 964), at least if this participation would not intrude on their official duties. However, the call of a local law enforcement official may provide more protection to the FBI agent than he would have if he acted on his own. While rendering such service he would have the status of a *posse comitatus*, and as such possess full authority to render all needed assistance, and he is given the same protection that surrounds the local official. 1 Wharton's *Criminal Procedure* § 52, at 146-47 (12th ed., 1974); *State v. Goodmen*, 449 S.W. (2d) 656, 661 (Mo. S. Ct. 1970).

II.

You raise several questions concerning the view the Department of Justice would take with respect to an agent who intervened in a criminal offense outside the FBI's statutory jurisdiction. You inquire whether the Department would view the agent's action to be within the scope of his employment and would afford him representation in any civil or criminal action that might ensue, and whether the Department would pay money damages that might result from a civil action brought against the agent individually.

The Department's representation of employees is generally contingent on two criteria: representation must be in the interest of the United States, and the employee's actions must reasonably appear to have been performed within the scope of his employment.² 28 CFR § 50.15(a)(2). The fact that intervention in

²Other conditions may at times also preclude departmental representation—*e.g.*, the fact that the agent is a target of a Federal criminal investigation regarding his intervention in the local offense.

State offenses may be beyond an agent's Federal authority will not, in our opinion, preclude either of these two criteria from being satisfied. We believe that in the ordinary case it is in the interest of the United States to represent such employees. If representation is not afforded, some State offenses may take place that otherwise would not have; some offenders may escape where they otherwise might not have; cooperation with State and local law enforcement agencies may be unduly hampered; and the FBI's image as a law enforcement agency may be tarnished. It is in the interest of the United States to avoid such results.

We also believe an agent's intervention in local offenses will generally come within the scope of his employment. Even though such action would be beyond the agent's Federal authority, a determination as to scope of employment is not entirely dependent on the extent of Federal authority. Court decisions leave little doubt that a Government agent may act beyond his actual authority and yet still be within the scope of his employment. *Hatahley v. United States*, 351 U.S. 173, 180-81 (1956). An agent will be deemed to have acted within the scope of his employment if his acts have "more or less connection" with the duties committed to him by law. *See, Spalding v. Vilas*, 161 U.S. 483, 498 (1896); *Cooper v. O'Connor*, 99 F. (2d) 135, 139 (D.C. Cir. 1938). Since a Federal agent's intervention in State or local crime is an act of law enforcement, we believe that such action would generally have "more or less connection" with the agent's statutory responsibility, even if those laws are of a different sovereign. The Second Circuit's decision in *United States v. Reid, supra*, upholding a conviction under 18 U.S.C. § 111 for an assault on a Federal agent who intervened in a State crime, would support this result. The court noted that the agent was "properly expected" to intervene "in the enforcement of State criminal laws." *Id.*, at 964. This proposition would appear to bring such action within an agent's scope of employment.³

While a determination as to representation must depend on the facts and circumstances of each case, the Department has decided, on the basis of the above discussion, to provide representation generally to agents who intervene in State and local crimes. Thus, representation normally will be provided in situations involving a lawful exercise of authority under State law. Moreover, since an unlawful arrest does not necessarily mean that an agent was acting beyond his scope of employment, *see, United States v. Simon*, 409 F. (2d) 474, 477 (7th Cir. 1969); *United States v. Heliczer*, 373 F. (2d) 241, 245 (2d Cir. 1967), representation normally will be provided in these cases if it appears that the agent at the time of the arrest acted in good faith and with a reasonable belief in the legality of his conduct. Several caveats are in order here, however. An agent's conduct during the course of his intervention could be so egregious that his action will no longer be deemed to be within the scope of his

³On the basis of this same rationale, it is conceivable that a court could also conclude that a Federal agent's intervention in a State offense was not "manifestly or palpably beyond his authority." *see, Spalding v. Vilas, supra; Norton v. McShane*, 332 F. (2d) 855, 859 (5th Cir. 1964), and thus may afford that agent the benefit of a qualified official immunity defense. However, we have found no decision on this particular issue.

employment. Moreover, an effort to enforce minor infractions of the law could be deemed as a mere personal frolic, rather than as a serious effort at law enforcement, and as such may not be within an agent's scope of employment. *Cf., Green v. James*, 473 F. (2d) 660, 662 (9th Cir. 1973).

The situation is different with respect to the payment of money damages. While a former Deputy Attorney General opinion may have implied that the Department would assume responsibility for money damages awarded against agents intervening in State offenses, we know of no authority for the Department to do this, and we know of no instance in which the Department has actually assumed such a responsibility. The Department may not, under current law, reimburse individuals for damages awarded against them individually. Federal agencies are prohibited from undertaking such action unless they are authorized to do so by law or appropriation. 31 U.S.C. § 665(a); 41 U.S.C. § 11(a). *See also* 16 Comp. Gen. 803 (1937); 7 Comp. Gen. 507 (1928). While the Department is authorized to pay money judgments rendered against the United States, 31 U.S.C. § 724(a), no statute exists which authorizes the Department to pay money judgments awarded against Federal agents in their individual capacities.

We would note here that pending legislation may alter this situation, both with respect to departmental representation and money damages. Under the Department's recent proposal to amend the Federal Tort Claims Act, the Department of Justice would defend all cases involving alleged violations of constitutional rights, if the agent was acting within the scope of his employment or under color thereof; the Government would also be liable for all money judgments awarded in such cases.

III.

A related issue is whether the Department would institute criminal proceedings under 18 U.S.C. § 111 against one who has assaulted an FBI agent intervening in a State or local offense. The Criminal Division informs us that the fact that the agent responded to a non-Federal violation would not be a factor in determining whether to prosecute under 18 U.S.C. § 111. Rather, they intend to adhere to *United States v. Reid*, *supra*, and in fact would welcome an opportunity to test the limits of that decision. However, in some circumstances State or local prosecution of the assault may be preferable. Also, all courts have apparently not reached the same result as the court in *Reid*. *See, Schiffner v. People*, 476 P. (2d) 756, 758 (Col. S. Ct. 1970) (indicating that an acquittal occurred in the Federal courts due to the fact that an agent's intervention in a local offense was not deemed to be an action in his capacity as a Federal officer).

IV.

You ask, finally, whether the FBI might issue manual instructions similar to those that DEA issued and later became a focal point in the *Reid* case. Those instructions are stated as follows:

Should an agent happen to witness a State violation (whether he is on or off duty) the Administration expects him to take reasonable action as a law enforcement officer to prevent the crime and/or apprehend the violator. This policy applies only to felonies or violent misdemeanors. It does not apply to traffic violations or other minor offenses. Unless specifically authorized as a peace officer under State law, the agent's authority in these situations is that of an ordinary citizen. A detailed discussion of the agent's authority to make arrests under various State laws can be found in Appendix 66A. The Administration will fully support the agent for any reasonable action taken by him in these situations.

We believe that these instructions go too far. To say that an agent is expected to prevent certain State crimes implies (even though there are caveats) that the agent is under a Federal duty to do so—and we do not believe this to be the case. Moreover, to say that the Government will “fully support the agent for any reasonable action . . . in these situations” may promise, at least implicitly, more than the Government can or will do. For example, as noted above, the Government is without authority to pay any money judgments subsequently awarded against the agent. Moreover, the Government cannot promise representation in every instance, for this must be decided, as it is in all other situations, on a case-by-case basis.

We do, however, believe that the idea of manual instructions on this topic is a good one, and it should set forth the conclusions reached in this opinion. In brief, those conclusions are that there is no Federal authority for FBI agents to intervene in State crimes, that they may do so in certain circumstances under the authority of State law, that they may be obliged to do so under State law if called upon by a local law enforcement official, and that in any event they should be encouraged to intervene in felonies and violent misdemeanors as part of their role as law enforcement officers. The agents should, however, be advised of the potential risks that they may incur in taking such action. They should be made aware that their status will depend on a particular State's law when they are responding to violations outside FBI jurisdiction; since in many States they will not be regarded as peace officers, they are acting as ordinary citizens (unless summoned by local law enforcement authorities). While the Department will in most instances provide legal representation in suits arising out of intervention in local offenses, the Department cannot pay money judgments rendered against the employees in their individual capacities.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

February 27, 1978

**78-12 MEMORANDUM OPINION FOR THE
GENERAL COUNSEL, DEPARTMENT OF
ENERGY**

**Arms Control and Disarmament Act
(22 U.S.C. § 2576)—Arms Control Impact
Statements—Nonweapons Program**

In response to your request, we have considered the question whether § 36(a) of the Arms Control and Disarmament Agency Act, as amended, 89 Stat. 758, 22 U.S.C. § 2576(a), permits the Director of the Arms Control and Disarmament Agency (ACDA) to require the Department of Energy to prepare an "Arms Control Impact Statement" (ACIS) for research, development, or production programs that do not involve "weapons" technology. We understand that this would involve nonmilitary programs that may affect arms control policy. For the reasons stated below, we conclude that § 36(a) does not require the preparation of an ACIS for programs not designed or intended to be applied as weapons.

Section 36(a) of the Arms Control and Disarmament Agency Act provides as follows:

(a) In order to assist the Director in the performance of his duties with respect to arms control and disarmament policy and negotiations, any Government agency preparing any legislative or budgetary proposal for—

(1) any program of research, development, testing, engineering, construction, deployment, or modernization with respect to nuclear armaments, nuclear implements of war, military facilities or military vehicles designed or intended primarily for the delivery of nuclear weapons,

(2) any program of research, development, testing, engineering, construction, deployment, or modernization with respect to armaments, ammunition, implements of war, or military facilities, having—

(A) an estimated total program cost in excess of \$250,000,000,
or

(B) an estimated annual program cost in excess of \$50,000,000,
or

(3) any other program involving weapons systems or technology which such Government agency or the Director believes may have a significant impact on arms control and disarmament policy or negotiations,

shall, on a continuing basis, provide the Director with full and timely access to detailed information, in accordance with the procedures established pursuant to section 2575 of this title, with respect to the nature, scope, and purpose of such proposal.

The section requires reports to the Director for three categories of programs: (1) all programs involving nuclear armaments, implements of war, or their delivery systems; (2) programs involving "armaments, ammunition, implements of war, or military facilities" costing \$250 million or more or \$50 million per year; and (3) "any other program involving *weapons systems or technology*" which the agency or the Director of ACDA "believes may have a significant impact on arms control and disarmament policy or negotiations." [Emphasis added.] These reports are the first stage in preparing an ACIS.¹ Since the programs in question do not fall within category (1) or (2), the issue is whether the term "weapons" in subsection (a)(3) modifies "technology" as well as "systems," so as to require reports only for "weapons technology."

We understand that ACDA believes that "weapons" does not modify "technology" and that it can therefore require an ACIS for such nonweapons programs as the breeder reactor. On the other hand, the Department of Energy concludes that established principles of statutory construction and the legislative history demonstrate that § 36(a)(3) should be read to mean "weapons systems or weapons technology."

It is a familiar principle of statutory construction that terms should be read in context and that specific terms control general ones. *See, Philbrook v. Glodgett*, 421 U.S. 707, 713-714 (1975); *Weyerhaeuser S.S. Co. v. United States*, 372 U.S. 597, 600-601 (1963). The whole of § 36(a) is concerned with the effect of programs for weapons, delivery systems, and supporting facilities on arms control. Subsections (1) and (2) require reports on weapons programs that are significant *per se* because of their nature or size. Subsection (3), in this context, gives ACDA discretion to require reports on lesser weapons programs that may have significant effects. The structure of subsection (3) is consistent with this interpretation. Modifying a series of terms with an adjective placed at the head is a common way of preventing needless repetition. It is reasonable to conclude, as you have, that the draftsman of § 36(a) did not intend to expand the scope of subsection (3) beyond the remainder of the section merely by using a familiar stylistic device.

¹Under § 36(b)(2)(A) of the Act, an ACIS must accompany all requests to Congress for authorization or appropriations for category (1) or (2) programs. Under § 36(b)(2)(B), a category (3) program requires an ACIS only if NSC accepts the Director's advice that the program will have a significant impact on arms control policy or negotiations.

The legislative history supports this interpretation. Section 36(a)(3) originated in the House of Representatives,² and the legislative history is particularly significant. The general explanation in the House committee report states that § 36 would:

Generate[s] vital and necessary information for both the Executive Branch and Congress by:

(a) providing for [ACDA] participation in assessing and analyzing the impact on arms control and disarmament policy of proposed weapons programs or technology³

This, it continues, would allow Congress to exercise an informed foreign policy judgment “in the all important area of proposed defense programs.”⁴ The bill would accomplish this by requiring reporting of all weapons programs above its dollar limits. In addition, the report continues:

. . . For weapons programs which fall below the \$50 million annual limit and policy issues with no expenditure as such, the legislation provides a discretionary authority for the Director to make an arms control and disarmament assessment and analysis identical to the procedure outlined above. The intent in providing this discretionary authority to the Director is to include programs which, regardless of cost, have a potentially significant arms control impact. Included in this intent are items of a “seminal” nature, such as major philosophical or doctrinal changes in defense posture or new weapons concepts in various stages of research and development—any of which could have far-reaching implications for arms control and disarmament policy and planning.⁵

The section-by-section analysis of the bill states that “weapons systems or technology” refers to the above programs.⁶ Finally, Representative Zablocki, Chairman of the House Foreign Affairs Committee and floor manager of the bill, said in his opening statement that the purpose of § 36(a) was to allow ACDA participation in the assessment of “defense programs.”⁷

It thus appears that the bill was concerned with the effect of “defense programs” on arms control. Moreover, there is strong evidence that the House understood the bill to be limited to such programs. Representative Simon introduced an amendment that would have required ACDA to report to the National Security Council (NSC) and Congress on the transfer of any nuclear

²See H. Conf. Rept. No. 94-660, 94th Cong., 1st sess. (1975), at 26; 121 Cong. Rec. 21853 (1975).

³H. Rept. No. 94-281, 94th Cong., 1st sess. (1975), at 3.

⁴*Id.*, at 5.

⁵*Id.*, at 6.

⁶*Id.*, at 11.

⁷121 Cong. Rec. 21848 (1975).

material to a foreign country.⁸ Its purpose, he stated, was to assure that ACDA informed the NSC and Congress of the impact of such transfers on nuclear proliferation.⁹ A point of order was then raised that the amendment covered nuclear material transferred for peaceful purposes and was thus not germane to the bill. Representative Jordan, in the chair, ruled that the amendment was not germane to § 36, "which merely requires the furnishing of information regarding defense systems." The ruling was not challenged.

From the committee report and the history of the Simon amendment, it is thus evident that the House intended § 36 to apply only to programs with a military purpose. The history of the Senate version of the bill is not to the contrary. Senators Humphrey and Stennis, who prepared that version, explained that the "weapons system or technology" provision was intended to give ACDA discretion to study less important weapons programs.¹⁰ Nowhere in the legislative history, in either House, is there support for the conclusion that § 36(a)(3) includes all technology which may affect arms control.

We conclude that § 36(a)(3) of the Arms Control and Disarmament Agency Act does not give the Director of ACDA authority to require reports on the Department of Energy's nonmilitary technology programs which may affect arms control policy or negotiations.¹¹

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

⁸The amendment provided:

No agreement between the United States and any foreign country providing for the sale or other transfer to such country of any nuclear material may be entered into, and no license for the sale or other transfer to any foreign country of any nuclear material may be issued unless the Director has submitted a report analyzing the impact of such sale or other transfer on arms control and disarmament policies and negotiations to the National Security Council and the Congress. 121 Cong. Rec. 21853 (1975).

⁹121 Cong. Rec. 21854.

¹⁰121 Cong. Rec. 28687-88 (1975).

¹¹We note that under § 35 of the Arms Control and Disarmament Agency Act, 22 U.S.C. § 2575, and Executive Order No. 11044, 3 CFR 627 § 2 (1959-1963 Compilation), the President may require the Department of Energy to keep ACDA informed "on all significant aspects of the United States arms control and disarmament policy and related matters, including current and prospective policies, plans, and programs."

February 28, 1978

**78-13 MEMORANDUM OPINION FOR THE
ASSISTANT ATTORNEY GENERAL,
OFFICE FOR IMPROVEMENTS IN THE
ADMINISTRATION OF JUSTICE**

**United States Attorneys—Suggested
Appointment Power of the Attorney
General—Constitutional Law (Article II,
§ 2, cl. 2)**

This responds to your request for our opinion on whether U.S. Attorneys are inferior officers within the meaning of Art. II, § 2, cl. 2, of the Constitution, so that Congress could by law provide for their appointment by the Attorney General.

This question has arisen in connection with a proposal to provide for the appointment and removal of U.S. Attorneys by the Attorney General alone, in contrast to the present law pursuant to which U.S. Attorneys are appointed by the President by and with the consent of the Senate and removed solely by Presidential authority.

Art. II, § 2, cl. 2, provides generally that the President shall have power to appoint the officers of the United States

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

The question therefore is whether the U.S. Attorney is an inferior officer within the meaning of that constitutional provision.

The Constitution does not define the term "inferior officer." Earlier commentators point to the vagueness and the absence of exact lines drawn in this aspect of the Constitution. Rawle, *Constitution of the United States*, p. 164; Story, *Commentaries on the Constitution of the United States*, § 1536. In *Collins v. United States*, 14 Ct. Cl. 568, 574 (1878), the court defined the term "inferior" not in the "sense of petty or unimportant" but in the sense of subordinate or inferior to the officer in whom the power of appointment is vested. This definition appears to have been generally accepted. *Constitution of*

the United States of America, Analysis and Interpretation (1973 ed.) S. Doc. 92-82, pp. 526-527.

In light of this interpretation the U.S. Attorneys can be considered to be inferior officers, since 28 U.S.C. § 519 authorizes the Attorney General to direct all U.S. Attorneys in the discharge of their duties. In this context the Supreme Court suggested nearly 100 years ago in *Ex Parte Siebold*, 100 U.S. 371, 397 (1879), that Congress could vest the authority to appoint U.S. Marshals in the Attorney General. The status of the U.S. Marshals is quite closely related to that of the U.S. Attorneys. See 28 U.S.C. § 569(c).

Since the beginning of the Republic, Congress has not exercised its discretionary power to vest the appointment of U.S. Attorneys in the Attorney General. This failure to exercise that discretionary power, however, does not create customary constitutional law precluding Congress from exercising that authority. As Justice Story stated (*id.*, § 1535):

In one age the appointment might be most proper in the President;
and in another age, in a department.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

March 1, 1978

**78-14 MEMORANDUM OPINION FOR THE
GENERAL COUNSEL, DEPARTMENT OF
TRANSPORTATION**

**Administrative Law—Agency Authority—
Payment of Attorneys' Fees—*Greene County
Planning Board v. Federal Power
Commission* (559 F. (2d) 1227)**

This responds to your request for our opinion whether any authority your Department might have to provide compensation, under appropriate standards and procedures, to parties intervening in proceedings before the Department of Transportation, would be circumscribed by the *en banc* decision of the Second Circuit in *Greene County Planning Board v. Federal Power Commission*, 559 F. (2d) 1227 (1977), cert. denied, 434 U.S. 1086 (1978). For reasons stated below, it is our opinion that the holding of *Greene County* does not preclude your Department from determining whether it has explicit or implicit statutory authority to provide compensation in the form of expert witnesses' fees, attorneys' fees, and other expenses of parties who intervene in proceedings before it.

Although the history of the *Greene County* litigation is somewhat complex, a brief sketch of that history will suffice for present purposes. Party intervenors in proceedings before the Federal Power Commission (FPC), now the Federal Energy Regulatory Commission (FERC), sought compensation from the FPC for certain expenses incurred by them in those proceedings. The FPC ultimately took the position, based on its interpretation of certain provisions of its organic statute, the Federal Power Act,¹ that it lacked statutory authority to award such compensation. The Second Circuit, relying at least in part on the interpretation given by the FPC to its organic statute, held that the FPC lacked authority to provide the compensation requested.

The party intervenors in *Greene County* then petitioned the Supreme Court for a writ of certiorari to review the Second Circuit decision. As you may know, the Solicitor General filed with the Court a brief for the present

¹ 16 U.S.C. §§ 793, 825g, 825h, and 825m(c).

respondent, Federal Energy Regulatory Commission. In that brief, the Solicitor General took the position that the Second Circuit decision was incorrect and suggested to the Court that it grant certiorari, vacate the Second Circuit judgment, and remand the case to the Second Circuit for reconsideration in light of the present position of FERC, that its organic statute does provide authority for the compensation at issue.

Because the holding of the Second Circuit in *Greene County* involved only a construction given to the Federal Power Act, 559 F. (2d), at 1238, we think it clear that no Department or Agency (including your Department) other than, possibly, FERC is bound by that holding. Nor do we think that the Second Circuit, in reaching its conclusion regarding the Federal Power Act, announced a principle of law broad enough to cover other Departments and Agencies. In fact, the court appeared to give great weight to the views of the FPC concerning its authority under the Federal Power Act in reaching its decision. *See* 559 F. (2d), at 1236-37, and n. 2.²

The Second Circuit could have based its decision on a broader ground; for example, it could have taken the position that no compensation for expenses such as attorneys' fees could be paid absent explicit statutory authority. Had it done so, its decision would have created doubt as to whether other Departments and Agencies could construe their respective organic statutes as providing power to compensate where such authority was not explicit. The Second Circuit, however, did not do so, thus obviating the difficult question that might be presented by a broader opinion.³

We conclude that, notwithstanding the *Greene County* decision, your Department is required to interpret its own organic statute and any other relevant statutory provisions and determine whether Congress has authorized it, explicitly or implicitly, to provide compensation in proceedings before it. Assuming it concludes that such power exists, it additionally will have to determine the standards and procedures under which such compensation may be provided.

We would add that we attach no significance to the Supreme Court's denial of certiorari in the *Greene County* case. That action did not constitute a decision on the merits or otherwise address the question which you have raised with us.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

²This point was made in the dissenting panel opinion of Judge Van Graafeiland, who wrote the majority *en banc* opinion.

³For example, whether other Federal Departments and Agencies would have to conform their conduct to the Second Circuit's decision might itself pose a substantial question.

March 8, 1978

**78-15 MEMORANDUM OPINION FOR THE
GENERAL COUNSEL, CENTRAL
INTELLIGENCE AGENCY**

**Central Intelligence Agency—Investigative
Authority—United States Citizens—*Weissman*
v. CIA, (565 F. (2d) 692)**

This responds to your request for our views on the Central Intelligence Agency's (CIA) proposed procedures regarding its investigations of United States persons in the United States. This informal discussion does not represent our final conclusions on this matter, but is meant to serve as a basis for future discussion. With the signing of Executive Order No. 12036, many of the issues touched upon by these procedures will, as you know, become the subject over the next few weeks and months of procedures promulgated under §§ 2-206, 2-207, and 2-208 of that order.¹ The questions to be considered in that process are among the most difficult arising under the order, and it is not our intention here to foreclose deliberation on any of those matters, but instead to give you the benefit of our preliminary thinking. On this basis, we believe the following issues raise problems in light of *Weissman v. CIA*, 565 F. (2d) 692 (D.C. Cir. 1977).

I. Delineation of Individuals Subject to Investigation

In our view, the decision in *Weissman* did not wholly preclude investigation by the CIA of those United States persons who have a "connection" with the agency. Several of the categories of individuals included in paragraph [1] of your proposed procedures will have an obvious connection with the CIA, and we perceive few problems with the propriety of investigations in these cases. For example, employees of the agency, those who are detailed to the agency, those who apply for employment with the agency, or those who expressly

¹Executive Order No. 12036, entitled *United States Intelligence Activities*, was issued by President Carter on January 24, 1978. See *14 Weekly Compilation of Presidential Documents* 194 (January 30, 1978).

consent to an investigation (including employees of contractors) would meet this criterion rather easily.

However, the "connection" of other categories of personnel listed in paragraph [1] with the CIA is not so clear. Our principal concern is with those individuals who do not know that they are subject to a CIA investigation and who have no reason to believe that they may be investigated. In particular, this would refer to employees (or applicants for employment) of proprietaries and instrumentalities who are unaware of their employer's connections, including contractors' employees and others who have no reason to believe that the CIA may investigate them. Because these individuals have no such knowledge, their "connection" with the CIA must rest solely on the fact that they have become unwittingly involved in a situation where the CIA considers it necessary to subject them to some form of investigation. We believe this raises two different sorts of problems under *Weissman*. First, while we do not believe that the court made an individual's awareness of an investigation an "invariable prerequisite" to an inquiry by the CIA, the court was clearly troubled by an investigation of an American citizen "without his knowledge" or "security investigations of unwitting American citizens." 565 F. (2d) at 695, 696. In our view, this concern of the court may not legitimately be entirely ignored. Second, since the individuals here cannot be taken to have even implicitly consented to a background investigation, the requisite "connection" in such cases becomes more tenuous than where they were aware of, and consented to, such investigation.

But we do not believe that these problems will preclude investigations of such personnel. Rather, we wonder whether an approach along the lines suggested in our previous opinion on this matter would prove administratively feasible—*i.e.*, gearing the extensiveness and intrusiveness of the contemplated investigation to the degree that an individual has a "connection" with the CIA. More specifically, in cases in which an individual's connection is limited, the CIA might promulgate more restrictive procedures than are applicable to those individuals that the CIA directly employs. The restrictions contemplated would pertain to approval authority, duration of investigation, methods of investigation, disposition of records, etc.

II. Purposes of Investigation

At present the proposed procedures do not state the purposes for which an investigation may be conducted. While we have no substantial objection to this open-ended approach with respect to Agency employees and others close to the Agency (provided that the purposes are lawful), we are troubled by its application to those who have less of a connection. With respect to such individuals, if the CIA is to justify an investigation by reference to some limited "connection," we believe that the regulations should clearly specify that the investigation will not go beyond whatever is required by reason of that connection. Otherwise, it might be claimed that the CIA is using a rather tenuous connection to justify an investigation serving other purposes. Such a departure from the investigation's underlying justification may be an abuse of

that aspect of *Weissman* allowing an investigation predicated upon a connection.

III. Method of Investigation

The proposed procedures do not now specify which methods of investigation may be used, and we think that it is necessary in light of the order to delineate explicitly what methods will be used. Perhaps more importantly, paragraph [3] implies that physical surveillance may be used in some instances. While the order itself places limits on physical surveillance, additional restraints may be necessary to fulfill the Attorney General's responsibilities under § 3.305 of the order. *Weissman* suggests such limitations. For instance, the order permits physical surveillance of present employees of CIA contractors. If these individuals were unaware of the possibility of a CIA inquiry into their lives, we question whether their "connection" with the CIA would suffice to justify the intrusiveness of a physical surveillance.²

IV. Paragraph [2]

The exception contained in paragraph [2] may be too broadly written. The provisions of paragraph [2A] appear to allow exactly the sort of investigation that occurred in *Weissman*, except that it would be limited in duration and subject to record disposal requirements. The provisions of paragraph [2B] would allow for an exception in all other areas, and hence provide for a way of avoiding the limitations of the proposed procedures entirely. There is no provision that either dictates the conditions under which this may occur or that limits the use of this broad exception. While a member of your staff has suggested that this provision could be modified to apply only to certain sorts of personnel, the open-ended nature of this approach would still trouble us. Its application to those with only tenuous connections with the CIA may, for the reasons discussed above, create problems under *Weissman*.

V. Coordination With H.R. 7-1c(1)(g)

We suggest that more consideration be given as to how the proposed procedures are to fit in with H.R. 7-1c(1)(g). As the situation presently stands, the CIA will have two different sets of procedures dealing with the problems raised in *Weissman*. In our view, these two sets of procedures are somewhat inconsistent. For example, several provisions in the current regulations would appear to allow for investigations beyond those contemplated in your proposed procedures. *See, e.g.*, H.R. 7-1c(1)(g)(4) and (6). In order to prevent possible conflicts or confusion, it may be advisable to promulgate one set of guidelines to cover this entire area. Presumably, this will be done in formulating procedures under the order.

²The special concern about physical surveillance is one that was suggested by the *Weissman* court, as we pointed out in our earlier memorandum. *See* 565 F. (2d) at 695 n. 8.

VI. Record Retention

Paragraph [2A] states that records of those investigated but not contacted will be disposed of in accordance with General Records Schedules. Because we are unfamiliar with these schedules, we cannot now comment on the efficacy of this provision. We assume, however, that this question and others will be included in the preparation of procedures under the order and, in that context, we would be pleased to provide whatever additional assistance we can.

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

March 10, 1978

**78-16 MEMORANDUM OPINION FOR THE
ASSISTANT ATTORNEY GENERAL, CIVIL
DIVISION**

**Department of Justice—Retention of Private
Counsel—Authority—Defense of Federal
Officials**

At your request, we have examined the Congressional Research Service memorandum on the authority of the Department of Justice to retain private legal counsel and the unsigned memorandum entitled "Statutory Authority for Justice Department Hiring of Private Counsel" ("Opposition Memo"). Each memorandum deals at length with the derivation of the statutes concerning representation of Federal agencies and employees and with judicial decisions regarding those statutes. The Congressional Research Service memorandum concludes (p.39) that there is "substantial doubt whether the Department of Justice has the statutory authority to retain private attorneys who are not subject to the supervision . . . of the Attorney General . . . or who have not been appointed in accordance with [28 U.S.C. §§ 515 and 543]." The Opposition Memo states a similar conclusion (p. 37), namely, that 28 U.S.C. §§ 515 and 543 are the only statutes authorizing the Department to retain private counsel and that the Attorney General has no authority to do so in the manner provided in Attorney General Order No. 683-77, 28 CFR §§ 50.15-50.16.

We disagree. In our opinion, this view fails to give proper weight to the reasons for the Department's practice and to action taken by Congress in light of that practice.

I.

The significant statutes, 28 U.S.C. §§ 516-517, have two parts— they place a responsibility of representation upon the Department and they specify the means of carrying out that responsibility. The only means expressly authorized are use of an officer of the Department of Justice or an attorney appointed pursuant to 28 U.S.C. § 515 or § 543. In 1975, however, the Department was faced with circumstances in which its obligation to represent present and former

Federal officials in cases involving interests of the United States could not be accomplished through use of the prescribed means. The Department's choice was between carrying out its obligation of representation through use of private attorneys or declining to provide representation at Government expense. We adhere to our earlier view that the Department's policy of retaining private attorneys in the limited circumstances described in 28 CFR §§ 50.15 and 50.16 is adequately supported by the implied authority of the Attorney General in connection with representation of Federal agencies and their employees. Interests of the United States, as well as interests of the individual defendants, are at stake in these cases.

II.

The Department has kept Congress and the General Accounting Office informed with regard to its use of private counsel. For example, in December 1975, Attorney General Levi sent identical letters to the Chairmen of the Senate and House Judiciary Committees describing the use of private attorneys in certain civil actions and explaining the reasons for the Department's action. In 1976, the General Accounting Office began a study relating in part to the Department's use of private attorneys; the study resulted in a report issued in May 1977.¹

Furthermore, in 1977, the Department requested a supplemental appropriation of \$4,878,000 for payment of private counsel fees.² The matter was discussed at length during the hearings before the House and Senate Appropriations Committees. The House committee did not approve the Department's request,³ but the Senate committee included in the bill the full request, subject to certain conditions.⁴ The conference committee provided for a smaller appropriation, \$1,860,000, than did the Senate, but deleted the conditions stated in the Senate-approved bill. However, the conference report⁵ stated:

. . . the conferees are agreed that none of the funds available to the Department shall be obligated or expended by the Department for the representation of any defendants in suits commenced after the effective date of this Act, until the appropriate committees of the Senate and the House of Representatives have reviewed the policy

¹Report of the Comptroller General, *Lawsuits Against the Government Relating to a Bill to Amend the Privacy Act of 1974* (May 6, 1977). As noted previously, the Department's policy is discussed with approval in a May 16, 1977, decision of the Comptroller General, 56 Comp. Gen. 615.

²Previously, the cost of private attorneys had been absorbed by the Department through the use of its regular appropriation.

³See H. Rept. No. 95-68, 95th Cong., 1st sess. 112 (1977).

⁴The Senate committee's report stated that approval of the Department's request should not be construed as "approval or disapproval of the Department's policy statement . . . embodied in Attorney General's Order No. 687-77. . . ." S. Rept. No. 95-64, 95th Cong., 1st sess. 144 (1977). The committee added to the bill a requirement that no funds be obligated or spent for private counsel fees in suits commenced after enactment of the bill, until the Senate Judiciary Committee had approved the Department's policy statement.

⁵H. Rept. No. 95-166, 95th Cong., 1st sess. 27 (1977).

statement embodied in the Attorney General's Order No. 687-77 dated January 19, 1977.

In certain circumstances, the courts have held that providing appropriations for an activity of the executive branch constitutes ratification by Congress of that action. *See, e.g., Brooks v. Dewar*, 313 U.S. 354 (1941) (issuance by Secretary of the Interior of temporary grazing permits). Care must be used in relying on this doctrine, however.⁶ In our opinion, it is applicable here notwithstanding the language of the Senate report.⁷ Congressional acquiescence in the Department's policy may be tentative or qualified. Nonetheless, funds to carry out that policy were provided in the Supplemental Appropriations Act for Fiscal Year 1977.⁸ Thus, to that extent, the legislative action supports our view that authority exists for the Department's policy.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

⁶*See, e.g., Committee for Nuclear Responsibility, Inc. v. Seaborg*, 465 F. (2d) 783, 785 (D.C. Cir. 1971) (question of compliance with National Environmental Policy Act).

⁷*See* footnote 4, *supra*.

⁸Pub. L. No. 95-26, 91 Stat. 61, 106 (1977).

March 16, 1978

**78-17 MEMORANDUM OPINION FOR THE
ACTING DIRECTOR, OFFICE OF
MANAGEMENT AND BUDGET**

**Reorganization Plan No. 1 of 1978—Equal
Employment Opportunity Commission—
Transfer of Function**

This responds to your request for our opinion concerning two legal questions raised by § 3(b) of Reorganization Plan No. 1 of 1978, 14 Weekly Comp. Pres. Doc. 398, 43 F.R. 19807.

Under § 3(a) of the Plan, the responsibility for enforcement of equal opportunity in Federal employment, presently lodged in the Civil Service Commission (CSC), would be transferred to the Equal Employment Opportunity Commission (EEOC), an executive branch agency.¹ Section 3(b) of the Plan would empower the EEOC to delegate to the CSC or a successor agency "the function of making a preliminary determination on the issue of discrimination," whenever a Federal employee has alleged in a proceeding before the EEOC that his rights under § 717 of the Civil Rights Act of 1964 have been violated.² Your questions arise because it is contemplated that the CSC's successor agency for these purposes would be an independent regulatory agency exercising quasi-judicial powers whose members would not serve at the pleasure of the President.

The first question is whether the independence of this successor agency would be affected by the transfer to it of the responsibility for making a preliminary determination of the merits of a Federal employee's allegation. The task of making such determinations is purely adjudicatory. Under the rationale of the most recent Supreme Court decisions dealing with this general question,

¹This office has taken the position, most recently in our letter to you of February 7, 1978, that commissioners of the EEOC serve at the pleasure of the President and that the Agency is an executive—as opposed to an independent regulatory—agency.

²(b) The Equal Employment Opportunity Commission may delegate to the Civil Service Commission or its successor the function of making a preliminary determination on the issue of discrimination whenever, as a part of a complaint or appeal before the Civil Service Commission on other grounds, a Federal employee alleges a violation of § 717 of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-16), provided that the Equal Employment Opportunity Commission retains the function of making the final determination.

assignment of an adjudicatory function to an agency then recognized to be "independent" would not alter its independent status in any way. *Cf.*, *Wiener v. United States*, 357 U.S. 349 (1958). We see no basis for a different conclusion here.³

The second question is whether limiting the successor agency to making a preliminary determination on the merits of the employee's allegation while retaining in the EEOC the "function of making the final determination concerning such issue of discrimination . . ." would affect the independence of the successor agency. In other words, does the placement of power in an executive agency to review and overturn a preliminary decision reached by an independent agency impinge on the independent status of the latter? We think the answer to this question is "no."

The proposition that executive agencies may be empowered by Congress to review and adopt or overturn decisions made by "independent" agencies or hearing examiners without affecting the independent status of either is well established. For example, the President is authorized by statute to review and reverse certain decisions made by the Civil Aeronautics Board; yet we have no doubt that members of that Board may be removed only for cause under 49 U.S.C. § 1321. More recently, Congress has given the Secretary of Energy the power to implement or reject certain regulatory actions formulated by the Federal Energy Regulatory Commission, an independent agency.⁴ The conference report indicates that Congress believed that such review power in the Secretary would not affect the independent status of the Commission. *See H. Rept. No. 539, 95th Cong., 1st sess., at 78 (1977).*

Given the adjudicatory nature of the decisions to be reviewed by the EEOC under § 3(b), we think the history of the use of independent administrative law judges and hearing examiners under the Administrative Procedure Act (APA) of 1946 supports our position. Under § 11 of that Act,⁵ these officers were specifically made "independent . . . in their tenure and compensation."⁶ One of the major functions performed by administrative law judges is to preside over formal APA proceedings, 5 U.S.C. § 556(c), and then to make the initial decision or recommendation regarding the disposition of the matter before them, 5 U.S.C. §§ 554(d) and 557(b). This decision may then be reviewed by the agency, often an executive agency, which has "all the powers which it would have in making the initial decision . . ." 5 U.S.C. § 557(b).

Thus, to conclude that EEOC review of preliminary decisions made by a successor agency pursuant to § 3(b) of the Plan would jeopardize the independence of the latter agency would cast grave doubt on the principle under which

³We drew the same conclusion with regard to this question in our memorandum to W. Harrison Wellford of February 23, 1978.

⁴Department of Energy Organization Act, § 402(c), Pub. L. No. 95-91, 91 Stat. 565.

⁵Section 11 is now codified in various sections of 5 U.S.C., namely, §§ 1305, 3105, 3344, 4301(2)(E), 5362, and 7521.

⁶Administrative Procedure Act—Legislative History, S. Doc. No. 248, 79th Cong., 2d sess., at 215 (1946).

administrative law judges and similar hearing officers have performed equivalent adjudicatory functions for more than three decades during which their independence has never been doubted, although subject to administrative review.

Thus, we conclude that the delegation under § 3(b) of the Plan will not raise questions as to the independent status of the CSC successor agency.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

March 16, 1978

**78-18 MEMORANDUM OPINION FOR THE
ATTORNEY GENERAL**

**Vacancy Act (5 U.S.C. §§ 3345-3349)—Law
Enforcement Assistance Administration**

We are herewith responding to your request for our analysis and comment on the opinion of the Deputy Comptroller General to Representative Holtzman of February 27, 1978, concerning the service of Mr. James H. Gregg as Acting Administrator of the Law Enforcement Assistance Administration (LEAA) for a period in excess of 30 days following the resignation of its Administrator on February 25, 1977. The opinion concludes, on the basis of the so-called Vacancy Act, 5 U.S.C. §§ 3345-3349, that the service of Mr. Gregg as Acting Administrator could not extend beyond 30 days, and that after that date "there was no legal authority for anyone to perform the duties of the Administrator except the Attorney General himself, in whom by statute, all the Administrator's functions are vested."

I.

The sole authority cited by the opinion is the earlier opinion of the Comptroller General involving the service of L. Patrick Gray as Acting Director of the Federal Bureau of Investigation in 1973, with which opinion this Department disagreed.

In a letter to Senator Hruska, dated March 13, 1973, then Assistant Attorney General Robert G. Dixon (OLC) responded to the Senator's request concerning the Comptroller General's opinion. Mr. Dixon took the position that the Vacancy Act, in particular the 30-day provision of 5 U.S.C. § 3348, did not apply to every vacancy in the executive branch, including some of the offices which textually might appear to be covered by the Act. To the contrary, Mr. Dixon opined that specific or later statutes dealing with the manner in which an officer may perform the duties of a vacant office prevailed over the Vacancy Act. As stated in our memorandum to you of February 27, we adhere to that view and note that this interpretation of the Act has been upheld by the courts in

United States v. Lucido, 373 F. Supp. 1142, 1148 (E.D. Mich. 1974) and *United States v. Halmo*, 386 F. Supp. 593, 595 (E.D. Wis. 1974).¹

Mr. Gregg does not exercise the powers of the Administrator, pursuant to 5 U.S.C. §§ 3345, 3346, or 3347; hence, the 30-day provision of 5 U.S.C. § 3348 is not directly applicable. The opinion of the Court of Appeals in *Williams v. Phillips*, 482 F. (2d) 669 (D.C. Cir. 1973) referred to in our original memorandum of February 27, 1978, indicates that in this situation Mr. Gregg could act pursuant to the delegation of authority only for a reasonable period of time and suggests that 5 U.S.C. § 3348 would constitute a guideline for what constitutes a reasonable period in the absence of a nomination. It is clear that the court intended to foreclose other tests of reasonableness, or to indicate that it would not take into account the special problems created by an impending reorganization of the agency involved. Incidents of this type have occurred in the past. Thus, the then-Secretary of Commerce resigned on February 1, 1967. At that time President Johnson planned to combine the Departments of Commerce and Labor, and did not fill the vacancy in the Department of Commerce until June 1967, when it became apparent that Congress would not accede to the consolidation of the two Departments.

II.

The consequences drawn by the Deputy Comptroller General from his conclusion that Mr. Gregg lacks authority to perform the duties of the Administrator are on even less solid ground. He takes the position that only the Attorney General can now act for LEAA and that he indeed should ratify past actions taken by Mr. Gregg since they are subject to challenge. Those conclusions ignore the statutory limitations on the power of the Attorney General with respect to the LEAA and the *de facto* officer rule.

First: The basic organic provision of LEAA is 42 U.S.C. § 3711(a), as amended by § 102 of the Crime Control Act of 1976 (Pub. L. No. 94-503; 90 Stat. 2407); it provides:

(a) There is hereby established within the Department of Justice, *under the general authority, policy direction, and general control of the Attorney General*, a Law Enforcement Assistance Administration (hereafter referred to in this chapter as "Administration") composed of an Administrator of Law Enforcement Assistance and two Deputy Administrators of Law Enforcement Assistance, who shall be appointed by the President, by and with the advice and consent of the Senate. [Emphasis added.]²

¹Moreover, the Deputy Comptroller General's present reliance on his *ipse dixit* in the *Gray* case is misplaced since that situation involved a designation of an Acting Director of the FBI under 28 U.S.C. §§ 509, 510. The present situation does not involve a designation of an acting head of an executive agency but rather it concerns a delegation of authority under 42 U.S.C. § 3752, a different matter from a legal standpoint. The legal effect of the delegation was considered in our February 27 memorandum.

²We note that the quotation of this subsection in the Deputy Comptroller General's opinion is erroneous; it fails to take into account its amendment by the Crime Control Act of 1976.

The functions of LEAA thus are not completely vested in the Attorney General, as are those of most of the components of the Department of Justice. See 28 U.S.C. § 509. The Attorney General is given "general authority, policy direction, and general control." As shown by the legislative history of the 1976 amendment, its purpose was to give LEAA a considerable amount of internal autonomy, especially with respect to specific grants.

The Senate report (S. Rept. No. 94-847, 94th Cong., 2d sess. (1976), p. 15), states:

. . . the responsibility for its [LEAA's] day-to-day operational control rests with the Administrator.

And again:

The new language is added to make clear the concept that, as a component of the Department of Justice, the Administration falls within the overall authority, policy direction, and control of the Attorney General, while the responsibility for its day-to-day operational control rests with the Administrator. [p. 35]

The pertinent House report, H.R. Rept. No. 94-1155, 94th Cong., 2d sess. (1976), p. 30, contains the following statement of then-Deputy Attorney General Tyler:

H.R. 9236 embodies several clarifications and refinements that we believe would improve the efficacy of the LEAA program. First of all, H.R. 9236 proposes that the Act be clarified by expressly stating that LEAA is under the policy direction of the Attorney General. The Act now provides that LEAA is within the Department of Justice, under the "general authority" of the Attorney General. In accordance with this language, the Attorney General is deemed ultimately responsible for LEAA. To make this responsibility meaningful, the Attorney General must concern himself with policy direction. *Under the proposed language change, responsibility for the day-to-day operations of LEAA and particular decisions on specific grants will remain with the Administrator, as they are now.* The proposed additional language will make clear what is now assumed to be the case. [Emphasis added.]

Senator Hruska explained on the floor of the Senate that the purpose of the limitation on the Attorney General's power was

. . . to assure that the Senate and local nature of the program would not be overshadowed by the Department of Justice programs. [122 Cong. Rec. S. 23332 (Daily Ed., July 22, 1976)]

The authority reserved to the Administrator or Deputy Administrators and delegated to Mr. Gregg consists, apart from personnel actions, mainly of

approving important, complex, and controversial grants.³ Because of the statutory limitation on the Attorney General's authority with respect to LEAA, those grant functions could not be performed by anyone pending Presidential nomination and Senate confirmation of a new Administrator, LEAA, if Mr. Gregg—as asserted by the Comptroller General—is incapable of performing the functions delegated to him. This would be an extreme result; but it is the logical conclusion of the Deputy Comptroller General's reading of the Vacancy Act.

Second: The Deputy Comptroller General's assumption that Mr. Gregg's past and present actions in carrying out the functions of the Administrator are subject to challenge because his tenure violates the Vacancy Act ignores the *de facto* officer principle. That principle holds that where an officer performs the duty of an office under color of title, he is considered a *de facto* officer, and his acts are binding on the public, and third persons may rely on their legality. *McDowell v. United States*, 159 U.S. 596, 601-602 (1895); *United States v. Royer*, 268 U.S. 394 (1925); *United States ex rel. Dorr v. Lindsley*, 148 F. (2d) 22 (7th Cir. 1945), cert. denied, 325 U.S. 858. Indeed, the authority of *de facto* officers can be challenged as a rule only in special proceedings in the nature of *quo warranto* brought directly for that purpose. *United States ex rel. Dorr v. Lindsley*, *supra*; *United States v. Nussbaum*, 306 F. Supp. 66, 68-69 (N.D. Cal. 1969); Mechem, *Public Office and Officers*, §§ 343, 344 (1890).

The reason for the principle is that there should be no cloud on the validity of public acts and the right of the public to rely on them in the case of technical imperfections or doubts. A typical case of a *de facto* officer is an officer who continues to serve after his term of office has expired. *Waite v. Santa Cruz*, 184 U.S. 302, 322-324 (1902); *United States v. Grouppe*, 333 F. Supp. 242, 245-246 (D. Maine 1971), *aff'd*, 459 F. (2d) 178, 182, fn. 12 (1st Cir. 1972). The Deputy Comptroller General concedes that Mr. Gregg validly exercised the functions of the Administrator for at least 30 days. It is our conclusion, therefore, that under the *de facto* officer principle, Mr. Gregg's actions will continue to bind third parties until his right to perform the delegated functions

³A. Authority reserved for Administrator or Deputy Administrators.

1. Sign Track II discretionary grants, *i.e.*, grants involving States in one region of the country, if:
 - a. Cost is \$300,000 or more;
 - b. Project is of a controversial nature;
 - c. Project is a construction project;
 - d. Approach has not been tested or demonstrated elsewhere.
2. Sign Track I discretionary grants, *i.e.*, involve more than one region or have national impact.
3. Sign Public Safety Officers' Benefits Act awards. Also make final agency decision on PSOB claims.
4. Approve personnel actions for GS-14 and GS-15.
5. Make final agency decision on compliance and adjudicatory hearings including civil rights.

has been adversely determined in proceedings specifically brought for that purpose.⁴

For the reasons stated above, we disagree with the legal positions taken by the Deputy Comptroller General in his opinion. Nevertheless, we believe the only satisfactory resolution of the uncertain status of Mr. Gregg's authority is for the President to submit a nomination to fill the position of Administrator even though the position may well be abolished with the proposed reorganization of LEAA.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

⁴We may add that the *de facto* officer rule is not an antiquated doctrine, but has been applied frequently in connection with technical violations in the composition of draft boards. See *Group*, *supra*.

March 16, 1978

**78-19 MEMORANDUM OPINION FOR THE
ATTORNEY GENERAL**

**Constitutional Law—First Amendment—
Establishment Clause—Nonpublic
Elementary and Secondary Schools—
Tuition—Tax Credits**

You have asked for our opinion concerning the constitutionality, under the Establishment Clause of the First Amendment, of providing either tax credits or grants for tuition payments to nonpublic elementary and secondary schools. You referred to two specific proposals providing such grants or credits: the Packwood-Moynihan bill, S. 2142, which would give limited income tax relief in the form of a credit for tuition payments to nonpublic schools; and the extension of the Basic Educational Opportunity Grant program to include nonpublic elementary and secondary school education.

In our opinion, under existing Supreme Court decisions both proposals would violate the First Amendment guarantee against establishment of religion. The controlling decisions on tuition grants and credits for nonpublic elementary and secondary education are *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), and *Sloan v. Lemon*, 413 U.S. 825 (1973), a companion case.

In *Nyquist*, the Court invalidated a New York tuition reimbursement and tax relief plan. The plan provided limited tuition reimbursements to low-income families with children attending nonpublic elementary and secondary schools. Families failing to qualify for tuition reimbursement were allowed tuition tax credits in varying amounts depending upon adjusted gross income. The Court found both facets of the program unconstitutional under the three-part Establishment Clause test enunciated in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971):

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster "an excessive entanglement with religion." [Citations omitted.]

The Court acknowledged that the purposes of the State in enacting the measures—to preserve a healthy, safe educational environment for all schoolchildren, to promote pluralism and diversity in education, and to prevent further overburdening of the public school system—were secular and not inappropriate legislative goals. It held, however, that the tuition grants and credits failed the second prong of the test because a primary effect of the plan was to aid religious education. The Court noted additionally that the plan created the prospect of politically divisive church-state entanglement. Adoption of programs assisting sectarian education would generate ongoing controversy along religious lines over continuing or enlarging available relief.

In *Sloan*, the Court held that a Pennsylvania tuition reimbursement program was constitutionally indistinguishable from the New York program invalidated in *Nyquist*. Since the Pennsylvania program had the effect of advancing religion, it, too, infringed upon the Establishment Clause guarantee.

The Packwood-Moynihan bill provides an income tax credit for tuition payments to elementary and secondary schools as well as vocational schools, colleges, and universities.¹ The amount of the credit is 50 percent of tuition up to a total of \$500 per student. If the credit to which the taxpayer is entitled exceeds his tax liability, the difference is refunded to him. We believe that the tax relief provided in the bill for tuition payments to nonpublic elementary and secondary schools falls within the scope of *Nyquist*.

Although we have considered carefully possible arguments distinguishing the Packwood-Moynihan tax credit from the New York tax relief program struck down by the Supreme Court, we do not believe the differences are of constitutional dimension. It might be argued that the facially neutral, broad-based tax relief provided in the bill prevents it from having a "primary effect" of advancing religion. According to that argument, aid accruing to nonpublic elementary and secondary schools would be only "incidental" to an otherwise neutral plan, and therefore would be constitutionally permissible under *Nyquist*. 413 U.S. at 771, 782 n. 38; *Walz v. Tax Commission*, 397 U.S. 664 (1970). A realistic appraisal of the tax credits proposal, however, indicates that it is not so neutral or broad based as it might appear. In analyzing the effect of the tuition tax credit under the Establishment Clause, it is necessary to separate the elementary and secondary school and higher education components of the bill.² Recent Supreme Court decisions have consistently distinguished aid to college-level institutions from aid to lower-level schools, pointing out that

¹We understand that the bill as reported out of the Senate Finance Committee was amended in a number of ways but that the basic tax credit provisions remain unchanged.

²We understand that a severability clause was added to the bill as recently reported out of the Senate committee.

religiously affiliated institutions at the college level are less often so “pervasively sectarian” as schools educating younger students and that older students are generally less impressionable. See, e.g., *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736 (1976); *Hunt v. McNair*, 413 U.S. 734 (1973); *Committee for Public Education v. Nyquist*, 413 U.S., at 777, n. 32; *Tilton v. Richardson*, 403 U.S. 672, 685 (1971).

Once the focus is on elementary and secondary school tuition credits alone, it is evident that the effect on sectarian education is not merely incidental. Not only would the credits benefit institutions whose role is to emphasize religious training and beliefs, but they would also benefit sectarian schools in significantly larger numbers than nonsectarian schools. The high percentage of sectarian elementary and secondary schools in New York State—approximately 85 percent of all nonpublic schools—was one factor influencing the Court’s decision in *Nyquist*.

Current statistics on nonpublic schools nationally show that nearly 17 percent of the Nation’s elementary and secondary schools are nonpublic. Of that percentage, 85 percent are religiously affiliated. U.S. Department of Health, Education, and Welfare, National Center for Education Statistics, *Nonpublic School Statistics, 1966-77*. According to the most recent statistics available, 87.5 percent of nonpublic schools at the elementary level and 70.2 percent of nonpublic schools at the secondary level are sectarian.³ U.S. Department of Health, Education, and Welfare, National Center for Education Statistics, “Statistics of Nonpublic Elementary and Secondary Schools, 1970-71.” Although sectarian secondary schools do not dominate nonpublic education to the same extent as sectarian elementary schools, we believe that their number is sufficiently substantial so that no meaningful distinction between credits for elementary and secondary schools can be drawn.

It might be argued that the availability of credits for public elementary and secondary school tuition under the provisions of the bill would significantly affect those statistics. The Court has repeatedly made the point, however, that the actual impact or “effect” of the program is the controlling determinant, not its hypothetical consequences. The simple fact is that most public schools are supported by State funds, not tuition payments, and there is no evidence of which we are aware that the structure of State funding is likely to change radically as a result of this legislation. Thus, it appears that the tax credits here,

³Statistics showing the breakdown of schools at the elementary and secondary school levels for the 1976-77 academic year have not yet been completed. Preliminary statistics on student enrollment during 1976-77 are available, however, which, although compiled using a somewhat different format than earlier statistics, suggest that the percentages of nonpublic schools have not changed radically over the last 6 years.

like the tax reductions in *Nyquist*, have a primary effect of benefiting parents of children attending sectarian, nonpublic schools.⁴

The neutrality argument deserves elaboration because it is the most plausible basis for distinguishing the bill from the statute at issue in *Nyquist* and *Sloan*. The argument rests primarily on language in Mr. Justice Powell's opinion for the Court in *Nyquist*, in which he distinguished *Walz v. Tax Commissioner*, 397 U.S. 664 (1970). In *Walz*, the Court upheld the constitutionality of property tax exemptions for churches. The *Nyquist* Court distinguished the earlier case on several grounds, one of which was the broad-based and neutral class of property exempted:

The exemption challenged in *Walz* was not restricted to a class composed exclusively or even predominantly of religious institutions. Instead, the exemption covered all property devoted to religious, educational, or charitable purposes. As the parties here must concede, tax reductions authorized by this law flow primarily to the parents of children attending sectarian, nonpublic schools. Without intimating whether this factor alone might have controlling significance in another context in some future case, it should be apparent that in terms of the potential divisiveness of any legislative measure the narrowness of the benefited class would be an important factor. [413 U.S., at 794]

At the end of the above discussion the Court added a footnote referring back to a similar point made earlier, which stated:

[W]e need not decide whether the significantly religious character of the statute's beneficiaries might differentiate the present case from a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian or public-nonpublic nature of the institution benefited. [413 U.S., at 783 n. 38]

An argument could be made, on the basis of those remarks, that the present bill is valid because it would benefit a large, diverse class and would not in its

⁴We should emphasize that the Court in *Nyquist* made clear that a law could offend the Establishment Clause even if aid to religion was not the primary effect but was only one of several consequences of that law. An additional New York State program considered by the Court in *Nyquist* provided "maintenance and repair grants" to nonpublic schools, limiting those grants to 50 percent of the maintenance and repair costs of public schools. Even though it was clear that most of the funds would be used for nonsectarian purposes, the Court held the grants unconstitutional. The flaw in the program was that it provided no means of excluding State funds from benefiting religion. 413 U.S., at 778-80. Possibly a clearer example may be found in the Federal higher education construction grants involved in *Tilton v. Richardson*, *supra*. In that case, even though it was clear that the constructed facilities would be used predominantly for secular purposes, the fact that they could be used for sectarian purposes 20 years after their construction was enough to render that portion of the law unconstitutional in the unanimous view of the Court. Indeed, the Court struck the provision down on the ground that the 20-year limitation "will *in pari* have the effect of advancing religion," 403 U.S., at 683 [emphasis added], not because that effect was predominant. No one could have claimed there that the law's central effects were secular. Only when the sectarian effects may be characterized fairly as merely "incidental" can a funding program which benefits religion be upheld.

operation draw distinctions based upon the religious character of institutions. This contention may be maintained, however, if no line is drawn between elementary and secondary school and higher education tuition credits. We think the bill cannot be viewed in this manner for several reasons. First, as we noted above, the Supreme Court has repeatedly drawn a distinction between grants to sectarian colleges and universities and similar grants at the precollege level. Second, the history of education in this country has evolved along lines distinguishing between universal free and mandatory public education at the elementary and secondary level and nonmandatory, and rarely free, educational offerings by the States at the higher education level. Because of these differences, the effect of the bill's tax credit provisions will be decidedly different for parents of public schoolchildren than for those whose offspring are enrolled in colleges and universities. Third, comments and testimony submitted on the bill leave little doubt that Congress is aware of the differences between tuition tax credits for the families of college students and credits for those families of elementary and secondary schoolchildren who desire a private school alternative.⁵ See, e.g., letter dated December 21, 1977, to Senators Packwood and Moynihan from Professor Freund of Harvard Law School.

Finally, we do not think that broadening the class of beneficiaries to mesh elementary and secondary students with college and university students obscures the fact that one of the "primary effects" of the bill is to aid sectarian education. The Court has stated clearly that to constitute a "primary effect" a law need not result exclusively or even predominantly in religious benefits. Rather, a primary effect can exist even where there are any number of other appropriate and praiseworthy consequences of the legislation. Given these considerations, we do not think it reasonable to contend that the provisions of the bill pertaining to tuition for elementary and secondary schools would survive on "neutrality" grounds.⁶

An alternative argument in support of the bill is that Federal tax relief is fundamentally different from similar State measures. If the States promote the education of elementary and secondary schoolchildren through the provision of free public schools, the primary effect of any State tax relief for elementary and secondary school tuition is to assist the sectarian schools which make up the bulk of educational institutions charging tuition. It is argued that the Federal Government, on the other hand, does not provide elementary and secondary

⁵We note that the report of the Senate Finance Committee on the bill, as amended, separately discusses elementary and secondary school tuition credits and college tuition credits. S. Rept. No. 95-642, 95th Cong., 2d sess. 2-3 (1978).

⁶Supporters of the bill who seek to distinguish *Nyquist* make one other generalized claim. The assertion is made that the Court's precedents in the Establishment Clause area of First Amendment law have been so flexible and unpredictable that little significance may be attached to recent holdings. In our view that reading of the cases is unfair. Certainly, as the Court has freely acknowledged, the lines are not easy ones to draw. The Court has, however, developed—and adhered to—the three-part test outlined at length 8 years ago in *Lemon v. Kurtzman*, *supra*. That test has commanded the votes of every Justice of the Court with the exception of Justices White and Rehnquist. Moreover, we know of no reason to argue that *Nyquist* and *Sloan*, the precedents directly pertinent here, are of doubtful vitality.

schooling, and can attempt effectively to promote the education of schoolchildren only through generally applicable tax relief measures. This argument ignores the focus of *Nyquist*. Although the purpose underlying a tax-benefit plan may be both secular and laudable, the effect of the plan may be impermissibly to advance or inhibit religion. As we have said, it is our opinion that the effect upon nonpublic elementary and secondary schools of the Packwood-Moynihan tax credit would be constitutionally indistinguishable from the effect of the *Nyquist* tax reduction legislation.⁷

Our comments with respect to the proposed extension of the Basic Educational Opportunity Grant (BEOG) program⁸ to include nonpublic elementary and secondary education follow the same vein. Under the present program grants are awarded to students enrolled at institutions of higher learning on the basis of need. The amount of the grant is determined by a number of factors including family size, income, and tuition costs. The proposed extension would make those grants available to pupils in nonpublic elementary and secondary schools as well. Both *Nyquist* and *Sloan* hold that tuition grants for nonpublic elementary and secondary education infringe upon the Establishment Clause guarantee if a primary effect of the grant or reimbursement plan is to aid sectarian schools. Given the predominantly sectarian affiliation of nonpublic elementary and secondary schools nationally, any broadening of the BEOG program into elementary and secondary education would appear to have a primary effect nearly identical to the tuition reimbursement plans invalidated in *Nyquist* and *Sloan*.

Finally, we note that the problem of entanglement in the form of politically divisive activity described by the Court in *Nyquist* would exist under both tuition relief proposals. Insofar as the programs have a primary effect upon sectarian elementary and secondary schools, controversy is predictable. As the Court stated:

[W]e know from long experience with both Federal and State Governments that aid programs of any kind tend to become entrenched, to escalate in cost, and to generate their own aggressive constituencies. . . . In this situation, where the underlying issue is the deeply

⁷We believe, however, that the Packwood-Moynihan tax credit would be constitutional with respect to college and university tuition. It appears that the benefits of a higher education tax credit would flow to a broad class of individuals, and not, as with elementary and secondary school credits, primarily to individuals affiliated with sectarian institutions. As the Court noted in *Nyquist*, nothing in its decision compels the conclusion that a generally available form of education assistance, such as the "G.I. Bill," 38 U.S.C. § 1651, impermissibly advances religion. 413 U.S., at 783, n. 38. Our views on the constitutionality of the college tuition tax credit are buttressed by the Court's recent summary affirmation of a case involving an Establishment Clause challenge to a Tennessee program providing grants to students in public and private colleges. *Americans United for the Separation of Church and State v. Blanton*, 434 U.S. 803, (1977), *aff'g* 433 F. Supp. 97 (M.D. Tenn. 1977). The district court, relying in part on the *Nyquist* footnote mentioned above, concluded that the broad Tennessee college scholarship program, with its emphasis on the student rather than the institution, did not have the effect of favoring private or sectarian institutions over public institutions and therefore did not compromise Establishment Clause values. We believe that the same rationale is applicable to Federal tax credits for college and university tuition.

⁸That program is set out at 20 U.S.C. § 107a (1975 Supp.), as amended by 20 U.S.C.A. 1070a (1976).

emotional one of Church-State relationship, the potential for seriously divisive political consequences needs no elaboration. [413 U.S. at 797]

In conclusion, it is our opinion that both the proposed extension of the BEOG and the provisions of the Packwood-Moynihan bill which would provide relief for tuition payments to nonpublic elementary and secondary schools are unconstitutional under the decisions of the Supreme Court in *Nyquist* and *Sloan*.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

April 5, 1978

**78-20 MEMORANDUM OPINION FOR THE
GENERAL COUNSEL, NATIONAL
COMMISSION ON THE OBSERVANCE OF
INTERNATIONAL WOMEN'S YEAR**

**National Commission on Observance of
International Women's Year—Transfer of
Funds—Authority (Public Law 94-107 (1975),
89 Stat. 1003)**

This opinion confirms our earlier advice to you on whether the balance of funds of the National Commission on the Observance of International Women's Year (IWY) can be transferred to the Committee of the National Women's Conference prior to the termination of the Commission on March 31, 1978. It is our opinion that the Commission's funds may not properly be transferred to the Committee by grant, contract, or other means.

Section 8 of Public Law 94-167, 89 Stat. 1003 (1975), which continued the IWY Commission established by Executive Order No. 11832, as amended, 3 CFR 937 (1971-1975 Compilation), provides that the Commission shall continue in operation until 30 days after submitting its report to the President and the Congress, "at which time it shall terminate, but the life of the Commission shall in no case extend beyond March 31, 1978." As you know, appropriations may be used only for the purposes for which they are made and unobligated balances of funds must revert to the Treasury, 31 U.S.C. §§ 628, 701, 718. Section 9 of the statute provides that funds are available for obligation until expended without fiscal year limitation, but, of course, does not make the funds available for expenditure beyond the life of the Commission.

The Commission's grant-making authority (§ 4(6) of the Act) is limited to facilitating the organization and conduct of State and regional meetings in preparation for the National Women's Conference held in Houston last year. The function of the Committee of the Conference, established by the Conference pursuant to § 3(a)(7) of the Act, is "to take steps to provide for the convening of a second National Women's Conference."

The legislative history clearly indicates that the statutory functions of the Commission and the Committee of the Conference were to be completed no later than March 31, 1978. During the House debate on December 10, 1975, Representative Abzug explained:

I wish to make it entirely clear that this bill in no way authorizes a second conference. Should such a Conference be thought appropriate, it would have to be provided for by separate legislation. [121 Cong. Rec. H. 39713 (1975)]

The bill originally provided that the second Conference would be held in 1985, to evaluate steps taken to improve the status of women "during the 'Decade of Women,' 1975-85." Representative Steiger expressed concern that the staff for the second Conference would continue for 10 years. Representative Abzug explained:

All that the bill provides in that regard is that there will be a committee established after the Conference which will be responsible for making some continuing efforts so that the reports and the recommendations and all of those things that we are required under the bill to provide will have some implementation in the next period of time. [*Id.* at H. 39727]

Representative Steiger proposed an amendment to eliminate the language in order "to eliminate the 10-year life of the committee." [*Id.* at H. 39727], explaining:

All I am asking is that if indeed these people want to get together to see how they are doing for the next 10 years, God love them, let them get together and do it, but let them do it with their own money and not with tax money.

A substitute amendment offered by Representative Conyers to simply strike out reference to 1985 as the date of the second Conference and the reference to the Decade of Women, 1975-1985, was adopted. [*Id.* at H. 39728]

Representative Bauman proposed adding language in § 8, relating to the termination of the Commission, to provide "but in no event shall the Commission continue in operation beyond March 31, 1977," and explained:

My amendment will give the Commission time to write its report, have all the State conferences, a national conference, dismiss the bureaucracy and then make plans for another Conference, but this all would have to be done before March 31, 1977. [*Id.*]

Representative Abzug's amendment, substituting March 31, 1978, as the termination date, was adopted instead. She explained that the reason for extending the date to 1978 "was just to make sure that we could clean up, get our report in to the Congress and to the President, and be done with it." [*Id.* at H. 39729]

Because financing of the second Conference planning function of the Committee of the Conference beyond March 31, 1978, was not contemplated by the Act, neither transfer of funds nor a contract with the Committee of the Conference to finance such planning functions is authorized.

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

April 19, 1978

**78-21 MEMORANDUM OPINION FOR THE
GENERAL COUNSEL, DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT**

**Department of Housing and Urban
Development—Delegations of Authority—
42 U.S.C. §§ 3533, 3535**

This responds to your request for our opinion concerning concurrent delegations in the Department of Housing and Urban Development (HUD). Generally, they consist of the delegation of authority by the Secretary of HUD to an officer required to be appointed by the President by and with the advice and consent of the Senate¹ and to that officer's deputy appointed by the Secretary² in such fashion that the deputy may exercise the authority when both are on duty.

The Secretary's delegations to his or her principal officers³ are authorized, and indeed required, because the Department of Housing and Urban Development Act and other statutes administered by the Secretary vest most, if not all, of the functions of the Department in the Secretary.⁴ But the Act also provides that the principal officers of the Department are to:

perform such functions, powers and duties as the Secretary shall prescribe from time to time.⁵

The delegations to the deputies are based on § 7(d), 42 U.S.C. § 3535(d), pursuant to which:

The Secretary may delegate any of his functions, powers, and duties to such officers and employees of the Department as he may

¹Department of Housing and Urban Development Act (Act), § 4(a), 79 Stat. 668, as amended, 42 U.S.C. § 3533(a); *see also* 42 U.S.C. § 3533a.

²Section 7(c) of the Act, 42 U.S.C. 3535(c).

³The term "principal officer" includes the Under Secretary, the Assistant Secretaries, the General Counsel, and the Federal Insurance Administrator. Act, § 4(a). We refer to them as Assistant Secretaries.

⁴Section 4 of the Act, 42 U.S.C. § 3534; *see also, e.g.*, the National Flood Insurance Act of 1968, Pub. L. No. 90-448, Title XIII, 82 Stat. 572.

⁵Section 4(a), 42 U.S.C. § 3533(a).

designate, may authorize such successive redelegations of such functions, powers, and duties as he may deem desirable, and may make such rules and regulations as may be necessary to carry out his functions, powers, and duties.

We have been advised by your Department that the Assistant Secretaries and their deputies do not, as the result of the concurrent delegations, hold their offices jointly; the deputy does not become the coequal of the Assistant Secretary. The latter retains the responsibility for the subdivision he heads. He has the power to direct his deputy, and prevails in case of disagreement. While both parties may have the same apparent powers with respect to outsiders, there is no doubt that in the internal relations between the Assistant Secretary and his deputy the former is the superior.

The status of Assistant Secretary as the officer responsible for his subdivision is made manifest in a HUD handbook entitled "Organization of the Department of Housing and Urban Development." It places the duties and responsibilities for the several departmental subdivisions in the Assistant Secretary who heads it, and not jointly in the Assistant Secretary and his deputy who hold a concurrent delegation.⁶ Thus, the purpose of the concurrent delegations is not to modify the hierarchical organization of the Department, but rather is a matter of form and administrative convenience. It is designed above all to enable the deputy to sign documents without having to establish, possibly years later, that the Presidential appointee was absent or disabled at that time, and, second, to lessen the principal's workload, without detracting from his authority or responsibility, by authorizing the deputy to take action even if the principal is physically available.⁷

Senator Eagleton has recently challenged the legality of a concurrent delegation to the Federal Insurance Administrator and to his deputy, *see* 124 Cong. Rec. S 2521 (Daily Ed., February 28, 1978),⁸ and has introduced a bill, S. 2602 (95th Cong., 2d sess.), that would in effect prohibit the practice of concurrent delegations to an officer, whether or not he had been appointed by and with the advice and consent of the Senate.

Senator Eagleton's objection to concurrent delegations is based on the proposition that the confirmation process would be "a mockery" if, after the Senate's careful inquiry into the background and qualifications of the person nominated by the President, the same functions can be exercised by someone

⁶However, we have been advised that the subsequent concurrent delegations did not affect the allocation of responsibility set forth in the handbook.

⁷It should be noted that these results could also have been achieved by a redelegation by the Presidential appointee specifically authorized by § 7(d) of the Act; 42 U.S.C. § 3535(d).

⁸This particular concurrent delegation was revoked on February 24, 1978; 43 F.R. 7719. This revocation, however, does not resolve the problem since, according to a compilation prepared by the American Law Division of the Library of Congress, concurrent delegations have been given to the General Counsel; the Assistant Secretary for Housing—Federal Housing Commissioner; and the Assistant Secretaries for Administration, for Neighborhoods, Voluntary Associations, and Consumer Protection, and for Fair Housing and Equal Opportunity.

about whom the Senate knows nothing.⁹ In support of his position Senator Eagleton submitted a memorandum from the American Law Division of the Library of Congress which, relying on *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Williams v. Phillips*, 360 F. Supp. 1363 (D.D.C. 1973), stay denied, 482 F. (2d) 669 (D.C. Cir. 1973), states:

. . . that, although the matter is not free from doubt, the courts are likely to hold that HUD may not administratively create an office which would concurrently exercise functions with a statutorily created office which must be filed by a presidential nominee with the advice and consent of the Senate. [124 Cong. Rec. S. 2523 (Daily Ed., February 28, 1978)]

In our opinion, the two cases cited by the Library of Congress memorandum are inapplicable to the system of concurrent delegations prevailing in your Department. The portion of the opinion in *Buckley v. Valeo* pertinent to the problem at hand (pp. 124-141), holds 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 [*i.e.*, Article II of the Constitution]" (at p. 126). Under the concurrent delegations here involved a deputy holding a concurrent delegation unquestionably exercises significant authority pursuant to the laws of the United States; hence he has to be appointed pursuant to one of the procedures established by Article II, § 2, cl. 2.

The constitutional provision states that officers of the United States must be appointed by the President by and with the advice and consent of the Senate, unless in the case of inferior officers, Congress by law vests the appointment in the President alone, the courts of law, or the heads of departments. Congress has exercised its power here by vesting the appointment of inferior officers in your Department in the Secretary. Section 7(c), *supra*, authorizes the Secretary to appoint "such *officers* and employees . . . as shall be necessary to carry out the provisions of this Act and to prescribe their authority and duties." [Emphasis added.] Deputy Assistant Secretaries unquestionably are inferior officers who can be appointed by a Department head.¹⁰ The Deputy Assistant Secretaries of HUD, accordingly, have been appointed by the Secretary pursuant to a statute which authorizes him to do so. The constitutional requirement set forth in *Buckley v. Valeo* therefore has been met.

There is also the implication that a person to whom an authority equal to that of an Assistant Secretary has been delegated cannot be appointed pursuant to § 7(c), because Congress has required that the latter must be appointed by the

⁹This argument fails to realize, as will be shown in further detail below, that in confirming a Department head and even an Assistant Secretary, the Senate does not expect him to make all the decisions of the office over which he has jurisdiction, but rather that he is expected to be responsible for its general guidance and supervision.

¹⁰In some Agencies even some officers holding the rank of Assistant Secretary are appointed by the Department head. *See, e.g.*, the Assistant Attorney General for Administration (28 U.S.C. § 507); and the Assistant Secretary of Agriculture for Administration. Reorganization Plan No. 2, of 1953, § 3, 7 U.S.C. § 2201 note, and *see* 7 U.S.C. § 2213.

President by and with the advice and consent of the Senate. In that connection reliance is placed on *Williams v. Phillips, supra*. That case involved a vacancy in the office of the Director of the Office of Economic Opportunity, an advice-and-consent position (42 U.S.C. § 2941(a)), which the President had filled on an acting basis for a considerable period of time with a person who had not been confirmed. The district court held that where a statute specifically provides that a position must be filled with a person appointed by the President by and with the advice and consent of the Senate, the President cannot avoid the statutory requirement by filling it, even on an acting basis, with a person who has not been confirmed by the Senate in the absence of a statutory authorization.¹¹

The statutory structure in your Department is quite different from the one involved in *Phillips*. The only advice-and-consent position in your Department, the powers and responsibilities of which are defined by statute, is that of the Secretary. The Department of Housing and Urban Development Act, § 3(a), 42 U.S.C. § 3532(a). The other departmental positions requiring Senate confirmation are set forth in § 4(a), but the Act does not prescribe their functions and responsibilities; to the contrary, § 4(a) provides that they shall have such powers and duties as may be prescribed by the Secretary.¹² On the other hand, § 7(d) provides for a general delegation of authority vested in the Secretary. The statute thus—with the exceptions noted—does not direct what functions must be vested in officers who have been confirmed by the Senate; to the contrary, on its face it permits the Secretary to delegate any of his functions to any officer in the Department.

We are not confronted with the situation presented in *Phillips*, where a statute provided specifically that a certain position had to be filled by an officer confirmed by the Senate. Here the Act, with a few exceptions, gives the Secretary discretion as to the functions he wishes to vest in an Assistant Secretary, and those functions he wishes to retain or delegate to an officer not subject to Senate confirmation.

We are, however, willing to believe *arguendo* that where a statute requires the confirmation of an officer, it implicitly provides that a provision such as § 7(d), which authorizes the Secretary to delegate any of his functions to any officer he may designate, cannot be used to give an unconfirmed officer the same organizational position as an officer who must be confirmed. The requirement of confirmation connotes that the officer shall be the head of the departmental subdivision placed in his charge, that he shall be responsible for

¹¹The opinion of the Court of Appeals while denying a stay of the lower court's decision suggested that the President has the power to appoint an official who had not been confirmed by the Senate on an acting basis for a limited period of time.

¹²The only exception is the Assistant Secretary designated to be the Federal Housing Commissioner. He "shall administer, under the supervision and direction of the Secretary, departmental programs relating to the private mortgage market." But even this provision does not preclude the delegation of other functions to him. Again it could be implied from 42 U.S.C. § 3533a, which establishes the Office of the Federal Insurance Administrator, that Congress expected that the Secretary would delegate to him the responsibility for the insurance programs administered by HUD.

it, and that he alone shall have the overall power and authority, under the supervision of the Secretary, to direct and control the manner in which all other officers assigned to his subdivision perform their duties. On the other hand, he is not and cannot be expected to perform or even to supervise personally all the activities assigned to his subdivision as long as he retains the overall direction.¹³

A concurrent delegation that would remove a Deputy Assistant Secretary from the general supervision and control of the Assistant Secretary and give him equal powers of performance and equal control over a departmental subdivision might well be inconsistent with the confirmation requirement for the position of Assistant Secretary. However, as we have been advised by your Department, the concurrent delegations are not designed to impair the Assistant Secretary's responsibility for and control over the subdivision that is in his charge. The concurrent delegations generally refer to the Assistant Secretary's "power and authority," *i.e.*, the day-to-day execution of the statutes in his charge, whose performance must by necessity be delegated and perhaps subdelegated. The delegations do not, however, erode the Assistant Secretary's legal accountability. That responsibility is not included in the concurrent delegation to the deputy and remains vested in the Assistant Secretary.¹⁴ A comparison of the Handbook with the concurrent delegations reproduced at 124 Cong. Rec. S. 2523-2525 (Daily Ed., February 28, 1978) demonstrates the difference between the powers and authorities covered by the delegations and the hierarchical responsibilities that are not affected.

We conclude that because the Assistant Secretaries retain both responsibility for and control over the action of the Deputy Assistant Secretaries, the concurrent delegations do not conflict with the confirmation process and, therefore, constitute a valid exercise of the Secretary's authority.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

¹³In *Barr v. Matteo*, 360 U.S. 564, 573 (1959), the Court stated that "the complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation as to many functions. . . ." See also, *Cooper v. O'Connor*, 99 F. (2d) 135, 142 (D.C. Cir. 1938), cert. denied, 305 U.S. 643 (1938).

¹⁴See in this context the various delegations in 24 CFR Part 3 where it is spelled out that the several concurrent delegations to deputies contained in that Part are subject to the *general supervision* of the principal. In order to avoid future misunderstandings, it may be desirable to include similar clauses in all concurrent delegations.

May 5, 1978

**78-22 MEMORANDUM OPINION FOR THE
ASSISTANT TO THE PRESIDENT FOR
DOMESTIC AFFAIRS AND POLICY**

**Constitutional Law—First Amendment—
Flexibility in Federal Employee Work
Schedules—Religious Observance**

This responds to your inquiry concerning the constitutionality of H. R. 12040. The question is whether the bill would violate the Establishment Clause of the First Amendment. With the several important caveats discussed below, and with the few revisions which we have recommended, we think that the bill would probably not be held unconstitutional.

H. R. 12040, one of several similar bills, instructs the Civil Service Commission to promulgate regulations allowing Federal employees to take time off to participate in religious observances. The employee must make up the time used by working an equal number of hours of overtime. The bill also contemplates that agencies may grant exceptions from the time-off requirement where "necessary to efficiently carry out the mission of the agency." Because the bill has been recently introduced, there is no meaningful legislative history as yet, nor is it likely that any substantial history will be forthcoming. Therefore, in evaluating whether the bill is constitutionally sound, we have found it necessary to rely on representations made by the sponsor as to its purpose and scope.

Legislation touching upon matters of religion raises difficult questions under the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Supreme Court, especially within the past decade, has been confronted with a variety of cases in which it has been called upon to give content to these clauses. As a result, their general contours are now rather firmly settled. Laws challenged as violative of the Establishment Clause must satisfy a three-part test: (1) there must be a "clearly secular legislative purpose"; (2) there must be "a primary effect that neither advances nor inhibits religion"; and (3) the enactment must "avoid excessive government entanglement with religion." See, e.g., *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 773 (1973).

Although, as the Court often noted, the line between the constitutional considerations underlying the Establishment Clause and the purposes of the Free Exercise Clause is not always easy to identify, their central theme is that Government must maintain a relationship of "neutrality" both toward particular religious sects and toward religion generally. *See, e.g., Gillette v. United States*, 401 U.S. 437, 449 (1971). In other words, the Government may neither promote religion nor discriminate against it.

Although the general outlines are now settled, the legal questions have not become easier to resolve, and what the Court may hold concerning a particular legislative proposal is not fully predictable. The principles are understood, but their application—given the variety of situations in which these questions arise—remains uncertain.

Before turning to a consideration of the application of those general principles to H. R. 12040, it is useful to review briefly a line of recent cases interpreting the provisions of Title VII of the 1964 Civil Rights Act, which mandates nondiscrimination by public and private employers on religious grounds. 42 U.S.C. §§ 2000e—2(a)(1), 2000e(j). These provisions instruct employers to make reasonable efforts to accommodate the religious needs of their employees. On three separate occasions in recent years private employers challenging such provisions under Establishment Clause grounds have had their cases before the Supreme Court. On the first two occasions the lower court decisions were affirmed without opinion by an equally divided Court. *See, Dewey v. Reynolds Metals Co.*, 429 F. (2d) 324 (6th Cir. 1970), *aff'd*, 402 U.S. 689 (1971); *Parker Seal Co. v. Cummins*, 516 F. (2d) 544 (6th Cir. 1975), *aff'd*, 429 U.S. 65 (1976). This was followed last term by a third case in which the constitutional issue was once again presented: the Court, over the dissents of Justices Marshall and Brennan, decided the case on nonconstitutional grounds thereby avoiding again First Amendment complexities. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

In each of the above cases the Solicitor General submitted an *amicus* brief defending the constitutionality of the relevant title VII provisions. His argument supports the constitutionality of H. R. 12040, assuming it can be read in the same manner as we read the similar language in title VII.

As stated above, in addressing the three-part Establishment Clause analysis, we have found it necessary to rely on representations made by the bill's sponsor. The first representation is that the language of the bill as it will be introduced on the House floor will carry important modifications. We understand that the critical provision of the bill will read as follows:

Not later than thirty days after the date of the enactment of this section, the Civil Service Commission shall prescribe regulations providing for work schedules under which an employee whose *personal religious beliefs require the abstention from work during certain periods of time, may elect to engage in overtime work for time lost in meeting such obligations.* . . . [Emphasis added.]

The underlined language stresses that the bill is not intended to favor any particular religious sects or denominations but is aimed at accommodating

strongly held personal convictions even though they may not rest on the dogma of any organized religion or faith. Its focus is placed properly on the individual's personal evaluation rather than upon the dictates of any theistic body.

It was precisely this focus that became the basis on which the Supreme Court upheld the constitutionality—or found it unnecessary to question the constitutionality—of the conscientious-objector laws. *See, United States v. Seeger*, 380 U.S. 163 (1965); *Welsh v. United States*, 398 U.S. 333 (1970); *Gillette v. United States*, 401 U.S. 437 (1971). We also think that it was in large measure the breadth and neutrality of the similar provisions of title VII which allowed the Sixth Circuit to conclude that they were constitutionally sound, *Cummins v. Parker Seal Co.*, 516 F. (2d), at 553, 557, and which assisted the Supreme Court in avoiding the constitutional issue last term in *Hardison, supra*, at 81.

Our comments about the precise language of the bill must be read in conjunction with two other representations which we understand have been made. First, we understand that the sponsor of the bill does not regard as one of its purposes granting any form of "preference" to religion or to religious institutions. Second, we understand that the bill is premised upon considerations which the Court has heretofore regarded as neutral and secular, including a desire to promote the good will and *esprit de corps* that flow from governmental policies which accommodate and are sensitive to the personal concerns of Government employees. A governmental policy recognizing the "principle of supremacy of conscience," as this one does, would probably be held to have an adequate nonsectarian foundation. *Gillette v. United States*, 401 U.S., at 453. It will be helpful in eventual judicial review of the bill to have an expression on the record of these underlying sentiments.

A further word is necessary with respect to the first representation eschewing the notion that the bill is designed to fulfill some affirmative duty, thought by some to arise from the Free Exercise Clause, requiring the Government to "prefer" or promote religion. We believe that there is no basis for disagreeing with the statement in the dissenting opinion of Judge Celebreeze in one of the title VII cases that *if* the purpose of a law is to provide "impartial governmental assistance to all religions," it must surely be an unconstitutional intrusion on the separation of church and state. *Cummins v. Parker Seal Co.*, 516 F. (2d), at 557. *See also, McCollum v. Bd. of Education*, 333 U.S. 203, 211-12 (1948); *Zorach v. Clauson*, 343 U.S. 306, 315 (1952); *Gillette v. United States*, 401 U.S., at 450. No such contention will be proffered in support of this bill. Instead it will be viewed as a means of accommodating important interests in a neutral and nondiscriminatory manner.

Finally, we understand that supporters of H. R. 12040 have considered the question of appropriate implementation of the Civil Service Commission. To avoid an excessive entanglement, it is anticipated that the Commission will not place itself in the posture of reviewing and scrutinizing such questions as whether the employee's religious beliefs do, in fact, require absence from work. It will not be asked to examine the theology of any religious sect or

institution. Rather, its focus, as in the conscientious-objector cases, will be on the reliability of the employee's assertions. *See, e.g., United States v. Seeger*, 380 U.S., at 185. There should, then, be no need for the sort of "discriminating and complicated . . . basis of classification" that would raise serious questions about the extent of governmental entanglement with religion.¹ *See, Walz v. Tax Commission of the City of New York*, 397 U.S. 664, 698-99 (1970) (Harlan, J.); *Gillette v. United States*, 401 U.S., at 457.

With these several representations in mind, and with the language changes we have discussed, we believe that a case can be made for the constitutionality of the bill under the Establishment Clause. It is supported by valid, secular purposes; its primary effects are not to aid religion, and any such benefits can fairly be characterized as "incidental" (*see, Cummins v. Parker Seal Co.*, 516 F. (2d), at 553; *Committee for Public Education v. Nyquist*, 413 U.S., at 771-72); and in its operation it will not require the sort of continuing and detailed scrutiny that would impermissibly entangle church and state.

We may add that we have discussed our views with the General Counsel of the Civil Service Commission and he has asked that we advise you that he concurs.

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

¹Whether a statute so broadly conceived, and so susceptible to claims of abuse, is desirable as a matter of policy is a question we do not address. We have not considered the question of desirability of this bill in regards to either title VII as presently constituted or as it might be amended to accommodate further the religious needs of governmental employees.

May 9, 1978

**78-23 MEMORANDUM OPINION FOR THE
ASSISTANT ATTORNEY GENERAL, LAND
AND NATURAL RESOURCES DIVISION**

**Eminent Domain—Leaseholds—Rentals—
Economy Act Limitation (40 U.S.C. § 278(a))**

This responds to your request for our opinion on whether the United States is authorized to acquire leasehold interests in real property by proceedings under the Declaration of Taking Act, 40 U.S.C. § 258(a), where the estimated fair annual rent exceeds the limitation provided by § 322 of the Economy Act, 40 U.S.C. § 278(a). The General Services Administration (GSA) has requested the advance opinion of the Comptroller General on this question in connection with a proposed taking.

Section 322 of the Economy Act, 40 U.S.C. § 278(a), provides in pertinent part:

After June 30, 1932, no appropriation shall be obligated or expended for the rent of any building or part of a building to be occupied for Government purposes at a rental in excess of the per annum rate of 15 per centum of the fair market value of the rented premises at date of the lease under which the premises are to be occupied by the Government

GSA states that its estimate of the fair rental value of the space to be leased is greater than 15 percent of its fair market value. Plainly, GSA could not enter into a voluntary lease. The question, then, is whether there is a permissible alternative route bypassing the 15 percent limitation. We think not.

Under the Declaration of Taking Act, the Government files a declaration of taking which includes an estimate of the fair value of the property involved, and it deposits that sum in court. It acquires title when the declaration is filed, and is irrevocably committed to pay judicially fixed just compensation. *See* 40 U.S.C. § 258(a).¹ As you know, the Federal courts consistently have held that the measure of just compensation for taking a leasehold interest is its fair rental

¹*See also* 74 Cong. Rec. 779 (1931).

value. *See, e.g., Kimball Laundry Co. v. United States*, 338 U.S. 1, 7 (1949); *John Hancock Mutual Life Ins. Co. v. United States*, 155 F. (2d) 977, 978 (1st Cir. 1946); *United States v. 883.89 Acres of Land, Etc., Sebastian Co., Ark.*, 314 F. Supp. 238 (W.D. Ark. 1970), *aff'd*, 442 F. (2d) 262 (1971). To file a declaration of taking for a leasehold with fair rental value of more than 15 percent of the market value of the premises would thus, in effect, obligate the United States to pay rent at that level.

Section 3 of the Declaration of Taking Act, 40 U.S.C. § 258(c), provides:

Action under section 1 of this Act [40 U.S.C. § 258(a)] irrevocably committing the United States to the payment of the ultimate award shall not be taken unless the chief of the executive department or agency or bureau of the Government empowered to acquire the land shall be of the opinion that the ultimate award probably will be within any limits prescribed by Congress on the price to be paid.

In addition to its plain language, the legislative history of the section conclusively demonstrates that its purpose is to prohibit an agency from using § 258(a) to obligate funds in excess of any statutory limit. The Act originated from a condemnation statute for the District of Columbia which lacked such a provision. The Department of Justice proposed § 258(c) after experience with the local statute showed that condemnation proceedings initiated at the request of agencies could bypass statutory limits on expenditures. *See* H. Rept. 2086, 71st Cong., 3d sess., at 2. During the debate Representative LaGuardia explained the section's purpose as follows:

I think section 3, which the gentleman has some misgivings about, is for the very purpose of preventing abuses and undue expenditures, which the gentleman seeks to avoid. It states that before you can avail yourself of the benefit of this law, a responsible agency head must certify that the land in question will not cost, *even in condemnation*, beyond the amount authorized by Congress.² [Emphasis added.]

In short, 40 U.S.C. § 258(c) forbids an agency to initiate proceedings under 40 U.S.C. § 258(a) when it knows or believes that the result will be to require payment of more than Congress has authorized.

GSA relies primarily upon a statement in 22 Comp. Gen. 1112, 1114-15 (1942), that § 322 of the Economy Act does not, and cannot, limit an owner's constitutional right to receive just compensation for property taken by the Government. From this, it concludes that any leasehold may be acquired under the Declaration of Taking Act without regard to the limitation provided by § 322. However, this reading of the Comptroller General's decision is overly broad.

The proceeding discussed in that decision was brought under § 201 of Title II, Second War Powers Act, 56 Stat. 177. Under that section, after the Government filed the condemnation petition, "immediate possession may be taken and the property may be occupied, used, and improved for the purposes

²74 Cong. Rec. 778 (1931).

of this Act, notwithstanding any other law.” This language, said the Comptroller General, “negatives the idea that it was intended to be subject to the restrictions of § 322 of the Economy Act.” 22 Comp. Gen. 1112, 1115. Thus, the Comptroller General held that Congress did not intend that § 322 limit the amount of compensation for a condemned leasehold.

In contrast, 40 U.S.C. § 258(c) does, in our opinion, incorporate § 322 of the Economy Act. It does so, however, not as a limit on the compensation received by the owner, but as a restriction on the Government’s authority to take the property in the first instance. Once a declaration of taking has been filed, 40 U.S.C. § 258(a) commits the Government to pay whatever sum the court finds to be just compensation. Furthermore, the legislative history of the Declaration of Taking Act shows that Congress understood that a property owner’s constitutional right to just compensation was not limited by the statute.³ On the other hand, Congress also intended to protect its own constitutional power to control the expenditure of appropriated funds. It reconciled the two by forbidding the Government to incur liability for just compensation when it appeared that statutory limits on expenditure would be exceeded. Since 40 U.S.C. § 258(c) limits authority to take, and not the amount of compensation paid after taking, it is not inconsistent with the portion of the Comptroller General’s decision on which GSA relies.

To summarize, it is our opinion that 40 U.S.C. § 258(c) incorporates the restriction on the payment of rent contained in § 322 of the Economy Act and prohibits the Government from filing a declaration of taking when it knows that just compensation would exceed that limit. While the Comptroller General’s decision limits the effect of § 322 on the Government’s duty to pay just compensation, it does not purport to affect the power of Congress to prevent the Government from incurring that obligation in the first instance.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

³74 Cong. Rec. 779 (1931).

May 10, 1978

**78-24 MEMORANDUM OPINION FOR THE
ASSISTANT ATTORNEY GENERAL,
OFFICE OF LEGISLATIVE AFFAIRS**

**Bureau of Prisons—Inmates—Administrative
Segregation—Due Process**

We understand that the Department is formulating standards to guide the operation of Federal penal institutions. In connection with this effort, you have requested our opinion on what procedural protections, if any, are constitutionally required in transferring inmates from the general prison population to "administrative" segregation.¹ You also asked whether procedural requirements of such transfers are dependent upon the existence of a statutory or any other legally recognized right to remain in the general population. Finally, you asked whether such requirements would differ if the transfer were made in the context of a "classification" procedure,² rather than a disciplinary procedure.

We conclude that the Constitution requires, except in exigent circumstances, certain due process procedures prior to transferring a Federal inmate, against his or her will, from the general prison population to administrative segregation. In emergency cases, where time does not permit prior review, these procedures must be followed within a reasonable time after transfer. Further, we believe the same procedure applies whether the transfer is based upon administrative or disciplinary reasons.

The Bureau of Prisons has adopted Policy Statement No. 7400.5D, July 7, 1975, on inmate discipline that defines the term "administrative detention" as . . . the status of confinement which results in a loss of some privileges which the inmate would have if assigned to the general population. Administrative detention is to be used only where the

¹We understand that you use the term "administrative segregation" interchangeably with the term "administrative detention," as that latter term is used by the Bureau of Prisons. *See, infra*, pp. 2-3.

The Bureau of Prisons advised this Office that administrative detention is comparable, in terms of physical restrictions, to disciplinary segregation.

²By "classification" procedure, we understand you to mean a procedure, resulting in segregation, which is not instituted for disciplinary reasons.

continued presence of the inmate in the general population poses a serious threat to life, property, himself, other inmates, staff members or the security of the institution.

An inmate may be placed in administrative detention only if he poses the kind of threat described above, *and* when he:

- a. Is pending a hearing for a violation of institution rules or regulations;
- b. Is pending an investigation of a violation of institution rules or regulations;
- c. Is pending investigation or trial for a criminal act;
- d. Requests admission to administrative detention for his own protection or the staff determines that admission to or continuation in administrative detention is necessary for the inmate's own protection;
- e. Is pending transfer or is in holdover status during transfer; or
- f. Is pending classification. [*Id.*, p. 16]

Further, when an inmate is placed in administrative detention the policy statement requires that

. . . [a] memorandum detailing the reason for placing an inmate in administrative detention will be prepared and given to members of the inmate's unit or team, with a copy to the Operations Supervisor of the administrative detention unit. A copy of this memorandum will also be given to the inmate provided institutional security is not thereby compromised. [*Id.*]

Finally, involuntary administrative detention is to be used only for short periods of time. *Id.*, at 17.

In determining whether one is entitled to procedural protections against arbitrary governmental action, the threshold question is whether a property or liberty interest protected by the Constitution is at stake. *Wright v. Enomoto*, 462 F. Supp. 397 (N.D. Cal. 1976) (three-judge court), *aff'd*, 434 U.S. 1052, 1978; *Board of Regents v. Roth*, 408 U.S. 564 (1962); *Morrissey v. Brewer*, 408 U.S. 471, 481, 482 (1972). The inquiry is whether a prison inmate has a constitutionally cognizable liberty interest in remaining in the general prison population. If the answer is in the affirmative, the inmate may be stripped of that interest only if there is compliance with due process requirements commensurate with the nature of the interest involved. *Cf.*, *Cafeteria and Restaurant Union Workers v. McElroy*, 367 U.S. 886, 894-95 (1961).

The three-judge district court in *Enomoto* held (p. 402):

When a prisoner is transferred from the general prison population to the grossly more onerous conditions of maximum security, be it for disciplinary or for administrative reasons, there is severe impairment of the residuum of liberty which he retains as a prisoner—an impairment which triggers the requirement for due process safeguards. *Cluchette v. Procunier*, [497 F. (2d) 809 (9th Cir. 1974),

modified, 510 F. (2d) 613 (1975), *rev'd in part on other grounds*, 425 U.S. 308]; *United States ex rel. Miller v. Twooney*, 479 F. (2d) 701 (7th Cir. 1973), cert. denied, 414 U.S. 1146 (1974); *Allen v. Nelson*, 354 F. Supp. 505 (N.D. Cal. 1973), *aff'd*, 484 F. (2d) 960 (9th Cir. 1973). [*Id.*, p. 13]

In *Enomoto*, California claimed that the foregoing proposition was no longer viable after the Supreme Court's recent decisions in *Meachum v. Fano*, 427 U.S. 215 (1976), and *Montanye v. Haymes*, 427 U.S. 236 (1976). These cases hold that a prisoner has no constitutionally protected interest against being transferred from one institution to another even if the receiving institution has more onerous living conditions than the sending institution, unless State law or practice conditions the transfer upon serious misconduct or the occurrence of some other specified event.³

In rejecting the contention that these cases have undermined the notion that due process requirements apply where a prisoner is transferred to "grossly more onerous conditions," the court stated (p. 402):

Meachum and *Montanye* hold only that some discretionary decisions of prison officials, such as the decision to transfer a prisoner to another institution, do not result in such a substantial invasion of a prisoner's liberty interest as to trigger the need for due process protections. The Supreme Court explicitly stated that the transfer decisions did not result in confinement in maximum security segregation. *Meachum v. Fano*, *supra*, 427 U.S. 219; *Montanye v. Haymes*, *id.*, 427 U.S. 236. Contrary to defendants' contention, these opinions do not hold that a prisoner may be confined in maximum security segregation "for whatever reason or for no reason at all," regardless of the extent of the deprivation caused by such segregation.

. . . [Imposition of "solitary" confinement] represents a major change in the conditions of confinement and is normally imposed only when it is claimed and proved that there has been a major act of misconduct. Here . . . there should be minimum procedural safeguards as a hedge against arbitrary determination of the factual predicate for imposition of the sanction. [*Wolff v. McDonnell*, *supra*, 418 U.S. at 571-72, n. 19.]

The Court went on to state that *Meachum* and *Montanye* hold that if the State "imposes limits on its discretion by conditioning decisions such as prison transfers on a specific standard being met, the state creates a liberty interest which is protected by due process." *Ibid.* The court further found that

³On April 24, 1978, the Supreme Court heard oral argument in *Vitek v. Miller*, 437 F. Supp. 569, a case raising the question whether due process requirements apply where prisoners are transferred from a State correctional institution to a State mental hospital. The Court vacated the judgment and remanded the case for consideration of the question of mootness. *Vitek v. Jones*, 436 U.S. 407 (1978).

California had created such a liberty interest by virtue of the following regulation:

§ 3330. General Policy. (a) Inmates must be segregated from others when it is reasonably believed that they are a menace to themselves and others or a threat to the security of the institution. Inmates may be segregated for medical, psychiatric, disciplinary, or administrative reasons. The reason for ordering segregated housing must be clearly documented by the official ordering the action at the time the action is taken.⁴

It therefore held that the State had, with this regulation, created a liberty interest which could only be withdrawn consistent with due process guarantees. The Supreme Court affirmed, without opinion, the three-judge court ruling in February 1978 (over the dissents of the Chief Justice and Justice Rehnquist).

Policy Statement No. 7400.5D closely parallels this regulation in that it provides for administrative segregation of prisoners where they pose a threat to themselves, others, or the security of the institution. The policy statement also requires documented reasons for placing an inmate in administrative detention. Therefore, following the analysis of *Enomoto*, the Federal Government has created a liberty interest not subject to withdrawal without due process protections.⁵

Federal prisoners are entitled to due process safeguards before they are transferred to administrative detention unless exigent circumstances require immediate transfer. In these latter situations the hearing should be held at the earliest possible time thereafter. The procedures should be followed whether the transfer is for disciplinary or administrative reasons. *Enomoto, supra*, at 13.

Having concluded that the transfers in question implicate a liberty interest to which due process guarantees attach, we now turn to the question of what process is due. *Wolff v. McDonnell*, 418 U.S. 539 (1974), held that in a prison proceeding the following procedures must be observed: (1) The inmate must be given written notice of the charges against him and a reasonable time after receiving notice, no less than 24 hours, to respond. (2) There must be a written statement by the prison authorities as to the evidence relied on and the reasons for the action taken. (3) When it would not be unduly hazardous to institutional safety or correctional goals, the inmate should be allowed to call witnesses and present documentary evidence in his defense. (4) Finally, where an illiterate inmate is involved or the issue is so complex, making it unlikely that the inmate will be able to marshal and present the necessary evidence for his case, he should be allowed to solicit the aid of a fellow inmate or have the prison designate someone to assist him.

⁴Chapter 4, Article 6, of the Rules and Regulations of the California Director of Corrections.

⁵See also 18 U.S.C. § 4081, providing, *inter alia*, that penal and correctional institutions should assure proper classification and segregation of prisoners according to the nature of the offense, the prisoner's character and mental condition, and such other factors as should be considered in providing an individualized system of discipline, care, and treatment of persons committed to such institutions.

The court in *Enomoto* fashioned its judgment using the *Wolff* decision as a pattern and established procedures to govern cases in which inmates were “involuntarily confined for administrative reasons.” While neither *Wolff* nor *Enomoto* should be read as imposing inflexible requirements under all circumstances, those cases should be regarded as the necessary starting point in drafting appropriate departmental standards.

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

May 16, 1978

**78-25 MEMORANDUM OPINION FOR THE
ASSISTANT ATTORNEY GENERAL,
OFFICE OF LEGISLATIVE AFFAIRS**

**Bureau of Prisons—Inmates—Administrative
Segregation—Supplemental Views**

On May 10, 1978, we responded to your request for our opinion on what procedural protections are constitutionally required in transferring inmates from the general prison population to "administrative" segregation.¹ You asked that we supplement our opinion by answering the question whether the standards that we think apply to Federal penal institutions also apply to State institutions. We conclude that the same standards would apply.

The constitutional considerations involved in State prisoner transfers are the same as those in Federal prisoner transfers. However, Policy Statement No. 7400.50 applies only to Federal prisoners. Further, although we have no statistics, it is unlikely that every State has adopted provisions relating to prisoners that create constitutionally protectable liberty interests in remaining in the general prison population. Thus, the question is whether a liberty interest derives from the Constitution in the absence of such provisions.

The holding of *Enomoto* answers this question in the affirmative. Distinguishing *Meachum v. Fano* and *Montanye v. Haymes*, the three-judge court concluded that due process safeguards are triggered when prisoners are transferred from the general prison population to maximum security. These safeguards were held to apply whether the transfer is for disciplinary or administrative reasons. In so holding, the court ruled that the due process clause, standing alone, provided the fundamental basis for its decision. 462 F. Supp., at 402. The court proceeded to note that the California regulation provided additional authority for its holding.

The Supreme Court affirmed *Enomoto* without opinion. Thus, there is no way of determining whether the affirmance was based upon either or both of the reasons stated in the lower court's opinion. However, we find *Enomoto's* reasoning persuasive on both points and, therefore, we conclude that, even

¹See opinion 78-23.

absent provisions creating a liberty interest in remaining in the general prison population, transfers therefrom to maximum security trigger constitutional safeguards.²

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

²Complete unanimity is absent even within the Supreme Court on the precedential value of summary affirmances of decisions falling within the Supreme Court's appellate, as opposed to certiorari, jurisdiction. Where appeals are from three-judge court decisions, the Court has little choice but to affirm or reverse. (In these cases the Court cannot dismiss for want of a substantial Federal question because to do so would suggest that the issue raised by the plaintiff was without merit so as not to fall within the statutory jurisdiction of three-judge courts.) Nevertheless, an affirmance makes the lower court decision the "law of the land" until such time as the Supreme Court speaks again on the question.

May 16, 1978

**78-26 MEMORANDUM OPINION FOR THE
DIRECTOR, GENERAL GOVERNMENT
DIVISION, PRESIDENT'S REORGANIZATION
PROJECT**

**Reorganization Act—Reorganization Plan
Dealing With More Than One Logically
Consistent Subject Matter (5 U.S.C. § 905(a)(7))**

This responds to your request for our opinion concerning the interpretation to be given the phrase “dealing with more than one logically consistent subject matter” found in § 905(a)(7) of title 5. This limitation on the content of reorganization plans was first introduced in 1971, *see* 85 Stat. 576, in order to prevent the submission of plans which contain “a variety of miscellaneous actions, completely unrelated to one other. . . .” S. Rept. No. 485, 92d Cong., 1st sess. at 5 (1971); H. Rept. No. 146, 92d Cong., 1st sess. at 3 (1971). The legislative history of the 1977 version of the Reorganization Act sheds additional light on the question:

Logically consistent subject matter could include: a broad purpose of government such as Economic Development or Natural Resources; a series of similar programs in different agencies, such as Income Maintenance; all functions of a single agency; or crosscutting but identical functions, such as Administration, Budget, legal counsel, et cetera. [H. Rept. No. 105, 95th Cong., 1st sess. at 20 (1977)].

While this broad language may itself be indefinite, it provides at least some guidance concerning the phrase’s intended meaning.

LEON ULMAN
*Deputy Assistant Attorney General
Office of Legal Counsel*

May 17, 1978

**78-27 MEMORANDUM OPINION FOR THE
GENERAL COUNSEL, CIVIL SERVICE
COMMISSION, AND THE GENERAL
COUNSEL, PRESIDENT'S
REORGANIZATION PROJECT**

**Presidential Appointees—Removal Power or
Disciplinary Action—Constitutional Law
(Article II, § 2, cl. 2)**

This responds to your inquiry whether Congress has the constitutional power to authorize any Federal officer or agency to remove, or otherwise to discipline, Presidential appointees performing executive functions. Pursuant to the Civil Service Commission Reform bill, S. 2640, now pending in Congress, the Merit Systems Protection Board will have no authority to take any action with respect to allegations of misconduct by such Presidential appointees. Instead, the bill instructs the Special Counsel to report the results of any investigation of noncompliance by "Presidential appointees" directly to the President, thereby leaving to the President the discretion to take whatever action he or she deems appropriate (§§ 1206(h)(2), 1206(i)). You ask whether Congress could amend the bill to confer upon the Board the authority to take disciplinary action against such appointees.

First, we address the question of removal. The Supreme Court held in *Myers v. United States*, 272 U.S. 52 (1926), that the Constitution does not grant to Congress any authority to regulate the removal of executive officers appointed by the President. The essence of the Court's ruling is contained in the following statements:

The power of removal is incident to the power of appointment, not to the power of advising and consenting to appointment, and when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal. [*Id.*, at 122]

The condition upon which the power of Congress to provide for the

removal of inferior officers rests is that it shall vest the appointment in some one other than the President with the consent of the Senate. Congress may not obtain the power and provide for the removal of such officer except on that condition. If it does not choose to entrust the appointment of such inferior officers to less authority than the President with the consent of the Senate, it has no power of providing for their removal. [*Id.*, at 162]

Accordingly, when an official performing executive functions is appointed by the President with the advice and consent of the Senate, he or she "will be subject to removal by the President alone, and any legislation to the contrary must fall as in conflict with the Constitution." *Id.*, at 163.

The bill, however, exempts from the removal authority of the Merit Systems Protection Board all "Presidential appointees." Although not defined in the bill, this term includes both (1) executive officers appointed by the President with the advice and consent of the Senate, and (2) those "inferior officers" whose appointment the Congress has vested in the President alone (Art. II, § 2, cl. 2, of the Constitution). Although the *Myers* case is concerned with the first class of executive officers, *dictum* suggests that Congress has no greater authority to remove officers appointed by the President alone than it would have over those subjected to the advice and consent process. 272 U.S., at 161-62.¹ We find no reasonable basis for distinguishing between the two types of appointees.²

The second question presented is whether Congress may confer on the Board the authority to take disciplinary action against Presidential appointees. Disciplinary sanctions contemplated under the bill are: demotion, debarment from Federal employment for a stated period, suspension, reprimand, or civil

¹The pertinent language addressing this issue in the *Myers* opinion is:

Whether the action of Congress in removing the necessity for the advice and consent of the Senate, and putting the power of appointment in the President alone, would make his power of removal in such case any more subject to Congressional legislation than before is a question this Court did not decide in the *Perkins* case [*United States v. Perkins*, 116 U.S. 483]. Under the reasoning upon which the legislative decision of 1789 was put, it might be difficult to avoid a negative answer, but it is not before us and we do not decide it.

²There is another issue that arises whenever the *Myers* analysis is examined. It relates to the third method outlined in Art. II, § 2, cl. 2, for appointing inferior officers; that clause provides that "inferior officers" may, if Congress desires, be appointed by the heads of departments. The question is whether, and to what extent, the removal of those officers may be restricted. The Court in *Myers* made clear that Congress "may prescribe incidental regulations controlling and restricting . . . the exercise of the power of removal" of inferior officers who perform executive functions and who have been appointed by heads of departments. The Court in *Myers* also said that Congress could not "draw to itself or to either branch of it, the power to remove or the right to participate in the exercise of that power." *Id.*, at 161. The question might be raised if by assigning removal authority to the Merit Systems Protection Board—an independent agency vested with quasi-judicial power—Congress has in some fashion "drawn to itself" the power of removal. The short answer lies in the Court's analysis in *Weiner v. United States*, 357 U.S. 349, 355-56 (1958), in which the Court made clear that independent regulatory commissions are to be independent not only from the Executive but from Congress. Under the circumstances, we have little doubt about the propriety of the Board taking disciplinary action, including removal, with respect to such inferior officers.

penalty. § 1207(a). We are aware of no precedents controlling this question, but we believe that Congress does have, and must have, some authority to prescribe sanctions against executive branch officials who act in violation of existing law. The more difficult issue is whether the imposition of those sanctions can be assigned to a body over which the President has limited control. Insofar as Presidential appointees are concerned, we doubt that Congress may take from the President the ultimate authority to act in that manner. This would surely disrupt the appointee's ability to carry out the instructions of the President. The power to demote, suspend, or debar a Presidential appointee from Federal employment carries with it the power to supervise the appointee's actions; more importantly, to take this power away from the President would interfere with the President's duty faithfully to execute the laws. The conclusion is perhaps more doubtful with respect to lesser actions such as reprimand and civil penalties, but here again it is quite likely that disruptions would result. For a Presidential appointee to set aside the time to prepare for a hearing and to follow through with the administrative process contemplated by the bill might be a substantial interference with the President's necessary direction and control of such officials. It would also cloud the line of authority between the President and his subordinates.

The *Myers* holding proceeded from the view that the power to remove is implicit in the power to appoint and must necessarily be retained by the President if he is to fulfill his constitutional obligation faithfully to execute the laws. A different conclusion cannot be drawn with respect to the imposition of what might be seen as less drastic sanctions.

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

May 18, 1978

78-28 MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION

**Immigration and Nationality Act (8 U.S.C. § 1329)—
Eluding Inspection—Criminal Offense—Venue**

This is in response to your memorandum concerning prosecutions under 8 U.S.C. § 1325 following the recent unreported decision of the Idaho Federal District Court in *United States v. Wissel*, which by implication held that that provision did not create a continuing offense. Specifically, you inquire whether prosecutions for "eluding inspection" under 1325¹ may continue to be brought in the district where a defendant is apprehended, as authorized by 8 U.S.C. § 1329,² or whether the Sixth Amendment³ bars such proceedings except in a district at or near the border where the inspection should have taken place. We concur in the conclusion reached in your memorandum that because of the Sixth Amendment requirement, § 1329 is unconstitutional since it authorizes prosecution in a district other than the district at or near the border where the inspection should have taken place. Accordingly, we recommend that § 9-73.110 of the United States Attorneys' Manual be amended.

¹8 U.S.C. § 1325 provides:

Any alien who (1) enters the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall . . . be guilty of a misdemeanor. . . .

²8 U.S.C. § 1329 provides in pertinent part:

The district courts of the United States shall have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this subchapter. It shall be the duty of the United States attorney of the proper district to prosecute every such suit when brought by the United States. Notwithstanding any other law, such prosecutions or suits may be instituted at any place in the United States at which the violation may occur or at which the person charged with a violation under section 1325 or 1326 of this title may be apprehended. . . .

³The Sixth Amendment's guarantee that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." complements that found in Article III, § 2, cl. 3, that "The Trial of all Crimes. . . shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed."

Absent a continuing offense rationale, you have indicated that an “eluding inspection” violation cannot be deemed to have been committed in the district in which the defendant is found. It follows, then, as a constitutional matter, that all prosecutions charging violations of § 1325 must be brought in the district where the offense was committed, *i.e.*, where the alien entered the country or where the inspection station to which he was to have reported is located.

There is no way in which the clear language of § 1329 can be reconciled with this conclusion; it appears instead that its specification of the venue of § 1325 prosecutions as “at any place . . . at which the person charged with [such] a violation may be apprehended” is merely an anomaly produced by inartful drafting. Section 1329 was originally enacted in 1917,⁴ before illegal entry had been criminalized rather than simply made a ground for deportation. The language of this early version⁵ differed in minor but significant ways from the current version adopted as part of the overall 1952 revision of the immigration laws. While the earlier language appeared to apply to both criminal and civil proceedings and might be read to provide for proceedings where the person charged “may be found” only in the latter case,⁶ the 1952 revision subtly but significantly changed this focus by authorizing prosecutions only under certain enumerated criminal provisions (namely, §§ 1325 and 1326) in districts where the violator is “apprehended,” not simply where he might be found, *i.e.*, reside. This modification makes good sense in relation to § 1326, which was simultaneously revised to render criminal the act of being “found” in the United States where an alien had once been arrested and deported or excluded and deported.⁷ Thus, under the revised version of § 1326, if an alien who had previously been deported was found in a particular locality he could properly be prosecuted in that locality because in that context his presence there constituted a continuing offense that had begun

⁴See Act of February 5, 1917, ch. 29, § 25; 39 Stat. 893.

⁵This version read as follows:

That the district courts of the United States are hereby invested with full jurisdiction of all causes, civil and criminal, arising under any of the provisions of this Act. That it shall be the duty of the United States district attorney of the proper district to prosecute every such suit when brought by the United States under this Act. Such prosecutions or suits may be instituted in any place in the United States at which the violation may occur or at which the person charged with such violation may be found. . . .

⁶The Report of the Senate Judiciary Committee on the Immigration and Naturalization Systems of the United States undertaken in preparation for the 1952 revision of the immigration laws read the earlier version very narrowly. (“The section is rarely invoked and it is the general rule that violations must be prosecuted in the judicial district in which the offense was committed.”) S. Rept. No. 1515, 81st Cong., 2d sess., at 650 (1950).

⁷The earlier version of § 1326 (8 U.S.C. § 180 (a) (1940 ed.)) had provided:

If any alien has been arrested and deported in pursuance of law. . . and if he enters or attempts to enter the United States. . . he shall be guilty of a felony. . . .

Section 1326 now provides:

Any alien who—

- (1) has been arrested and deported or excluded and deported and thereafter
- (2) enters, attempts to enter, or is at any time found in, the United States. . . shall be guilty of a felony. . . .

when he reentered. Although the difficulties inherent in proving where an alien had entered the country so as to establish the proper venue for a prosecution under § 1325 would appear to be no less than those which spurred the revision of § 1326,⁸ no comparable amendment to the former section was recommended;⁹ the alteration that was accomplished in amending § 1329 to refer to that section as well, therefore, lacked the necessary foundation to have an equivalent effect.

We cannot reconcile the language of § 1329 with the requirement that prosecutions be undertaken in the district where the crime was committed; thus, we recommend that no future prosecutions under § 1325 be instituted except in such districts. We suggest the following language, which might serve as a substitute for that now included in the last sentence of § 9-73.110 of the United States Attorneys' Manual:

Cases charging the defendant with eluding examination or inspection should be prosecuted in the district where the inspection station to which the alien was to have reported on entering the United States is located.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

⁸Deputy Attorney General Peyton Ford, testifying in 1951 during hearings on earlier versions of immigration legislation ultimately adopted the following year, stated that § 276 of the bill (§ 1326) . . . adds to existing law by creating a crime which will be committed if a previously deported alien is subsequently found in the United States. This change would overcome the inadequacies in existing law which have been observed in those cases in which it is not possible for the Immigration and Naturalization Service to establish the place of reentry, and hence the proper venue, arising in prosecutions against a deported alien under the 1929 act. [*Joint Hearings Before the Subcommittees of the Committees on the Judiciary on S. 716, H.R. 2379, and H.R. 2816*, 82d Cong., 1st sess., at 716 (1951)]

⁹See n. 8, *supra*. No mention at all was made of the provisions that ultimately became §§ 1325 and 1329.

May 18, 1978

**78-29 MEMORANDUM OPINION FOR THE COUNSEL
TO THE PRESIDENT**

**Department of Energy—Vacancies (42 U.S.C.
§ 7342)—Vacancy Act (5 U.S.C. §§ 3345-3349)—
De Facto Officers**

This responds to your request for our opinion concerning the legality of the designation of certain acting officials by the Secretary of Energy.

The Department of Energy was established by the Department of Energy Organization Act of August 4, 1977, Pub. L. No. 95-91, 91 Stat. 565, 42 U.S.C. § 7101 *et seq.* (Act) involving a merger of the Federal Energy Administration (FEA), the Energy Research and Development Administration (ERDA), and the Federal Power Commission, and including the transfer of certain functions to the new Department from several other Government agencies (Title III of the Act). When the Department became operative on October 1, 1977, pursuant to Executive Order No. 12009, 42 F.R. 4267 (1977), the Secretary was the only officer required to be appointed by and with the advice and consent of the Senate, who had been confirmed. The President filled eight other positions that required Senate confirmation, on a temporary basis pursuant to § 902 of the Act, 42 U.S.C. § 7342.¹ He designated officers of the predecessor agencies, who had been appointed by and with the advice and consent of the Senate and who had held those positions immediately prior to the effective date of the Act,² to perform the duties of the vacant Department of Energy offices to which they were assigned.

¹Section 902 provides:

“In the event that one or more officers required by this Act to be appointed by and with the advice and consent of the Senate shall not have entered upon office on the effective date of this Act [October 1, 1977] the President may designate any officer, whose appointment was required to be made, by and with the advice and consent of the Senate, and who was such an officer immediately prior to the effective date of the Act, to act in such office until the office is filled as provided in this Act. While so acting such persons shall receive compensation at the rates provided by this Act for the respective offices in which they act.”

²Section 703 of the Act, 42 U.S.C. § 7293, terminated the predecessor agencies of the Department of Energy and the advice and consent offices in those agencies as of the date when the Department of Energy became operative.

For four positions—the offices of General Counsel, Inspector General, Assistant Secretary for Conservation and Solar Applications, and Assistant Secretary for Energy Technology—we were advised by officials at the Department of Energy that no officers were available in the predecessor agencies who had been appointed by and with the advice and consent of the Senate. We were also informed that, since Presidential designations under § 902 from personnel of the predecessor agencies were not possible, the other four positions were filled by the Secretary of Energy designating the Acting General Counsel, the Acting Inspector General of the Federal Energy Administration, the Acting Administrator for Solar, Geothermal, and Advanced Energy Systems, and the Acting Administrator for Nuclear Energy of ERDA to perform the duties of the respective vacant offices on an acting basis. The Acting Assistant Secretary for Defense Programs, who was one of the officers designated by the President pursuant to § 902 of the Act, resigned effective January 1, 1978. The Secretary thereupon designated the Acting Assistant Secretary's deputy to act in his place.

The President submitted nominations to the Senate for four of the eight positions requiring Senate confirmation.³ He indicated his intention to nominate an Assistant Secretary for Defense Programs, but, as of this writing, no such nomination has been formally submitted to the Senate. The nominees for the positions of General Counsel, Inspector General, and Assistant Secretary for Energy Technology were recently confirmed by the Senate. Their appointments are imminent, in which event the designation of the acting officials will terminate. The Acting Assistant Secretary for Energy Technology designated by the Secretary was the only acting official nominated by the President to the same position.

I.

The authority of the remaining five officers to act under secretarial designation has been questioned on the ground that it is inconsistent with § 902, *supra*. It is asserted that § 902 establishes the exclusive manner in which interim appointments to fill initial vacancies in the Department of Energy may be made. We disagree. Concededly, § 902 was designed to give the President the authority to make interim designations in the Department of Energy where possible, but we doubt that Congress intended to tie his hands and compel him to make what could be unsuitable designations to the detriment of the newly established Department, or to preclude any other method to fill those positions.

³The nominations were as follows: Assistant Secretary for Energy Technology, September 13, 1977, resubmitted January 26, 1978; General Counsel, September 22, 1977, resubmitted January 25, 1978; Assistant Secretary for Conservation and Solar Applications, January 25, 1978; Inspector General, April 20, 1978.

There is no legislative history to guide us concerning the scope of § 902. However, the statutory language, "the President may designate any officer," indicates that the section was intended to confer on the President a discretionary power to be exercised in conformity with the statutory spirit and purpose, rather than a binding and exclusive method of appointment.

When Congress provided for the establishment of the Department of Energy, it was a reasonable assumption that officials on the Assistant Secretary level, requiring Senate confirmation, would hold positions requiring highly specialized technical expertise, and that some of the nominations to those positions would go to persons who had held corresponding advice and consent positions in some of the predecessor agencies of the Department. At the same time, it was reasonable to expect that some of the nominations might not be acted upon by the time the Department became operative. The question of effectively providing for interim appointments was one that could not be ignored.

The existing procedures provided for in the Vacancy Act, 5 U.S.C. §§ 3345-3349, were not adapted to initial vacancies in a newly established department of the character of the Department of Energy. Section 3346 provides that in the case of a vacancy in a bureau of an Executive department⁴ the first assistant shall act unless the President makes a designation under § 3347. It is difficult to envisage a "first assistant" before there is an Assistant Secretary.⁵ Section 3347 provides an alternative method of filling a vacancy. The President can designate a department head or any other officer appointed by and with the advice and consent of the Senate to perform the duties of the vacant office. That procedure, however, was unsuited to the situation confronting the Department of Energy for several reasons.

As mentioned above, § 703 of the Act terminated, as of the date when the Department became operative, its predecessor agencies and the positions in those agencies that were either expressly authorized by law or compensated according to the Executive Schedule. Since the officers in those agencies who had been appointed by and with the advice and consent of the Senate, lost that status under § 703 of the Act, the President could not designate them as acting officers under § 3347. If § 3347 were controlling, his choice would have been limited to those already serving in advice and consent positions in other agencies. This would mean not only that it would be extremely difficult to find acting officers possessing the necessary technical qualifications for the highly specialized positions in the Department of Energy, but that, even then, the designees could only perform those duties on a part-time basis.

Temporary filling of positions on the Assistant Secretary level by persons who both lacked the necessary expertise and could not devote their entire time to the new positions could readily have presented difficulties for the new

⁴A departmental unit headed by an Assistant Secretary or comparable officer normally constitutes a bureau.

⁵Moreover, the Attorney General has interpreted the term "first assistant" as applying only to officials whose appointment has been specifically provided for by statute. 19 Op. A.G. 503 (1890); 28 Op. A.G. 95 (1909).

Department during the crucial first months of its existence. Moreover, under the Vacancy Act *ad interim* designations could last for only 30 days. Experience amply demonstrates that under present conditions, Senate confirmation frequently takes longer than that.⁶

In our view, § 902 was designed by the Congress to avoid Vacancy Act problems by enabling the President to make *ad interim* designations of experienced officials of the predecessor agencies who could serve on a full-time basis even if they no longer held advice and consent positions, and to permit them to serve more than 30 days if necessary. The last sentence of § 902 indicates that Congress envisaged that the interim designations under that section would primarily be given to former advice and consent officers who had served in the predecessor agencies. The acting official would receive compensation at the rate provided by the Act for the office in which he would serve on an acting basis. It was, we believe, intended to take care of the following problem: The designee originally was an advice and consent official in a predecessor agency and as such received his compensation under Executive Schedule, 5 U.S.C. §§ 5311-5316. When the President designated him to be an acting official, he was no longer an advice and consent officer because § 703 of the Act had abolished his former position; hence, he would have to be appointed to a position that did not require Senate confirmation and which carried a lower rate of compensation.⁷ Section 5535 of title 5 prevents an acting official from receiving compensation in addition to that of his regular position. The last sentence of § 902 thus has the effect of avoiding a reduction in compensation during the confirmation proceedings.

In short, § 902 is specifically addressed to the situation in which the President intended to appoint an advice and consent officer of a predecessor agency of the Department of Energy to a corresponding position in that Department, but confirmation prior to the activation of the Department was remote.

Section 902 was not a complete solution, however. When the Department of Energy became operative, it appeared that there was no suitable advice and consent officer, either in a predecessor agency or elsewhere, whom the President could designate to serve full time in an acting capacity in the several advice and consent positions in the Department of Energy. If such officers had been available, undoubtedly the President would have resorted to the authority given him by § 902.

A mechanistic interpretation of § 902 leads to a result that is so extreme we cannot attribute it to the Congress. It would mean that the President was required to designate an advice and consent officer, presumably from another agency, regardless of his qualifications and expertise and his ability to devote himself full time to the office, or he could make no designation to the office at

⁶In the situation at hand, the confirmation of the General Counsel and of the Assistant Secretary for Energy Technology took about 7 months.

⁷*I.e.*, at a supergrade, rather than in the Executive Schedule usually applicable to positions at the Assistant Secretary level.

all. Either alternative would be inconsistent with the legislative purpose of § 902 that vacancies in the Department of Energy were to be filled during the critical first months of its existence on a full-time basis by officials who possessed the necessary expertise. To interpret § 902 as providing the *exclusive* method of filling initial vacancies is inconsistent with its discretionary language and would defeat its purpose. It is a familiar axiom of construction that a statute is not to be interpreted in a manner at variance with its policy and purpose. *United States v. American Trucking Associations, Inc.*, 310 U.S. 534, 543 (1940); *United States v. Biscaglia*, 420 U.S. 141, 149-150 (1975).

II.

We therefore conclude that § 902 was not intended to establish the sole method of filling vacancies in the Department of Energy. The President would have utilized that provision if all its underlying premises could be met, *i.e.*, if qualified advice and consent officers were available who could devote themselves full time to the acting position. We do not believe that the section is to be construed to mean that such vacancies may not be filled at all on a temporary basis, if no advice and consent officers were available.

Having disposed of the question of the Vacancy Act, we believe that the Secretary of Energy could only resort to his general powers and responsibilities, including those under 5 U.S.C. § 301,⁸ which he did by designating the most experienced officials in the departmental subdivisions in which vacancies existed. That procedure, while not specifically authorized by § 902, would carry out what we regard as its purpose—that the vacancies should be filled by qualified persons on a full-time basis. To keep the Government running calls for the designation of acting officials to fill vacancies in the absence of express statutory authority, *see, Williams v. Phillips*, 482 F. (2d) 669, 670-671 (D.C. Cir., 1973). Similar considerations should be applicable where the strict requirements of the pertinent statute cannot be met due to unforeseen circumstances.

In *Phillips* the court, however, stated that such extrastatutory designations could not last indefinitely unless nominations were submitted to the Senate within a reasonable time. It suggested that the 30-day provision of the Vacancy Act, 5 U.S.C. § 3348, should serve as a guideline; hence, the designee in question was no longer entitled to hold his position when no nomination had been submitted for more than 4 months after the vacancy

⁸Section 301 provides:

“The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.”

had occurred.⁹ If the *Phillips* decision is used as a guideline, the designations by the Secretary of the Acting General Counsel and the Acting Assistant Secretary for Energy Technology met the requirements of that decision. The nominations for the two offices were submitted to the Senate in September 1977, *i.e.*, even before the Department of Energy was activated. Their extended acting service has been due exclusively to delay in the confirmation process.

The case of the Acting Assistant Secretary for Conservation and Solar Applications is perhaps not so clear, since a nomination for that office was submitted to the Senate only on January 25, 1978, nearly 4 months after the vacancy occurred. However, the reasonableness of the delay in submitting a nomination must also be measured against the difficulty of finding suitable candidates for the complex and responsible positions in the Department of Energy and the uncertainties created by delays in the enactment of the pending energy legislation. Moreover, it should be noted that the delay in the nomination included the period from December 15, 1977, to January 19, 1978, during which the Senate was in recess between the two sessions of the 95th Congress and during which no nominations could be made. Similar observations also apply to the offices of the Assistant Secretary for Defense Programs and the Inspector General.

III.

We turn to the legality of the actions taken by Department of Energy officials in an acting capacity, if it should be thought that some or all of them did not hold their positions *de jure*. Under the *de facto* officer rule, one who performs the duty of an office under color of title is considered a *de facto* officer, his acts are binding on the public, and third persons may rely on their legality. *McDowell v. United States*, 159 U.S. 596, 601-602 (1895); *United States v. Royer*, 268 U.S. 394 (1925); *United States v. Lindsley*, 148 F. (2d) 22, 23 (7th Cir. 1945), cert. denied, 325 U.S. 858. Indeed, the authority of *de facto* officers can normally be challenged only in special proceedings in the nature of *quo warranto* brought directly for that purpose. *United States ex rel. Dorr v. Lindsley*, *supra*; *United States v. Nussbaum*, 306 F. Supp. 66, 68-69 (N.D. Cal., 1969); Mechem, *Public Office and Officers*, §§ 343, 344 (1890).

The basis for the *de facto* officer principle is the avoidance of any cloud on the validity of public acts and on the right of the public to rely on them despite subsequent questions as to the authority of the officer to exercise the powers of the office.¹⁰ A typical case of a *de facto* officer is one who continues to serve

⁹An aggravating element in the *Phillips* case was that the acting officer was charged with seeking to impair the operation of the agency. That consideration is absent in the case at hand. To the contrary, the purpose of the designations here was made in order to further the administration of the Act and to comply with the spirit of § 902.

¹⁰Another rationale for the rule is that one should not be able to submit his case to an officer and accept his ruling if it is favorable, but challenge the officer's authority if the ruling is unfavorable. *Glidden Company v. Zdanok*, 370 U.S. 530, 535 (1962).

after his term of office has expired. *See, Waite v. Santa Cruz*, 184 U.S. 302, 322-324 (1902); *United States v. Group*, 333 F. Supp. 242, 245-246 (D. Maine 1971), *aff'd*, 459 F. (2d) 178, 182 n. 12 (1st Cir. 1972). This consideration is of particular importance in view of the position of the Court of Appeals in *Phillips* that the initially valid designation of an acting official may be vitiated by an excessive delay in the submission of a nomination.

IV.

Finally, the question has been raised whether some of the acting officials have received the compensation for the position in which they act pursuant to the last clause of § 902. We have been advised by the Department of Energy that these acting officials have not been compensated at the Executive level rates provided in § 902, but rather have been paid the appropriate compensation under the General Schedule salary scale which applies to positions in the excepted service.

V.

We have read the opinion of the Acting Comptroller General dated May 16, 1978, addressed to this problem. We agree with it to the extent that it concludes that the Vacancy Act is inapplicable to the situation at hand by its own terms. We disagree, however, with his result. The opinion ignores the considerations we have found decisive. The Acting Comptroller General has concluded that § 902 provides the exclusive method for making interim appointments at the Department of Energy, but has not addressed the factors which have led us to a contrary conclusion. The nonmandatory language of the section, the absence of guiding legislative history, and its plain purpose convince us that Congress did not intend to make it an exclusive method. Section 902 was written into the law because Congress believed that advice and consent positions in the Department of Energy should not remain vacant during the crucial initial months, and that interim designations should be given to persons having the requisite expertise and who could serve on a full-time basis.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

May 26, 1978

**78-30 MEMORANDUM OPINION FOR THE GENERAL
COUNSEL, CIVIL SERVICE COMMISSION**

**Presidential Appointees—Removal Power—Civil
Service Reform Act—Constitutional Law (Article II,
§ 2, cl. 2)**

This is in response to your request for our opinion concerning whether the Special Counsel of the Merit Systems Protection Board (the Board), under the proposed Civil Service Reform Act of 1978, S. 2640, may be protected by statute from removal by the President except for specific cause. We have considered this specific question, as well as related issues, and we conclude that, under the framework contemplated by the present bill, the Congress may not properly limit the grounds for removal of the Special Counsel by the President. Under the Constitution, such an officer must be removable at will by the President.

The Special Counsel is to be appointed by the President, with the advice and consent of the Senate, for a term of 7 years. § 1204. The question of Congress' authority to delimit the President's power to remove an official so appointed depends on the official's functions. *Wiener v. United States*, 357, U.S. 349, 353 (1958); *Humphrey's Executor v. United States*, 295 U.S. 602, 631 (1935).

The functions of the Special Counsel are set forth in both the draft bill, see § 1206, and the reorganization plan which divides the functions of the Civil Service Commission between two agencies, the Office of Personnel Management and the Board. The primary duties of the Special Counsel will be: (1) to receive and investigate allegations of prohibited practices specified in § 2302(b) and § 1206(f)(1); and (2) to initiate, and prosecute before the Board, cases involving prohibited practices.

In our opinion, the Special Counsel's functions are executive in character. Even though the Special Counsel will present cases only to the Board, his or her role in investigating and prosecuting prohibited practices is much the same as that of a U.S. Attorney or other Federal prosecutors. His duties are directed at the enforcement of the laws, a function that the Constitution entrusts to the

executive branch. *See, Buckley v. Valeo*, 424 U.S. 1, 138 (1976); *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928).

Because the Special Counsel will be performing largely executive functions, the Congress may not restrict the President's power to remove him. While there are no judicial decisions dealing with an official such as the Special Counsel, the principle of *Myers v. United States*, 272 U.S. 52 (1926), applies. That decision, even though subsequently delimited to apply only to "purely executive officers," *Humphrey's Executor v. United States*, *supra*, at 627-28, still stands for the proposition that officials exercising primarily executive functions must be removable at the discretion of the President. The decision in *Morgan v. Tennessee Valley Authority*, 115 F. (2d) 990, 993-94 (6th Cir. 1940) that *Humphrey's Executor* did not apply to an agency that exercised "predominantly an executive or administrative function," further supports this position.

We recognize that the Special Counsel is in a somewhat different position than most officials performing executive functions. First, as "Special Counsel of the Merit Systems Protection Board," § 1204, he is affiliated with a quasi-judicial body whose officials may be legitimately exempted from removal at the pleasure of the President. The Special Counsel is to be appointed to a defined term by the President with the advice and consent of the Senate, and he is to perform his vested responsibilities without any direction from the Board. This statutory scheme is modeled on the statute provided for the General Counsel of the National Labor Relations Board (NLRB), 29 U.S.C. § 153(d), and the purposes here are the same as those underlying that statute—*i.e.*, to give the Special or General Counsel independence to investigate and prosecute complaints of prohibited practices. *See* H. Rept. No. 510, 80th Cong., 1st sess., 37 (1947), discussing the status of the NLRB General Counsel. The Special Counsel has a status independent of and apart from the Board.¹ By virtue of this status, he is divorced from the Board's quasi-judicial functions; he will not participate in any adjudicatory decisions; nor is he intended to serve the Board, any more than any other prosecutor, in making those decisions. It is only the quasi-judicial or quasi-legislative nature of an official's duties that justify a measure of independence from Presidential control (*Wiener v. United States*, *supra*, at 353; *Humphrey's Executor v. United States*, *supra*, at 629-30). We believe that the Special Counsel's affiliation with a quasi-judicial body does not justify a status independent of the President.

Further, because the Special Counsel will be performing functions similar to those performed by "prosecuting" attorneys in other independent agencies, he may be granted the same measure of independence. For example, the appointment and supervision of those employed by the Federal Trade Commission lies with the Chairman of that Commission, Reorganization Plan No. 8 of

¹Indeed, the Special Counsel will be even more independent of the Board than the General Counsel is with respect to the NLRB. Unlike the statute pertaining to the NLRB General Counsel, 29 U.S.C. § 153(d), there is no provision in the bill or the reorganization plan that expressly provides that the Board may assign functions or duties to the Special Counsel.

1950, § 1(a), 15 F.R. 3175, 64 Stat. 1264, May 24, 1950, and presumably restrictions on the President's power of removal flow from this provision, the status of the FTC, and the decision in *Humphrey's Executor v. United States*, *supra*. However, these attorneys are appointed and supervised by the Chairman and they partake in the FTC's quasi-judicial and quasi-legislative functions. Even if they perform some executive functions—*i.e.*, investigation or prosecution—they do so “in the discharge and effectuation of [the FTC's] quasi-legislative or quasi-judicial powers.” *Humphrey's Executor v. United States*, *supra*, at 623. The Special Counsel does not operate in this context. He is independent of the quasi-judicial body and bears the same relation to that body as Federal prosecutors bear to the Federal courts. While he will prosecute cases before the Board, he does not partake in any way in the quasi-judicial process.²

We believe that the Congress may not condition the President's power to remove the Special Counsel. The decisions in *Humphrey's Executor* and *Weiner* do not extend to an officer appointed by the President with the advice and consent of the Senate, who performs predominantly executive functions and who, by reason of the statutory scheme, is independent of the quasi-judicial process.

LARRY A. HAMMOND
Acting Assistant Attorney General
Office of Legal Counsel

²There is an additional Special Counsel's function that is purely executive in nature. Sections 1206(h)(2) and (i) specify that the Special Counsel is empowered to investigate allegations of prohibited personnel practices by Presidential appointees. When he finds sufficient evidence to justify disciplinary action he should report the matter directly to the President. While this may not be a major part of his duties, it is one of his most important responsibilities. It is also one that is unquestionably executive in nature, involving no nexus with the quasi-judicial functions performed by the Board.

June 5, 1978

**78-31 MEMORANDUM OPINION FOR THE DEPUTY
ASSISTANT ATTORNEY GENERAL, CRIMINAL
DIVISION**

**Intelligence—Warrantless Electronic Surveillance—
Common Carriers (18 U.S.C. §§ 2510-2520, 47
U.S.C. § 605)**

This is in response to your request for our opinion regarding the legality of cooperation by common carriers in providing the Federal Government with technical assistance in connection with warrantless electronic surveillance for foreign intelligence purposes.¹ We conclude that such activities are not prohibited by § 605 of the Communications Act, 47 U.S.C. §605; nor do they violate chapter 119 or title 18, United States Code, 18 U.S.C. §§ 2510 -2520, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended.

I. Section 605 of the Communications Act

Section 605 provides in pertinent part that:

Except as authorized by chapter 119, Title 18, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpoena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority. . . .

¹You have indicated that only limited technical assistance, not interception and disclosure *per se*, would be requested. The scope of this memorandum is limited accordingly.

This language, found in the first sentence of § 605, is designed to regulate the conduct of communications personnel. S. Rept. No. 1097, 90th Cong., 2d sess., 1968 U.S. Code Cong. & Admin. News, at 2197. The remainder of the section deals only with radio communications. The current language was adopted in 1968 as § 803 of the Omnibus Crime Control and Safe Streets Act. The provision was “not intended merely to be a reenactment of [old] section 605. . . [but was] intended as a substitute.” *Id.*, at 2196.

Although the 1968 changes have in certain respects rendered pre-1968 judicial interpretations inapplicable,² certain interpretations may have continued vitality. Thus, in *United States v. Russo*, 250 F. Supp. 55, 58-59 (E.D. Pa. 1966), the court treated the first clause of § 605 as applicable under only very narrow circumstances, unlike those here at issue, indicating that the statute’s language was

. . . designed to apply to persons such as telegram or radiogram operators, who must either learn the content of the message or handle a written record of communications in the course of their employment. Clause 1 recognizes that the integrity of the communication system demands that the public be assured that employees who thus come to know the content of messages will in no way breach the trust which such knowledge imposes on them.

Also significant is the holding of the Court of Appeals for the Third Circuit, in *United States v. Butenko*, 494 F. (2d) 593 (*en banc*), cert. denied *sub nom.*, *Ivanov v. United States*, 419 U.S. 881 (1974), that in its earlier form the provision was simply not intended to reach wiretapping undertaken pursuant to Presidential order for foreign intelligence purposes. The provision of technical assistance for this limited purpose, using similar reasoning, would also seem to fall outside the current scope of § 605, particularly since an express disclaimer of such coverage appears in 18 U.S.C. § 2511(3), discussed below, which was enacted at the same time.

The language and legislative history of § 605, as amended, provide additional support for the view that the provision presents no bar to a carrier’s technical assistance in connection with warrantless intelligence taps. In its present form, the section simply bars divulgence of the existence or content of wire communications. Cooperation in identifying lines or otherwise providing necessary technical information to facilitate Government taps does not involve disclosures of this sort. Moreover, the legislative history of the amended provision states that “[T]he regulation of the interception of wire and oral communications in the future is to be governed by proposed new chapter 119 of title 18, United States Code [18 U.S.C. §§ 2510-2520].” S. Rept. No. 1097, *supra*, 1968 U.S. Code Cong. & Admin. News, at 2196. Rather than assuming that Congress intended separately to regulate interceptions (in title 18) and disclosures (in § 605), the courts have indicated that Congress effectively

²Significantly, under the earlier version the restrictions contained in the second through fourth sentences of the current provision, now applicable only to radio communications, also governed communications by wire.

shifted control of electronic surveillance operations to 18 U.S.C. §§ 2510-2520. See, *United States v. Falcone*, 505 F. (2d) 478, 482 (3d Cir. 1974), cert. denied, 420 U.S. 955 (1975). Cf., *Hodge v. Mountain States Telegraph & Telephone Co.*, 555 F. (2d) 254, 264 (9th Cir. 1977) (Hufstедler, J., concurring) (pen registers not barred by chapter 119 of title 18 and therefore not covered by § 605).

For these reasons we believe that communication carriers who provide limited technical assistance in connection with Presidentially authorized warrantless electronic surveillance undertaken for foreign intelligence purposes will not violate § 605 of the Communications Act.

II. 18 U.S.C. §§ 2510-2520 (Title III)

Section 2511(1) of title 18, United States Code, forbids interception of wire or oral communications, use of various devices to intercept oral communications, disclosure of the content of wire or oral communications, and use of the contents of such communications knowing that they have been obtained through illegal interception. "Intercept" is defined as "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device" 18 U.S.C. § 2510(4). Identification of particular telephone lines or provision of other technical assistance, knowing that another intends to undertake electronic surveillance, does not fall within the statutory language. Only actual interception or disclosure is forbidden, not lesser acts facilitating such consequences. The possibility that such conduct would be treated by a court as falling within the terms of the statute for the purpose of aiding or abetting or of a conspiracy charge where the electronic surveillance is not authorized pursuant to title III. cf., *White v. Weiss*, 535 F. (2d) 1067 (8th Cir. 1976) (private detective's participation in interception by providing equipment and instruction in its installation held basis for liability under § 2520), appears to be foreclosed by reference to the limitation on the scope of the title III prohibitions appearing in 18 U.S.C. § 2511(3).

Section 2511(3) provides:

Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. . . .

The Supreme Court, in *United States v. United States District Court (Keith)*, 407 U.S. 297 (1972), a case involving warrantless surveillance of a domestic organization allegedly inclined to attack and subvert the existing structure of Government, interpreted this provision not as a grant of authority to conduct warrantless national security searches, but as a disclaimer of congressional intent to define Presidential powers in matters affecting national security. In this limited context, the Court held that the Fourth Amendment warrant requirement did apply; in so doing, however, it appeared to assume that title III limitations were inapplicable, for it discussed at some length the possible variations in procedural requirements that might be permissible under the Constitution. *Id.*, at 322-323. The *Keith* decision provides guidance concerning the President's constitutional power to undertake surveillance, while at the same time it construes § 2511(3) broadly to exempt from coverage under title III Presidential action with regard to both national security and foreign intelligence surveillance, at least in the absence of further action by Congress.³ The Court's clear language supports this interpretation: "We therefore think the conclusion inescapable that Congress only intended to make clear that the Act simply did not legislate with respect to national security surveillance." *Id.*, at 306.

An alternative interpretation of *Keith* was suggested in *Zweibon v. Mitchell*, 516 F. (2d) 594 (D.C. Cir. 1975), cert. denied, 425 U.S. 944 (1976). In an opinion joined by Judges Leventhal and Robinson, and concurred in by Judge Bazelon, Judge Wright there asserted that the requirements of title III should be deemed to apply as fully as possible where warrantless electronic surveillance at the behest of the President was not found to be constitutionally authorized; specifically where such surveillance was directed against members of a domestic organization whose activities could affect the foreign relations of the United States, but who were neither agents of nor collaborators with a foreign power.⁴ At the same time, both Judge Wright and the other members of the court were careful to stress that the case did not require them to resolve the more difficult question left undecided in *Keith*, see 407 U.S. at 322, i.e., whether a warrant is constitutionally required in connection with electronic surveillance of collaborators or agents of a foreign power. Courts of appeal in three circuits have squarely held that warrants are not required under those circumstances. *United States v. Buck*, 548 F. (2d) 871 (9th Cir. 1977); *United States v. Butenko*, *supra*; *United States v. Brown*, 484 F. (2d) 418 (5th Cir. 1973). See also, *United States v. Humphrey*, Crim. No. 78-25-A (E.D. Va., March 31, 1978), memorandum opinion at 8. In light of this clear and growing authority, we do not believe that Judge Wright's analysis in *Zweibon* regarding

³In a recent decision, the U.S. District Court for the Eastern District of Pennsylvania adopted this view, holding that if it is established that surveillance is conducted for national security purposes, no right of action based on failure to comply with title III will lie, despite the conclusion that in that case there was a constitutional requirement that a warrant be procured. See *Burkhart v. Saxbe*, 448 F. Supp. 588 (E.D. Pa. 1978).

⁴Judges Wilkey, MacKinnon, and McGowan rejected this interpretation of *Keith*; Judge Robb, concurring in the result but not in the relevant portion of the Wright opinion, found title III applicable on the facts presented. It is therefore far from clear that the Wright view should be seen as controlling.

the breadth of application to be given the provisions of title III will be extended to render telephone companies liable for providing technical assistance in connection with even constitutionally flawed surveillances undertaken pursuant to Presidential authorization for foreign intelligence purposes.⁵

Given our conclusion that the proscriptions of title III do not apply where, pursuant to Presidential authorization, Federal agents carry out warrantless electronic surveillance for foreign intelligence purposes, we must nevertheless inquire whether telephone companies which provide necessary technical assistance at the request of the Government are equally exempt from liability. It would seem to follow that Congress, intending to leave unimpaired the President's authority in this regard, did not seek to bar cooperation by telephone companies where needed to accomplish the permitted end. *Cf.*, *Fowler v. Southern Bell Telephone & Telegraph Co.*, 343 F. (2d) 150, 156-157 (5th Cir. 1965) (recognizing a common law immunity from liability for telephone companies engaged in assisting immune State officials). This notion is strengthened by analogy to § 2511(2)(a), as amended in 1970, to provide that

(ii) It shall not be unlawful under this chapter for an officer, employee, or agent of any common carrier to provide information, facilities, or technical assistance to an investigative or law enforcement officer who, pursuant to this chapter, is authorized to intercept a wire or oral communication.

Section 2511(2)(a) and two other contemporaneous amendments to title III⁶ specifically provide for limited assistance in connection with court-authorized⁷ electronic surveillance which complies with the procedural protections of title III, but do not in terms immunize carriers who provide such limited assistance

⁵See *Burkhart v. Saxbe*, *supra*. It should, nevertheless, be noted that the *Humphrey* decision may be viewed as raising particular questions in this regard. There, the court held that a warrant was required by virtue of the Fourth Amendment once the gathering of evidence of criminal activity, rather than the accumulation of foreign intelligence information, had become the primary purpose of Presidentially authorized electronic surveillance, but did not analyze the issue in terms of title III. We do not believe that such a recognition of the Government's obligation under the Constitution to seek a judicial warrant at this later time should affect the liability of telephone companies under title III. Section 2511(3) states that nothing in chapter 119 of title 18 (title III) is to be read as limiting the President's constitutional power to undertake foreign intelligence surveillances as necessary. Interpreting title III to render telephone companies liable for providing necessary technical assistance whenever an investigation later changes in character (without their knowledge) so that a warrant is constitutionally required would effectively deter their participation at the outset. This result is questionable since it impinges upon the carefully preserved and judicially recognized Presidential power with regard to foreign intelligence surveillances.

⁶See 18 U.S.C. § 2518(4) (on request of the applicant for a court order compelling a communications common carrier to furnish information, facilities, and technical assistance in connection with court-authorized interception); 18 U.S.C. § 2520 (expanding the defense of good faith reliance on court orders or on the provisions of § 2518(7) to include reliance on court order or "legislative authorization").

⁷The Supreme Court in *Keith*, as earlier discussed, found that § 2511(3) did not constitute congressional "authorization" of warrantless intelligence surveillance undertaken pursuant to Presidential order.

in connection with Presidentially authorized surveillance.⁸ At the same time, however, they do demonstrate Congress' intent not to penalize under title III those who render this sort of aid in connection with electronic eavesdropping that is lawfully undertaken.⁹ The decision in *Halperin v. Kissinger*, 424, F. Supp. 838 (D.D.C. 1974), provides some support for this view insofar as the district court there found a telephone company which had provided limited technical assistance while acting in reliance on the representations of Government officials to be without liability.¹⁰ Based on the above reasoning and this limited authority, we therefore believe that it may properly be concluded that title III imposes no criminal or civil liability on common carriers which provide limited technical assistance pursuant to a Government request in connection with Presidentially authorized electronic surveillance for foreign intelligence purposes.

III. Conclusion

There have been few judicial decisions considering the liability of telephone companies which provide technical assistance in the conduct of foreign intelligence surveillances. However, based on relevant statutory provisions, we believe that no liability is likely to be found under 47 U.S.C. § 605, as amended. Additionally, it is our view that liability for rendering technical assistance at least in connection with Presidentially authorized warrantless electronic surveillance of an agent or collaborator of a foreign power could not be founded on the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

⁸The amendments were adopted in 1970 as part of the District of Columbia Court Reorganization Act. Their limited legislative history indicates that they were intended merely to clarify Congress' intent under title III of the 1968 Act. 115 Cong. Rec. 37192-93 (1970) (remarks by Senator McClellan). The Supreme Court has held that the amendments were primarily designed to overrule the Ninth Circuit's decision in *Application of the United States*, 427 F. (2d) 639 (1970), which had concluded that district courts lack power to compel a telephone company to assist in a wiretap conducted pursuant to title III. *United States v. New York Telephone Co.*, 434 U. S. 159, 177, n. 25 (1977). The use of such language to clarify Congress' intent in enacting title III does not compel the conclusion that the earlier version of the law did not permit the rendering of such assistance. Cf., *ibid.*

⁹That limited technical aid was expressly sanctioned does, however, by implication, suggest that direct telephone company involvement in interception and disclosure was not at the same time approved.

¹⁰It is unclear which of these distinguishable grounds and statutory bases (§ 2511(2)(a), concerning technical assistance, or § 2520, concerning good faith reliance) served ultimately as the basis for the court's ruling.

June 6, 1978

**78-32 MEMORANDUM OPINION FOR THE
COMPTROLLER OF THE CURRENCY**

**Comptroller of the Currency—Litigation
Authority (15 U.S.C. § 78u(d))**

This responds to your request for our concurrence in your position that the Comptroller of the Currency may appear in United States courts by its own counsel to carry out its functions under the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* (Exchange Act). We concur for the reasons outlined below.

In 1964, Congress enacted amendments to the Exchange Act which gave certain powers to the Comptroller with respect to securities of banks over which he has jurisdiction. 15 U.S.C. § 781(i). The sections of the Exchange Act which the Comptroller is authorized to administer and enforce as to bank securities include those relating to registration, reports, proxies, and trading by insiders. 15 U.S.C. §§ 781, m, n(a), n(c), n(d), n(f), and p.

The amendments vested in the Comptroller "the powers, functions and duties" possessed by the Securities and Exchange Commission (SEC) to administer these Exchange Act provisions as to pertinent bank securities. Among the powers vested in the SEC to enforce these provisions is the right to bring actions in the Federal district courts to enjoin violations. 15 U.S.C. § 78u(d). Although, as a general rule, the conduct of litigation to which an agency of the United States is a party is reserved to officers of the Department of Justice, 28 U.S.C. § 516, it has been held that the SEC has the authority to bring actions on its own behalf. *S.E.C. v. Collier*, 76 F. (2d) 939 (2d Cir. 1935); *S.E.C. v. Sloan*, 535 F. (2d) 679, 681 (2d Cir. 1976), cert. denied, 430 U.S. 966 (1977). Thus, the statute, standing by itself, seems plain enough with respect to the delegation of litigation authority to the Comptroller.

It is worth noting, moreover, that this interpretation is clearly supported by the legislative history. At the time of the amendment the SEC submitted an explanatory memorandum to Congress stating that "the Federal banking agencies . . . would have the power . . . to investigate, *institute suits to enjoin*, and forward evidence to the Attorney General from criminal prosecution under section 21[15 U.S.C. 78u(d)]." [Emphasis added.] *Investor Protection, Part 2*,

Hearings Before a Subcommittee of the House Interstate and Foreign Commerce Committee, 88th Cong., 1st and 2d sess. at 1365 (1964). Because the question you have asked is, in essence, whether litigating authority for bank securities in connection with the relevant Exchange Act provisions remains with the SEC or whether it has been delegated to the Comptroller, we consider the views of the Commission particularly relevant.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

June 16, 1978

**78-33 MEMORANDUM OPINION FOR THE GENERAL
COUNSEL, INTERSTATE COMMERCE
COMMISSION**

**Interstate Commerce Commission—Furnishing
Information to Congress (49 U.S.C. § 322(d))**

This is in response to your inquiry whether employees of the Interstate Commerce Commission (the Commission) may, under section 222(f) of the Interstate Commerce Act (the Act), 49 U.S.C. § 322(f), furnish documents or information to a member of the staff of the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary without fear of possible criminal liability under § 222(d) of the Act, 49 U.S.C. § 322(d). We conclude that, subject to the conditions set forth herein, employees of the Commission may lawfully furnish to members of the Subcommittee staff information protected by § 222(d).

1. The first question presented is whether the exception provided in § 222(f) applies to the prohibition against the release of "any fact or information" set forth in § 222(d). We think that § 222(f) clearly provides an exception to the prohibition established in § 222(d). Section 222(f) provides in pertinent part:

Nothing in this part shall be construed to prevent the giving of such information . . . to any officer or agent of the Government of the United States or of any State, Territory, or District thereof, in the exercise of his power.

The phrase "nothing in this part" refers to the entire Motor Carrier Act of 1935, Pub. L. No. 255, August 9, 1935 (49 Stat. 543), which was included at the time of its enactment as "Part II" of the Interstate Commerce Act. Because § 222(d) is a provision in "Part II," it would seem that the exception in § 222(f) applies to the latter provision as it does to all other provisions of "Part II." In addition, we think the exception provided for "such information" in § 222(f) is broad enough to reach the prohibition on the disclosure of "any fact or information" in § 222(d). We thus believe § 222(f) provides an exception to whatever prohibition exists by reason of § 222(d).

2. You also ask whether a subcommittee investigator or attorney is an "officer or agent of the Government of the United States" within the meaning

of § 222(f). We believe that such subcommittee officials come within the meaning of this phrase.

Our conclusion is based on both the language of § 222(f) and its legislative history. Simply relying on the plain meaning of the above phrase leads us to the conclusion that Congress and those who work for the Congress (or its committees) are included. This reading of the statute is supported by the evident intent displayed by other parts of § 222(f). That provision allows disclosure

. . . in response to any legal process issued under the authority of any court, or to any officer or agent of the Government of the United States or of any State, Territory, or District thereof, in the exercise of his power, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crimes.

The Congress, by allowing disclosure in response to legal process issued by a court, or to *any* officer or agent of the United States Government or of any State, territory, or district, or to *any* officer or other duly authorized person seeking information for purposes of prosecution, evidently intended that the prohibitions against disclosure in "Part II" of the Act should not interfere with the orderly processes of government. This underlying purpose clearly extends to the various activities conducted by the Congress and thus § 222(f) allows disclosure of the information subject to § 222(d) in order to facilitate the Congress' legitimate activity.

The meager legislative history of § 222(f) also supports this conclusion. As noted above, § 222(f) was enacted as part of the Motor Carrier Act of 1935, but no explanation was offered concerning Congress' intent underlying that provision. However, its language closely tracks, and apparently was modeled on, the language of § 15(13) of the Interstate Commerce Act, 49 U.S.C. § 15(13). *See* S.Rept. No. 433, 76th Cong., 1st sess. p. 15 (1939). This latter statute was originally added by floor amendment to the Mann-Elkins Act, Pub. L. No. 309, June 18, 1910 (36 Stat. 553) in a context, like that of the present situation, of providing an exception to a prohibition on the disclosure of information. Its intent, as set forth by Senator Burton, the sponsor of the amendment, was as follows:

Mr. President, very briefly I will explain the evil or injustice which this amendment is intended to prevent. It has developed in judicial proceedings in two instances that certain great industrial combinations maintain information bureaus. Those engaged in the work of these bureaus, by divers methods, none of which, I think, can be rated as commendable, obtain from railway corporations, or through their agents, information relating to the business of their minor competitors. For example, a great establishment ascertains that a competitor intends to ship into the State of Ohio, Indiana, or Texas a consignment of merchandise. The amount of that merchandise becomes known to the information bureau, and the name of this

consignee is also ascertained. Using this information, a strenuous effort is made to prevent the competitor from disposing of his merchandise, from making any sales in the locality to which the shipment is made. An unfair advantage is thus given to the larger establishment, which enables it, in a measure, to crush out competition. I have a mass of information on this subject, if there is a desire that I should read it. [45 Cong. Rec. 7207 (1910)]

It seems clear from this statement that Congress' concern in this area was the use of information to secure unfair competitive advantages, *see, United States v. Baltimore and Ohio Railroad Co.*, 319 F. Supp. 1103, 1105 (D. Md. 1970); *Commonwealth v. White*, 179 S.W. 469, 470 (Ct. App. Ky. 1915); *Mandell v. Long Island Railroad Co.*, 227 I.C.C. 278 (1938); nothing was said to indicate that the provisions were designed to impinge on the processes of Government. As such, since §§ 222(d) and (f) appear to be founded on this same concern, we believe that it would distort Congress' purposes underlying these provisions to conclude that they operate to preclude Congress from obtaining access to information held by the Commission. This suggests that the term "officer or agent of the Government of the United States" in § 222(f) is meant to include officials acting on behalf of Congress.

Finally, the limited case law interpreting provisions comparable to § 222(d) and (f) further supports this result. The courts generally have not interpreted these comparable provisions to impose inflexible or rigid requirements on access to information subject to a general prohibition on disclosure. Rather, the decisions have allowed access to such information by Federal agencies. *See, D.G. Bland Lumber Co. v. N.L.R.B.*, 177 F. (2d) 555, 558 (5th Cir. 1949); by State agencies, *State v. Atchison, T. and S. F. Ry. Co.*, 221 P. 259, adhered to by 225 P. 1026 (S. Ct. Kan. 1923-1924); by those seeking discovery in litigation, *Delta Steamship Lines, Inc. v. National Maritime Union*, 265 F. Supp. 654 (E.D. La. 1967); and even by ordinary citizens acting pursuant to a State statute, *State v. Seaboard Air Line Ry.*, 84 S.E. 283 (S. Ct. N. Car. 1915), *aff'd*, 245 U.S. 298 (1917). In view of the rather large number of individuals or entities to whom the courts have allowed access to information under provisions comparable to § 222(d) and (f), we think it unreasonable to conclude that these latter provisions should be applied restrictively. Again, this suggests that Congress is not barred from access to the information protected by § 222(d).

We thus conclude, for the foregoing reasons, that the term "officer or agent of the Government of the United States" includes officials acting on behalf of the Congress.

3. The fact that information protected by § 222(d) may be released to officials acting on behalf of the Congress does not mean, however, that they have unlimited access to such information. The statute grants access to the information to an officer or agent of the Government of the United States "in the exercise of his power." In our view, this condition necessarily calls for an inquiry whether the officials seeking access to information protected by § 222(d) are acting within the proper limits of their authority.

We have found no court decisions with respect to either § 222(f) or analogous provisions that are helpful in determining when an official acting on behalf of the Congress would satisfy the requirement "in the exercise of his power." We believe, however, that decisions of the courts on the legitimate scope of congressional power to investigate are instructive on this question. They set forth a number of factors bearing on Congress' power of investigation. See generally, *Wilkinson v. United States*, 365 U.S. 399, 408-09 (1961); *Ashland Oil, Inc. v. F.T.C.*, 409 F. Supp. 297, 305 (D.D.C. 1976), *aff'd*, 548 F. (2d) 977 (D.C. Cir. 1976). For example, the investigation must be pursuant to a valid legislative purpose, e.g., *Quinn v. United States*, 349 U.S. 155, 161 (1955); *Ashland Oil, Inc. v. F.T.C.*, *supra*, at 305, n. 8; the congressional entity conducting the investigation must be authorized by Congress to do so, e.g., *Gojack v. United States*, 384 U.S. 702, 716 (1966), and must conduct the investigation in the manner prescribed by the Congress, e.g., *Liveright v. United States*, 347 F. (2d) 473 (D.C. Cir. 1965); *Shelton v. United States*, 327 F. (2d) 601 (D.C. Cir. 1963); and the specific inquiries must be pertinent to the subject matter of the investigation. *Wilkinson v. United States*, *supra*; *Ashland Oil, Inc. v. F.T.C.*, *supra*. Any determination whether these criteria are met depends upon the facts and circumstances of each particular investigation, and we thus are not in a position to address such questions here. Rather, since these questions must be answered in a specific factual context, it is for the Commission to ascertain whether a subcommittee staff member seeking information is acting "in the exercise of his power" in a particular situation.

LEON ULMAN

Deputy Assistant Attorney General
Office of Legal Counsel

June 20, 1978

**78-34 MEMORANDUM OPINION FOR THE GENERAL
COUNSEL, DEPARTMENT OF AGRICULTURE**

**Advisory Committees—Federal Meat Inspection Act
(21 U.S.C. § 661(a)(4))—Poultry Products Inspection
Act (21 U.S.C. § 454(a)(4))**

This responds to your Department's request for our opinion regarding the role and composition of certain advisory committees provided for under the Federal Meat Inspection Act and Poultry Products Inspection Act. Two issues are presented: (1) whether the Secretary of Agriculture must appoint and consult with advisory committees prior to undertaking certain kinds of actions under the Acts; and (2) whether committee membership must be limited to members of State agencies as expressly provided in the Acts, or whether the Federal Advisory Committee Act would permit a more broadly representative membership. We conclude that, despite the language of discretion used in connection with the appointment of advisory committees under the two Acts, where specific reference is made in mandatory terms to consultation by the Secretary with such committees, creation and subsequent consultation is a necessary predicate to the specified action by the Secretary. We also conclude that so long as State agencies are adequately represented, membership may be broadened in keeping with the Federal Advisory Committee Act to insure balanced representation of pertinent interest in light of the functions of the committees. We do not, however, believe that Title XVIII of the Food and Agriculture Act of 1977 is applicable.

I. Need for Advisory Committees

Section 301(a)(4) of the Federal Meat Inspection Act (FMIA) (81 Stat. 597, 21 U.S.C. § 661(a)(4)), enacted in 1967, reads as follows:

(4) The Secretary [of Agriculture] may appoint advisory committees consisting of such representatives of appropriate State agencies as the Secretary and the State agencies may designate to consult with him concerning State and Federal programs with respect to meat inspection and other matters within the scope of this Act, including

evaluating State programs for purposes of this Act and obtaining better coordination and more uniformity among the State programs and between the Federal and State programs and adequate protection of consumers.

Its counterpart, § 5(a)(4) of the Poultry Products Inspection Act (PPIA) (82 Stat. 797, 21 U.S.C. § 454(a)(4)), enacted the following year, contains identical language with respect to poultry product inspection programs. Various provisions of the two Acts are, however, formulated in language which on its face appears to require the Secretary to consult with an appropriate advisory committee concerning the following matters: prescription of labeling and definitional standards relating to covered articles,¹ issuance of regulations concerning handling of meat and meat products by retail establishments with minimal involvement in interstate commerce² imposition of inspection, recordkeeping, and registration requirements and regulations on persons not engaged in commerce concerning transportation and importation of dead, dying, disabled, or diseased animals,³ provision of advice, technical and financial assistance to State programs,⁴ and Federal action to prevent production of adulterated meat or poultry for distribution within a State.⁵ Two interpretations of this mixture of discretionary and mandatory language are nevertheless possible: (1) creation of and consultation with such a committee is a condition precedent to undertaking actions by the Secretary of the sort specified; or (2) consultation is required only where a committee has, in the Secretary's discretion, been created. While the former view derives support from the Acts' structure and legislative history, no comparable case can be made for the latter.

At the outset, no practical explanation is apparent to support the latter interpretation, which assumes that Congress intended the mandatory use of an optional committee only if the committee has been created. Indeed, it seems clear that no important policy objective would be served on a uniform basis by such a haphazard approach, if the latter interpretation is adopted. It is, moreover, noteworthy that a rational pattern may be discerned from the scattered references to mandatory use of advisory committees; Congress apparently intended to insure proper inspection of meat and poultry where interstate commerce was implicated, but also endeavored to limit Federal intrusion where the States themselves had matters under control. To the extent that it does not impede necessary Federal action, such mandatory use of advisory committees is in keeping with this goal.

The legislative history supports this view. For the most part the committee reports simply track the language of the statutes as enacted. *See* H. Rept. No. 653, 90th Cong., 1st sess. 7, 17, 26 (1967); S. Rept. No. 799, 90th Cong., 1st sess. 16, 17 (1967) (FMIA); H. Rept. No. 1333, 90th Cong., 2d sess. 18, 22,

¹*See* FMIA § 7(c), 21 U.S.C. § 607(c); PPIA § 8(b), 21 U.S.C. § 457(b).

²*See* FMIA § 24, 21 U.S.C. § 624; (no PPIA counterpart).

³*See* FMIA § 205, 21 U.S.C. § 645; PPIA § 11(e), 21 U.S.C. § 460(e).

⁴*See* FMIA § 301(a)(3), 21 U.S.C. § 661(a)(3); PPIA § 5(a)(3), 21 U.S.C. § 454(a)(3).

⁵*See* FMIA § 301(c)(1), 21 U.S.C. § 661(c)(1); PPIA § 5(c)(1), 21 U.S.C. § 454(c)(1).

25 (1968); S. Rept. No. 1449, 90th Cong., 2d sess. 15 (1968) (PPIA). At some points, however, they are more revealing. Thus, referring to § 11(e) of the Poultry Products Inspection Act, the House committee stated:

The inclusion of interstate operations within these surveillance programs is possible when it is determined that the State does not have and does not exercise authority at least equal to that of the Federal Government over records, registrations, and distribution of '4-D' poultry, its parts or carcasses. This action could be taken only after consultation with appropriate State authorities.

A similar concern that the Federal Government do what was necessary without preempting the jurisdiction of the States over interstate commerce is apparent in the House committee report on the Federal Meat Inspection Act. See H. Rept. No. 653, *supra*, at 5. Based on this evidence, we believe that the provisions of the two Acts should be read literally so as to require consultation with State advisory committees before the Secretary undertakes the specified actions.

II. Composition of Advisory Committees

As the previously quoted language of § 301(a)(4) of the Federal Meat Inspection Act and its counterpart, § 5(a)(4) of the Poultry Products Inspection Act, reveals, advisory committees are to be composed of "such representatives of appropriate State agencies as the Secretary and the State agencies may designate." While this language on its face appears to contemplate committees comprised of official State representatives, it should also be noted that the statute is rather general in its terms and does not specify the number of committee members or reveal any special concern for the manner of their selection so long as the States' interests are represented.

It is our view that this statutory mandate may be observed while at the same time complying with the spirit of the Federal Advisory Committee Act. It should first be noted that the Act's rather fragmented structure provides grounds for some doubt as to whether, on its face, it is to apply in the rather unusual circumstances here presented. Section 5(c), 5 U.S.C. App. I § 5(c) (1976), provides that the guidelines regarding balanced membership contained in subsection (b) of that section are to be followed, to the extent they are applicable, by the President, agency heads, and other Federal officials in "creating" advisory committees. Since, as we have previously concluded, the advisory committees here in question must be available for mandatory consultation by the Secretary, they have, in effect, a duration provided by law, and should not have been subject to the termination provisions of § 14(a)(2)(B) of the Act. Thus, the Secretary will, in effect, need to reconstitute, rather than "create," the committees, and § 5(c) of the Federal Advisory Committee Act, on its face, would not appear to control.

Nevertheless, the intent of Congress in enacting the Advisory Committee Act leads us to believe that allowing for more broad-based membership while retaining adequate representation of State agencies would be appropriate. Section 4(a) of the Act provides: "The provisions of this Act. . . shall apply to

each advisory committee except to the extent that any Act of Congress establishing any such advisory committee specifically provides otherwise." Coupled with this intent that the Act be given a broad and uniform application is Congress' repeatedly stated concern that committees henceforth are to provide balanced representation. *See* H. Rept. No. 1017, 92d Cong., 2d sess. 6, 10, 15 (1972); S. Rept. No. 1098, 92d Cong., 2d sess. 5 (1972).

The spirit of the Advisory Committee Act and its requirement of balanced membership "in terms of the points of view represented and the functions to be performed by the advisory committee," 5 U.S.C. App. I § 5(b)(2), in no way conflict with the provisions of the FMIA and PPIA with regard to committee composition and function. Therefore, in our judgment, when the committees are reconstituted, more broadly representative members might properly be included in addition to representatives of State agencies.

There is the further question whether advisory committees under the FMIA and PPIA would be subject to Title XVIII of the Food and Agriculture Act of 1977, 7 U.S.C. § 2281 *et seq.* Since the definition of "advisory committee" for purposes of title XVIII excludes committees "established by statute" and since nothing in that Act's legislative history suggests a contrary reading (*see* S. Rept. No. 180, 95th Cong., 1st sess. 182 (1977); H. Rept. No. 599, 95th Cong., 1st sess. 247 (1977)), we conclude that the provisions of § 1805(c), 7 U.S.C. § 2285(c), relating to membership balance on Department of Agriculture "advisory committees," do not apply.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

June 23, 1978

**78-35 MEMORANDUM OPINION FOR THE GENERAL
COUNSEL, CIVIL SERVICE COMMISSION**

**Veterans Preference Act (5 U.S.C. §§ 2108,
3309-3320)—Dependents—Preference—Foreign
Installations**

This responds to your predecessor's request for our opinion as to the legality of certain Department of Defense (DOD) hiring practices in foreign-area installations.

Our understanding of the relevant facts is as follows: In 1972, the Civil Service Commission promulgated 5 CFR § 213.3106(b)(6). This excepted jobs in DOD foreign-area installations from the competitive service when filled by dependents of DOD personnel. It was issued under the Commission's general authority to except positions from the competitive service "when it determines that appointments thereto through competitive examinations are not practicable." 5 CFR § 6.1.

In these foreign-area installations DOD extends a preference in hiring to dependents of DOD personnel over other applicants. Some are hired in regular DOD civilian positions. Others, however, are hired pursuant to an arrangement between the Federal Republic of Germany and the United States. This arrangement is based upon a North Atlantic Treaty Organization Status of Forces Agreement (NATO SOFA—4 UST 1792, Art. IX, Par. 4), which provides that U.S. forces operating in other NATO countries may hire from the local civilian population in accordance with the laws of the receiving country, *i.e.*, the country in which the U.S. forces are present. Persons so hired are called "local nationals." Germany claims that certain treaty agreements entitle German local nationals to fill a specified number of these positions. However, all of these positions designated for local nationals are not so filled. Germany has permitted some local national positions to be filled by dependents in deference to the needs of DOD personnel and their families. Unless dependents (primarily wives of DOD personnel) are provided jobs to supplement the earnings of the family unit, DOD personnel could in many cases not afford to have their families accompany them abroad. In this regard, the State Department states "that as a matter of practice and not of written agreement the

Federal Republic of Germany willingly acquiesces in the United States forces in Germany employing its dependents for jobs designated, under NATO SOFA, for foreign national occupancy." DOD contends that attempts to fill these local national positions with persons other than dependents may result in the withdrawal of these positions from U.S. control.

Furthermore, we have been advised that the number of local national positions filled by dependents is approximately 5,659. Of these, about 5,449 are in Germany. As for dependents in regular DOD positions, they number approximately 5,680. Of these, about 4,051 are in Germany. The regular DOD positions can be filled with persons other than dependents with no danger of reversion to local nationals because these positions are not subject to foreign control.

As we understand it, a number of U.S. veterans residing in these foreign areas, particularly Germany, have complained that the dependent-preference hiring arrangement fails to take the Veterans Preference Act, 5 U.S.C. §§ 2108, 3309-3320, into account. Under that Act "preference eligibles"¹ are entitled to have 5 or 10 points² added to their employment-evaluation rating.

In this factual setting, the basic inquiry is whether DOD's practice of hiring dependents in foreign-area installations violates the Veterans Preference Act.³ Specifically, three questions are presented. The principal question is whether, in light of 5 U.S.C. § 3320, the Civil Service Commission had authority to promulgate 5 CFR § 213.3106(b)(6). Secondly, what effect, if any, does § 106 of Public Law 92-129, 85 Stat. 355, have on the Veterans Preference Act? Finally, do NATO SOFA and working arrangements under that agreement supersede the Veterans Preference Act? For the reasons that follow, we conclude that the Veterans Preference Act is applicable to these positions; we are of the opinion, however, that the Commission may properly excuse application of that Act to the local national positions filled by dependents should it find that such application would not benefit preference eligibles.

We now turn to the question whether § 106 of Public Law 92-129 supports the extension of an employment preference to dependents in our overseas installations. As stated above, in 1972 the Commission excepted positions in foreign area installations from the competitive service so long as they were

¹The term "preference eligible," as defined in 5 U.S.C. § 2108(3), includes veterans who have served on active duty in the Armed Forces under certain conditions that need not be listed here. And in some cases the spouses and mothers of these veterans are also preference eligibles.

²While most preference eligibles are entitled to a 5-point preference, others receive a 10-point preference. This latter group consists primarily of veterans with service-connected disabilities, and in some cases their spouses and mothers. Also, certain surviving spouses and mothers of individuals who lost their lives in military service to this country qualify for the 10-point preference. See 5 U.S.C. §§ 2108(3)(c)-(g), 3309.

³Although DOD admits that dependents are given preference over nondependents, it states that within the framework of its dependent hiring policy, dependents who are also veterans are given preference as against veterans who are not dependents. But DOD does not, and indeed could not, reasonably, contend that this procedure comports with the requirements of the Veterans Preference Act. Rather, it contends that § 106 of Public Law 92-129, discussed *infra*, renders the Veterans Preference Act inoperative in these overseas appointments that involve dependents.

filled by dependents of DOD personnel stationed in the area. This exception was granted, in large part, on the assumption that § 106 of Public Law 92-129 was intended to create a dependent's preference in foreign countries. We do not believe that Congress intended such a preference. That section reads, in pertinent part, as follows:

Unless prohibited by treaty no person shall be discriminated against by the Department of Defense . . . in the employment of civilian personnel at any facility or installation operated by the Department of Defense in any foreign country because such person is a citizen of the United States or is a dependent of a member of the Armed Forces of the United States

The purpose of § 106 is explained in its legislative history. The conference report states:

The Senate version contained a provision prohibiting job discrimination against American citizens and their dependents in hiring on United States military bases in any foreign country.

The House bill contained no such provision. The purpose of the Senate provision is to correct a situation which exists at some foreign bases, primarily in Europe, where discrimination in favor of local nationals and against American dependents in employment has contributed to conditions of hardships for families of American enlisted men whose dependents are effectively prevented from obtaining employment. [H. Rept. No. 92-433, 92d Cong., 1st sess. 31 (1971)]

The Senate report states:

The purpose of this amendment is to correct a situation which exists primarily on some American bases in Europe. In some cases, discrimination in favor of local nationals and against American dependents in employment has helped create conditions of poverty for families of American enlisted men. [S. Rept. No. 92-93, 92d Cong., 1st sess. 23 (1971)]

Finally, the Senate hearing with respect to § 106 also addresses the problem. Senator Schweiker commented on some problems facing U.S. military personnel stationed in Germany who have financial difficulty in bringing their wives to live with them. In a colloquy with then-Secretary of Defense Laird, Senator Schweiker stated:

One other inequity . . . is that the wife who does get over there mainly on a loan that the GI floats, and then rents whatever quarters is available, which isn't very much for that money, is then in a position where she can't take a job because under the Status of Forces Treaty obligations we are not permitted to let our nationals work at certain kinds of positions [W]e have our GI with a wife that he is trying to support on a poverty level, and we don't even let her work under the Status of Forces Agreement [I]t makes my blood boil a little bit when I see the way we are being treated by some of our allies over

there when they deny employment to the wives of GIs who just want the right to be with their husbands, something that every other citizen in Europe has at that time. I would appreciate if you would consider looking into amending that Status of Forces Agreement so that our GIs' wives are not discriminated against.⁴ [Selective Service and Military Compensation: Hearings on S. 392, S. 427, S. 483, S.J. Res. 20, S. 494, S. 495, and S. 496 before the Senate Committee on Armed Services, 92d Cong., 1st sess. 46-47 (1971)]

We are of the opinion that § 106 was not intended to create a preference for dependents over other American citizens in DOD foreign-area installation hiring. Its plain language prohibits discrimination against U.S. citizens and Armed Forces dependents. It, thus, evinces an intent to extend protection against discrimination to all U.S. citizens and Armed Forces dependents. The language permits no reasonable inference that any subgroup of the protected class was to enjoy benefits over any other subgroup. And the above quoted excerpts from § 106's legislative history clearly show that the statute was designed to protect U.S. citizens and dependents against discrimination in favor of local nationals. Thus, neither the language nor the legislative history of the section reveals a congressional intent to establish hiring preferences among U.S. citizens.

Neither the section nor its legislative history mentions the Veterans Preference Act. Accordingly, any contention that § 106 partially repealed that Act must rest on the argument that it was repealed by implication. It is a familiar principle of statutory construction that repeals by implication are disfavored. When two statutes are capable of coexistence, each must be regarded as effective absent a clearly expressed congressional intention to the contrary. *Administrator, FAA v. Robertson*, 422 U.S. 255 (1975); *Morton v. Mancari*, 417 U.S. 535 (1974). Any repeal intention must be clear and manifest. *Morton v. Mancari*, 417 U.S. at 551. There is no expression of congressional intention that the Veterans Preference Act was to be affected in any way and it is reasonably possible to read the two statutes compatibly. For these reasons we believe that § 106 was not designed to alter the application of the Veterans Preference Act.

II.

Another question asked is whether the Commission was authorized to promulgate 5 CFR § 213.3106(b)(6) in the face of 5 U.S.C. § 3320. That statute reads as follows:

The nominating or appointing authority shall select for appointment to each vacancy in the excepted service in the executive branch

⁴We note that Senator Schweiker's comments did not reflect an intent that the legislation under consideration in the hearings would have any effect on NATO SOFA. He merely requested Secretary Laird to look into the problem of NATO SOFA's impact on employment opportunities for wives of Armed Forces personnel. Moreover, § 106 expressly disclaims any intent to alter any treaty obligation.

and in the government of the District of Columbia from the qualified applicants in the same manner and under the same conditions required for the competitive service by sections 3308-3318 of this title. This section does not apply to an appointment required by Congress to be confirmed by, or made with the advice and consent of, the Senate.

We note preliminarily that all 5 CFR § 213.3106(b)(6) purports to do is place the dependent positions in Schedule A of the excepted service. In our opinion, 5 U.S.C. § 3320 makes it clear that the Veterans Preference Act applies to the excepted service as well as the competitive service. Therefore, merely placing positions in the excepted service does not remove them from coverage of the Act. And as we have discussed above, there is no statutory authority in this case for a Veterans Preference Act exemption.⁵

For these reasons we are of the opinion that the Veterans Preference Act applies to those dependent positions filled under routine DOD appointing authority. Thus, the approximately 5,680 positions in this category must be filled in accordance with that Act, and any preference eligible applying for such a position must be accorded the benefit of that Act.

III.

Finally, we turn to the question whether the Veterans Preference Act must be applied to those local national positions filled by dependents pursuant to an informal agreement between the United States and the Federal Republic of Germany. The specific issue presented is whether an international agreement ratified by the Senate, in this instance, the NATO SOFA, and working arrangements under that agreement, take precedence over the Veterans Preference Act? We have, however, been informed by representatives of the General Counsel at both the Defense and State Departments that NATO SOFA's exemption from U.S. employment laws⁶ applies only to foreign local nationals. Thus, they implicitly concede that there is no conflict between NATO SOFA and the Veterans Preference Act.

This, however, does not dispose of the question of whether the Commission must enforce that Act where dependents conditionally occupy local national positions. The facts presented indicate that any attempt to fill these positions with persons other than dependents of U.S. forces personnel will result in Germany's insistence that the positions revert to German local nationals. Hence, such a result would make application of the Veterans Preference Act a

⁵The Commission has indicated that it intends to terminate the exception of § 213.3106(b)(6). While we do not believe this exception serves to excuse the requirements of the Veterans Preference Act, we note that "[t]he Commission may remove any position from or may revoke in whole or in part any provision of Schedule A, B, or C." Commission Rule VI, 5 CFR § 6.6.

⁶NATO SOFA (4 UST 1792, 1810) provides that the laws of the receiving State shall be followed when U.S. forces or civilian components hire "local civilian labour." Neither the State Department nor DOD contends that these laws apply when U.S. citizens are placed in positions designated for local national occupancy.

hollow victory for veterans since they would not be allowed to occupy these positions.

The Veterans Preference Act is not indifferent to circumstances that might warrant selection of persons other than preference eligibles, even where the preference eligible has the highest rating of all job applicants. An appointing officer may pass over a preference eligible and select a nonpreference eligible if the reasons for so doing are stated in writing, and if the Commission finds such reasons to be sufficient. 5 U.S.C. § 3318(b). That section makes it plain that the Commission is the ultimate authority on the decision whether the reasons for passing over a preference eligible are sufficient.⁷ Your predecessor stated that the Commission tentatively concluded that the Veterans Preference Act should not apply to the local national positions.

If the Commission decides that application of the Veterans Preference Act would not result in jobs in local national positions for veterans, and that this constitutes a sufficient reason to pass over preference eligibles, we believe that decision would be within the scope of the Commission's authority.⁸

In sum, we believe that the Veterans Preference Act applies to overseas positions, and that there is no legal justification for excusing its application to regular DOD appointments. However, we think that the Commission is empowered to excuse its application to U.S. citizens filling the local national positions for the reasons stated herein.

We trust that this fully responds to your questions.

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

⁷See also S. Rept. No. 679, 83d Cong., 1st sess. 2 (1953), which makes it clear that the Commission has final authority in these decisions.

⁸Although § 3318(b) speaks in terms of passing over preference eligibles in individual appointments, we see no reason why the Commission may not grant a blanket pass over to cover a class of appointments involving similar situations, and having a common sufficient reason.

Further authority for such an exemption may be found in 5 CFR § 302.101(c), which provides in pertinent part:

. . . each agency shall follow the principles of veteran preference as far as administratively feasible. . . .

However, in the case of the local national positions it is arguable that it would not be "administratively feasible" to apply the Veterans Preference Act since such application would not result in jobs for veterans.

June 23, 1978

**78-36 MEMORANDUM OPINION FOR THE COUNSEL
TO THE VICE PRESIDENT**

**Officers and Employees—Volunteers—Federal Tort
Claims Act (28 U.S.C. § 2679(b))—Operation of
Motor Vehicles—Liability**

This is in response to your request for our answers to seven questions concerning liability and insurance coverage for Government employees and other persons who use automobiles in connection with the official travel of the President and Vice President. The vehicles involved may be Government-owned, leased for the occasion, or privately owned. The persons involved include:

- Regular full-time Government employees.
- Individuals who work on an irregular basis and receive compensation as consultants and travel and subsistence expense reimbursement.
- Individuals who volunteer their time but receive travel and subsistence expense reimbursement.
- Individuals who volunteer their time and receive no reimbursement for their expenses.

Vehicles may be rented in the name of the United States or in the name of the individual involved.

The seven questions you presented are as follows:

1. What liability coverage is provided by the Government for its employees?
2. Which of the above-described "staff" are covered by such protection?
3. Is the coverage the same regardless of the nature of the vehicle involved, *i.e.*, Government-owned, leased, or privately owned?
4. In the event that not all of the "staff" described are covered by the protection provided for regular Government employees, what are the minimum employment-related steps that must be taken to insure that an individual will be covered?
5. When renting a car, an option is provided to purchase insurance covering the deductible under the policy carried by the rental agency. Can and should this option be exercised affirmatively when the rental will be paid for with Government funds?

6. What is the Government's responsibility if a person for whom liability coverage is provided by the Government uses the vehicle for a personal frolic and an accident occurs?

7. On those occasions when the trip is a mixed official/political trip, what effect is there on the coverage that is provided by the Government?

I. General Principles

The liability of the Government and the individuals involved is governed primarily by the Federal Tort Claims Act, 28 U.S.C. § 2679(b), which provides as follows:

The remedy against the United States provided by sections 1346(b) and 2672 of this chapter for injury or loss of property or personal injury or death, resulting from the operation by an employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

The cited sections provide, with exceptions not relevant here, that the Government is liable for the negligence of its employees in the same manner as a private person. Thus, the effect of § 2679(b) is to make a suit against the United States under the Federal Tort Claims Act the sole remedy for damages arising from an automobile accident involving a Government employee acting in the course of his employment. *See, e.g., Thompson v. Sanchez*, 539 F. (2d) 955, 958 (3d Cir. 1976); *Carr v. United States*, 422 F. (2d) 1007, 1009-10 (4th Cir. 1970). Under the Act, it is the employee's duty to provide the Department of Justice with copies of any pleadings or process in a suit against him and the Department defends such suits. *See* 28 U.S.C. § 2679(c); 28 CFR § 15.1(a).

The protection provided employees by the Act is in lieu of any liability insurance furnished by the United States. The Comptroller General has held that appropriated funds are not available to pay for liability insurance for the Government or its employees unless a statute expressly so provides. 19 Comp. Gen. 798 (1940); *cf.* 42 Comp. Gen. 392 (1963); 22 Comp. Gen. 740 (1943). This holding is based on the view that it is ordinarily cheaper for the United States to self-insure than to purchase insurance. *See* 19 Comp. Gen. 798 (1940). The legislative history of § 2679(b) points out that suit against the United States was made the exclusive remedy because it is less expensive than having the Government either carry liability insurance for its drivers or reimburse them for their own insurance. *See* S. Rept. 736, 87th Cong., 1st sess., at 2-4 (1961); 107 Cong. Rec. 18499-500 (1961). In the light of the legislative history, we believe that the purchase of liability insurance for persons covered by the Act is unnecessary.

For the purpose of the Federal Tort Claims Act, an "employee of the government" is defined, 28 U.S.C. § 2671, as:

[O]fficers and employees of any federal agency. . . and persons acting on behalf of a federal agency in an official capacity, temporar-

ily or permanently in the service of the United States, whether with or without compensation.

The courts have consistently held that the test of employment under this statute is the common law principle of *respondeat superior*, particularly the “power to control the detailed physical performance of the individual.” *Logue v. United States*, 412 U.S. 521, 527-28 (1973); *see also, United States v. Becker*, 378 F. (2d) 319, 321-23 (9th Cir. 1967); *Prater v. United States*, 357 F. Supp. 1044, 1045 (N.D. Tex. 1973); *Delgado v. Akins*, 236 F. Supp. 202 (D. Ariz. 1964); *Martarano v. United States*, 231 F. Supp. 805, 807 (D. Nev. 1964); *cf., United States v. Orleans*, 425 U.S. 807, 814-15 (1976). The question of control turns on the facts of the particular case, and the courts are guided by the criteria set forth in *Restatement, Agency* 2d, §§ 2(1)-(2), 212. *See, e.g., Logue v. United States, supra; Becker v. United States, supra.* If the power of detailed supervision over the person exists, he is an employee even though unpaid or paid by a third person. *See, e.g., Provancial v. United States*, 454 F. (2d) 72, 75 (8th Cir. 1972); *Delgado v. Akins, supra; Martarano v. United States, supra.* As stated by the court in *Martarano*, at p. 807:

This does not mean, however, that only a person officially on a federal payroll may come within the definition of federal employee. The usual rules of *respondeat superior* are to be applied. This is quite plainly recognized in the statutory definition of employee of the Government by apt words encompassing persons “acting on behalf of a federal agency, temporarily or permanently,” whether with or without compensation.

II. Specific Questions

Applying these principles to your questions, our conclusions are as follows:

1. The United States assumes liability for the negligence of an employee operating any motor vehicle in the course of his official duties. Any other action against the employee arising out of an automobile accident occurring in the course of his employment is barred.

2. The status of an individual as full time, part time, paid, or unpaid, does not determine whether he is an “employee” of the Government. The significant fact is whether the Government agency involved has the power to exercise detailed supervision and control over the individual’s performance of his duties. Indicia of this power are: setting personal qualifications for the individual; that he is required to perform the services himself; and that he may be discharged by the agency. *See, e.g., Becker v. United States*, 378 F. (2d) 319, 322-23 (9th Cir. 1967); *Prater v. United States*, 357 F. Supp. 1044, 1045 (N.D. Tex. 1973); *Delgado v. Akins*, 236 F. Supp. 202, 203 (D. Ariz. 1964). *See generally, Restatement, Agency*, 2d § 220. Under these criteria, we believe that all of the individuals involved here would fall within the Federal Tort Claims Act when their official functions on behalf of the Vice President require them to operate a motor vehicle.

3. Section 2679(b) applies to “any” motor vehicle. It has been held to

include privately owned vehicles driven on official business. *See, e.g., Levin v. Taylor*, 446 F. (2d) 770 (D.C. Cir. 1972); *Nistendisk v. United States*, 225 F. Supp. 884 (W.D. Mo. 1964). While we are not aware of any case involving rented vehicles, we see no reason why the statute would not apply to them as well.

4. All of the enumerated individuals are "employees" as long as the Office of the Vice President has the power of detailed supervision over the performance of their official duties.

5. The Act makes the Government liable for both personal injury and property damage. As noted above, its legislative history indicates that this was intended to substitute for the procurement of liability insurance. In view of this legislative history and the Comptroller General's opinion that specific statutory authority is needed to procure insurance, optional insurance for rented vehicles may not be procured with Government funds.¹

6. The Act makes the Government liable only for accidents that occur when an employee is "acting within the scope of his office or employment." The scope of employment and the extent to which the Government remains liable where the employee deviates therefrom is determined by the law of *respondeat superior* at the place of the accident. *See* 28 U.S.C. § 2674; and, *e.g., Williams v. United States*, 350 U.S. 857 (1955); *Platts v. United States*, 409 F. (2d) 1009 (10th Cir. 1969); *Guthrie v. United States*, 392 F. (2d) 858 (7th Cir. 1968). As a general rule, driving would appear to be within the scope of employment "if the Government's interest was a substantial factor in the trip." *Guthrie v. United States, supra*, 392 F. (2d) at 860; *see, Levin v. Taylor*, 464 F. (2d) 770 (D.C. Cir. 1972); *United States v. Romiti*, 363 F. (2d) 662 (9th Cir. 1966). *See generally, Restatement, Agency 2d*, § 236 and comments, 523. However, the decisions emphasize that the facts of each particular case are controlling. *E.g., Guthrie v. United States, supra; United States v. Romiti, supra*. While we can say as a general rule that the Government would not be liable for an accident during a "frolic" or "diversion" for the personal benefit of the driver,² the application of this rule to any particular incident depends both on the specific facts and the law of the State where the accident may occur.

7. The liability of the United States is determined not by the nature of the President's or Vice President's travels but rather by the purpose for which the employee in question is driving. In a previous memorandum, we pointed out that even on political trips the President and Vice President require staff and assistance to perform their official functions. This, we stated, "would ordinarily include full provision for comfort and safety of the party; communications facilities for control and administration of the Armed Forces and other

¹We note that the Comptroller General permits the purchase of casualty or liability insurance on leased private property if the owner requires it as a condition of the lease. *See* 42 Comp. Gen. 392 (1963). Thus, there is no restriction on paying any part of the rental fee attributable to mandatory insurance.

²*See, e.g., Van Houten v. Ralls*, 411 F. (2d) 940 (9th Cir. 1969); *Binn v. United States*, 389 F. Supp. 988 (E.D. Wis. 1975); *Tavolieri v. Allain*, 222 F. Supp. 756 (D. Mass. 1963). *See also* H. Rept. 297, 87th Cong., 1st sess., at 4, 8-9 (1961).

agencies of the Government; clerical, logistical, and other administrative support; staff assistance in the management of paperwork and the records of decisions; and those staff members, advisers, and other persons who may reasonably be required for consultation or advice during the period of travel.” We believe that driving in relation to these functions is for the benefit of the official functions of the Vice President, regardless of the reason he is traveling,³ and thus within the scope of a driver’s official duties. However, there has never been any litigation on this point. In view of the case-by-case approach the courts take to scope-of-employment questions, we cannot predict where they would draw the line between official and political functions of employees traveling with the Vice President.

III. Additional Comments

Your memorandum also requested any additional comments we considered appropriate. We therefore call your attention to the procedures by which employees receive the protection of the Federal Tort Claims Act. Under 28 CFR § 15.1(a), any employee sued for personal injury or property damage on account of his driving a motor vehicle in the scope of his employment must promptly deliver all papers and pleadings to his immediate superior or a person designated by the agency. He must also immediately notify this person by telephone or telegraph. The agency in turn must notify and provide copies of the litigation papers to the United States Attorney for the judicial district in which the accident occurred and to the Chief, Torts Section, Civil Division, of the Department of Justice.

Under 28 CFR § 15.2(a), the agency must provide the U.S. Attorney and the Torts Section with a report “containing all data bearing on the question whether the employee was acting within the scope of his office or employment” at the time of the accident.

The U.S. Attorney may have a State court suit against an employee removed to the Federal district court by certifying that the employee was acting within the scope of his employment, 28 U.S.C. § 2679(c); 28 CFR § 15.3(a). If the district court determines that the driver was not an employee acting within the scope of his employment, the case will be remanded to the State court. *See, e.g., Binn v. United States*, 289 F. Supp. 988 (E.D. Wis. 1975); *Tavolieri v. Allain*, 222 F. Supp. 756 (D. Mass. 1963).

³The cited memorandum also states that travel by the Vice President is “political” if its primary purpose involves his status as a party leader, *e.g.*, fund-raising, campaigning for particular candidates, and appearing at party functions. Travel to obtain public confidence and support for the measures of the Administration, on the other hand, is part of the official functions of the Vice President.

We suggest that you inform part-time or volunteer drivers of their duty to report suits and to forward the papers in order to obtain the protection of the Federal Tort Claims Act. We further suggest that you consult the Torts Section about the form and content of the report required by 28 CFR § 15.2(a).

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

June 29, 1978

**78-37 MEMORANDUM OPINION FOR THE CHIEF
COUNSEL, FOOD AND DRUG ADMINISTRATION**

**Advisory Committees—Food and Drug
Administration—Conflicts of Interest
(18 U.S.C. § 208)**

This responds to your inquiry regarding the scope of the term "particular matter" as used in 18 U.S.C. § 208(a), in connection with the service of persons from the private sector on advisory committees in the Food and Drug Administration (FDA).

Section 208 requires an officer or employee of the executive branch to disqualify himself in any "particular matter(s)" in which, to his knowledge, he, his spouse or minor child, or an organization in which he is serving as an officer, director, trustee, partner, or employee has a financial interest. Thus, the meaning of the term determines the sort of occasions on which an advisory committee member must disqualify himself under the statute.

We understand that the advisory committees involved in the inquiry are utilized by FDA in the areas of premarketing approval of prescription drugs, classification of medical devices, and drafting of monographs for ingredients used in over-the-counter drugs. Your Office indicated in conversations with this Office last spring that without the use of these advisory committees, the members of which are expert in the areas involved, FDA could not discharge its statutory responsibilities at the level which the safety and the health of the public warrant.

Four examples of participation by members of various FDA advisory committees were given to us. Three of the members were on the faculties of universities that received research grants from pharmaceutical firms or manufacturers of medical devices. At least two actually worked on the university projects funded by the firms. You state that none of the individuals participated as an advisory committee member in any deliberations relating specifically to the firm or the product of the firm that funded the particular research grant to his university, but that each did participate in the committee's deliberations relating to general categories of medical devices or ingredients of

a certain classification of products, some of which were manufactured by the firm that funded the research.

The fourth example involved a member of the National Advisory Food and Drug Committee who had substantial holdings in a cattle feedlot operation and who participated in deliberations concerning the desirability of continuing the use of low levels of antibiotics in animal feeds for prophylactic purposes and growth promotion. He was not a manufacturer of any of the products involved and no competitive advantage or disadvantage would be conferred upon him vis-a-vis other members of his industry¹ regardless of the Agency's ultimate decision. It was also pointed out that this example and those of the university faculty members involved advisory committees established to advise the FDA about matters that involve segments of the regulated industry as a whole rather than particular products or companies.

The relevant statute, 18 U.S.C. §208(a), provides:

(a) Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, participates personally and substantially as a Government officer or employee, through decision approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, partner, organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest—

Shall be fined not more than \$10,000, or imprisoned not more than two years, or both.

You have informed us that the members of FDA advisory committees are designated as special Government employees. The question presented is whether participation in deliberations of the committees concerning a class of related products or an ingredient common to many products involves participa-

¹It was not indicated whether the phrase "his industry" refers to the feedlot industry or to the cattle industry as a whole. It is possible, for example, that the banning of antibiotics in animal feeds would work to the competitive advantage of those portions of the cattle industry that do not rely on animal feeds to the degree that feedlot operators do.

tion in a "particular matter" within the meaning of § 208(a). We believe that it does.²

As an initial matter, some confusion regarding the scope of § 208(a) may arise because of the use of the word "particular." It is our understanding that the word "particular" was included to make clear that an individual would not be disqualified from an entire area or range of activities merely because he might have a financial interest in a certain decision, proceeding, transaction, or recommendation arising within that area or range; disqualification is only required in the "particular" matter, not as to the entire area or range. *Cf.*, *Hearings on Federal Conflict of Interest Legislation before Subcommittee No. 5 of the House Judiciary Committee*, 87th Cong., 1st sess. 38 (1961). But it was evidently the purpose to make the enumeration of particular matters in § 208(a) and the other sections of the conflict of interest laws, in which the same enumeration appears, "comprehensive of all matters that come before a Federal department or agency." *Id.*; *see also id.*, at 41. Thus, it has been and continues to be our view that § 208(a) applies to any discrete or identifiable decision, recommendation, or other matter even though its outcome may have a rather broad impact. Accordingly, the word "particular" serves to limit the application of § 208(a) in terms of discrete areas of the employee's activities, not the number of outside parties who may be affected.

Our reading of § 208(a) in this manner finds support as well in the structure of the statute and its contemporaneous interpretation. To determine the proper scope of the language of §208(a), it must be examined as part of a comprehensive statutory scheme rather than in isolation. Utilizing that approach, we find, for example, that 18 U.S.C. § 203(a) and the first paragraph of §205 both bar regular Government employees from representing other parties in all "particular matters" involving the United States. However § 203(c) and the second paragraph of § 205 impose narrower restrictions on special Government employees, barring them from acting as agent or attorney only in "particular matter[s] involving a specific party or parties" that are pending before the Departments or agencies in which they are serving. Similarly, the postemployment statute, 18 U.S.C. § 207, bars a former Government employee, whether regular

²There may be some question whether a "financial interest" within the meaning of the statute is present on the facts involving the three faculty members. It may be that if the research grant to a university concerns the types of products involved in the advisory committee's deliberations, the committee's deliberations could influence FDA's decision with respect to the products. This could in turn have an impact on the continuity of a research grant pertaining to the same products. But it is arguable that neither the faculty member nor his employing university has a "financial interest" in the advisory committee's recommendations where the university's research has no relation to the products the advisory committee is considering.

On the other hand, there is at least some basis for concluding that a substantial contractual relationship with an affected company could itself give the university a financial interest in matters touching on the company's products. *See* Association of the Bar of the City of New York, *Conflict of Interest and Federal Service*, 200-201 (1960). Moreover, where a faculty member is actually a principal participant in a university research grant funded by a company, the situation presents much the same type of potential for divided loyalty in governmental matters affecting the company as if the member were actually employed directly by the company and therefore expressly required by § 208(a) to disqualify himself in matters relating to the company.

or special, from representing another person in a “particular matter involving a specific party or parties” in which he participated or had official responsibility while in Government.

The Memorandum of the Attorney General Regarding Conflict of Interest Provisions of Public Law 87-849, 18 U.S.C. §201, n., points out that “the phrase ‘particular matter involving a specific party or parties’ does not include general rulemaking, the formulation of general policy or standards, or other similar matters. Thus, past participation in or official responsibility for a matter of this kind on behalf of the government does not disqualify a former employee from representing another person in a proceeding which is governed by the rule or other result of the matter.” The clear implication is that general rulemaking and the formulation of general policy would be covered in the absence of the reference to specific parties.

Bayless Manning, an authoritative commentator on the conflict of interest laws, describes the importance of the limiting phrase “involving a specific party or parties” as follows:

Where the language is used [in the conflict of interest laws], it is clear that the statute is concerned with discrete and isolatable transactions between identifiable parties. Thus, the former employee of the Defense Department who worked on the establishment of contract procedures is not on that account forbidden by subsection (a) of Section 207 to act as agent or attorney with respect to any particular Defense contract

The significance of the phrase “involving a specific party or parties” must not be dismissed lightly or underestimated. Law 87-849 discriminates with great care in its use of this phrase. Wherever the phrase does appear in the new statute it will be found to reflect a deliberate effort to impose a more limited ban and to narrow the circumstances in which the ban is to operate. [B. Manning, *Federal Conflict of Interest Law*, 204 (1964)]

The implication of this passage would appear to be that the establishment of general contracting or similar procedures is a “particular matter,” but that participation in formulating such procedures does not trigger the postemployment bar of 18 U.S.C. § 207 because no specific parties are involved. *See also, id.*, at 70-71.

By way of contrast, a Presidential Memorandum of May 2, 1963, entitled “Preventing Conflicts of Interest on the Part of Special Government Employees,” explains the broader scope of the term “particular matter” in § 208(a) as follows:

The matters in which special Government employees are disqualified by section 208 are not limited to those involving a specific party or parties in which the United States is a party or has an interest, as in the case of sections 203, 205 and 207. Section 208 therefore undoubtedly extends to matters in addition to contracts, grants, judicial and quasi-judicial proceedings, and other matters of an

adversary nature. 'Accordingly, a special Government employee should in general be disqualified from participating as such *in a matter of any type* the outcome of which will have a direct and predictable effect upon the financial interests covered by the section. However, the power of exemption may be exercised in this situation if the special Government employee renders advice of a general nature from which no preference or advantage over others might be gained by any particular person or organization. The power of exemption may of course be exercised also where the financial interests involved are minimal in value. 28 Fed. Reg. 4539, 4543. [Emphasis added.]³

The broad statement in the memorandum that the disqualification requirement in § 208(a) applies to a "matter of any type" in which the employee has a financial interest does not on its face suggest that certain types of governmental decisionmaking should be excluded merely because they involve rules, policies, or recommendations that affect several or a number of different companies or products. Indeed, the further statement in the memorandum to the effect that the power of exemption in § 208(b)(1) may be exercised to permit a special Government employee to participate notwithstanding the ordinary disqualification requirement if the special Government employee renders "advice of a general nature from which no preference or advantage over others might be gained" necessarily proceeds on the assumption that "advice of a general nature" is covered by § 208(a).

Based on the contemporaneous construction of the statute reflected in the Presidential memorandum, we have consistently interpreted § 208(a) to apply to rule-making proceedings or advisory committee deliberations of general applicability where the outcome may have a "direct and predictable effect" on a firm with which the Government employee is affiliated, even though all other firms similarly situated will be affected in a like manner. An example might be the drafting or review of environmental regulations which would require considerable expenditures by all firms in the particular industry of which the company is a part.⁴

In one example cited in your letter, banning the use of antibiotics in animal feed could well have a direct and predictable effect on the operations of the feedlot owned by the advisory committee member, even though other feedlot owners would also be affected. Similarly, we would suppose that FDA's decision with respect to the classification of medical devices or use of

³The Presidential memorandum was drafted by the Office of Legal Counsel and therefore reflects a contemporaneous interpretation of the conflict of interest laws by the Department charged with construing them. The substance of the paragraph of the Presidential memorandum quoted in the text is now incorporated at page 4 of Appendix C, Chapter 735 of the *Federal Personnel Manual*, which prescribes the policies and procedures for appointing special Government employees.

⁴Of course the outcome of the particular matter must affect the firm distinctively, and not merely as a member of the general public or as part of the entire business community. For example, a member of an FDA advisory committee would not be disqualified from participating in the formulation of a recommendation about ingredients in aspirin merely because he purchased aspirin as a consumer.

ingredients in drugs could have a direct and predictable effect on a manufacturer of a given device or drug although the manufacturer's competitors who produce the same drug or device were affected in a like fashion.

Interpreting the term "particular matter" in the manner described above is consistent with the purposes of § 208(a). A benefit conferred on an industry generally can be as much of a boon to a firm within that industry as a competitor's going out of business. Typically, stockholders are primarily interested in the earnings of their corporation, and only secondarily in the corporation's relative standing in the industry. Thus, the fact that others will also be affected should not render wholly inapplicable the prohibition against a Government employee's participation in a matter in which he would have the opportunity to further his firm's financial interests. Moreover, to interpret § 208(a) in the way you have suggested—*i.e.*, requiring disqualification only where the firm with which the advisory committee member is affiliated is specifically involved—would be to introduce by way of construction the phrase "involving a specific party or parties" that was deliberately omitted from that section at the time of enactment.

A determination that the term "particular matter" includes recommendations affecting a category of products or a number of firms similarly situated does not, however, automatically foreclose participation on advisory committees by persons with related outside affiliations. Section 208(b)(1) provides that the disqualification requirement in § 208(a) shall not apply if the Government employee first advises the Government official responsible for appointment to his position of the nature and circumstances of the particular matter, makes full disclosure of the relevant financial interest, and receives an advance written determination from the appointing official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from the employee.⁵ There may be a question, of course, whether the financial interests involved in each of the four examples you cite are "insubstantial" in an absolute sense. However, the paragraph in the 1963 Presidential memorandum quoted above states that in addition to situations in which the financial interest is minimal, "the power of exemption may be exercised . . . if the special Government employee renders advice of a general nature from which no preference or advantage over others might be gained by any particular person or organization." This is an interpretation of § 208(b)(1) given soon after its enactment, and, as indicated above, this policy has been carried forward in Appendix C to Chapter 735 of the *Federal Personnel Manual*.

The effect of this interpretation is to put a gloss on the statutory language that the interest "is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect" from the special Government

⁵Although by its literal terms § 208(b)(1) would appear to require the appointing official to issue a separate exemption for each particular matter in which a given financial interest may arise, we have consistently taken the position that a blanket exemption covering a given financial interest may be issued in appropriate circumstances if the appointing official concludes that the financial interest will not be so substantial as to affect the integrity of the employee's services in whatever context it arises.

employee. It seems to be particularly geared to special Government employees, members of advisory committees, who are often specifically chosen because of an expertise that results from their affiliation with particular organizations, firms, or groups having a general interest in the very matters before the advisory committee.

The responsibility for issuing exemptions under § 208(b)(1) lies with the Agency concerned. We should stress, however, that § 208(b)(1) contemplates a close scrutiny of each special Government employee's outside affiliation to determine whether an affiliation may properly be deemed unlikely to affect the integrity of service as an advisory committee member. It may also be appropriate in certain cases to tailor the exemption in a way that permits the employee to participate in general policy matters but not in those proceedings which more narrowly affect the organization or firm with which he is affiliated. While the ultimate result of utilizing the exemption procedure in this manner to facilitate participation in general policy matters may be the same as if § 208(a) were construed to be wholly inapplicable in such a setting, this does not mean that granting an exemption should be viewed as a mere formality or an empty exercise. The process of granting an exemption compels the responsible Agency official to focus on the question of the special Government employee's outside affiliations and to make a specific, written finding with respect to the expected integrity of the individual's services. We may assume as well that this procedure will also have a beneficial effect on the advisory committee member's own perception of his responsibilities.

Finally, it should be noted that § 208(b)(1) requires that an exemption be granted prior to the employee's participation in the particular matter. We assume that separate exemptions were not granted to the four individuals described in your letter. It cannot be said with certainty whether the decisions with which the advisory committees were concerned would have a direct and predictable effect on the members' outside interests. Because your letter refers to past conduct, the determination of the application of § 208(a) in a case such as this would ordinarily be for the Criminal Division of this Department to make. However, after consultation with the Criminal Division regarding the facts described in your letter, we can advise you that in the absence of some element of bad faith or other aggravating factor, a referral to the Criminal Division is not in order here. In the future, the principles outlined in this letter should be followed and advisory committee members should be notified of their obligations under whatever arrangements are made in each case.

The Office of the General Counsel of the Department of Health, Education, and Welfare is familiar with the application of § 208(a) to special Government employee members of advisory committees and the exemption procedures under § 208(b)(1). That Office no doubt can assist you in these matters, and we are of course prepared to offer additional guidance if necessary.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

July 12, 1978

78-38 MEMORANDUM OPINION FOR DEPUTY ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION

Standards of Conduct (28 CFR Part 45)—Service of Employee in State Chapter of a National Organization

This is in response to your request for our opinion regarding the propriety of Mr. A, an attorney in your Division, engaging in certain activities as a member of a national organization ("the organization").

The principal issue is whether A may serve as chairman of the Legal Affairs Committee of his State's chapter of the organization. The Legal Affairs Committee has the responsibility for assisting in litigation undertaken by the organization, recommending to the leadership of the State chapter areas of potential legal involvement, and representing the State chapter as a party or *amicus curiae* in litigation. In addition, the committee would advise the leadership of the State chapter regarding compliance with laws that the organization monitors, draft legislation to be supported by the organization at the State level, and analyze legislation prepared by others. As chairman, A would direct the activities of the committee, handling some work himself and delegating other work to members of the committee.

Rendering legal advice and analysis and recommending and conducting litigation are traditional activities of a lawyer. It is clear that A's activities as chairman or even as an active member of the Legal Affairs Committee would constitute the private practice of his profession and therefore be prohibited by 28 CFR 45.735-9(a).¹ The Associate Attorney General may make specific exceptions to this prohibition in "unusual circumstances," upon a written application from the employee, directed through his superior. 28 CFR 45.735-9(c). Typically, this exempting power has been exercised with respect to individual cases or matters where a need arises, *e.g.*, to permit a lawyer joining the Department to complete work on a case that he was handling in private practice. Whether an exemption is appropriate in the present situation is

¹The absence of compensation is immaterial on this point.

a matter for the Associate Attorney General. Were the Associate Attorney General to grant an exemption, A would nevertheless be prohibited by 18 U.S.C. § 205 from acting as “agent or attorney” for the organization in cases or other matters in which the United States is a party or has a direct and substantial interest.

A also inquires about other activities of the organization unrelated to the work of the Legal Affairs Committee that principally derive from his role as chairman of the organization’s National Issues Committee for a congressional district in his State. These activities include attendance at meetings, educating present and prospective members, appearing on radio programs, and lobbying elected officials, usually Members of Congress.

The Department’s regulations do not prohibit membership in an outside organization or active participation in its affairs. Nor do the regulations ordinarily prohibit an employee from petitioning elected officials at the Federal or State level on his own behalf or on behalf of an outside organization. *See also* 5 U.S.C. § 7102. A should not, however, perform any of these activities on official time or allow his position as a Department employee to be used in any way in connection with his activities. In addition, if the occasion arises in which the organization becomes involved in an issue of particular interest to the Antitrust Division, consideration should be given to whether A’s activities would create a real or apparent conflict of interest. 28 CFR 45.735-9(d).

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

July 18, 1978

**78-39 MEMORANDUM OPINION FOR THE SOLICITOR,
DEPARTMENT OF THE INTERIOR**

**Antilobbying Laws (18 U.S.C. § 1913, Public Law
95-465, 92 Stat. 1291)—Department of the Interior**

This is in response to your request that we consider the effect of 18 U.S.C. § 1913 and several appropriation act riders on various materials prepared by the Department of the Interior for public release in connection with proposed legislation.

This Department has long taken the position that the purpose of 18 U.S.C. § 1913, as revealed in its legislative history, is to restrict the use of appropriated funds for a campaign of telephone calls, telegrams, letters, or other disseminations particularly directed at members of the public urging the recipients to contact Members of Congress about pending legislative matters. Section 1913 has not been construed by this Department to sweep more broadly than this evident legislative purpose so as to preclude the President or executive branch agencies from informing the public about programs and policies of the administration, including those that touch on legislative matters. This interpretation of § 1913, drawn from its legislative history, is consistent with rules of construction applicable to criminal statutes generally. Moreover, it respects the First Amendment right of the public to receive information about administration programs and the President's constitutionally based role in the legislative process.

Section 304 of the Interior Department Appropriation Act (Pub. L. No. 95-465, 92 Stat. 1291) by its terms appears to incorporate the substance of § 1913 and should presumably be interpreted in the same manner as that provision. Our interpretation of provisions such as that in § 607(a) of the Treasury, Postal Service, and General Government Appropriation Act of 1979 (Pub. L. No. 95-465, 92 Stat. 1001), which largely conforms to interpretations by the Comptroller General, have been based on similar considerations as those identified above in connection with 18 U.S.C. § 1913.

Your Department's press releases that merely disclose information that officials of your Department have given congressional testimony, made public speeches, or explained the administration's legislative proposals, but do not call

for the reader to contact the Congress, do not raise questions under the relevant statutory provisions. In any event, normal distribution of releases to the press, whose members may then independently determine whether to publish material contained in the releases, are qualitatively different than broad disseminations made directly by the Government to individual members of the public.

The Secretary's statement included in a series of columns in local newspapers, touching on nonlegislative issues, appears to be a legitimate explanation of the Department's position on major issues of public importance. It does not raise a question under the relevant statutory provisions, nor do newsletters addressed to persons who had asked to be on a mailing list, containing a straightforward explanation of issues of concern to the Department but making no suggestion that the reader contact Congress.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

July 19, 1978

78-40 MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, LAND AND NATURAL RESOURCES DIVISION

Conflicts of Interest (18 U.S.C. § 207)—American Bar Association Code of Professional Responsibility

The Office of Professional Responsibility has referred your inquiry regarding the letter received from a former Assistant U.S. Attorney (A), concerning his possible representation of several defendants in a case brought by the United States on behalf of an Indian tribe on a reservation.

A states that he resigned as an Assistant U.S. Attorney in 1976. While he was in the U.S. Attorney's Office, he participated, to some extent, in the case to prevent depletion of ground water supplies. The court has apparently granted the defendants' motion to join ground water users, and A states that he expects to be asked to represent some of the water users. Whether he may properly do so depends on the application of the criminal conflict-of-interest laws and Canons 4 and 9 of the American Bar Association (ABA) Code of Professional Responsibility to the particular facts.

A indicates that he does not believe his involvement in the case was substantial. He says that the Land and Natural Resources Division had primary responsibility for the case and that an attorney (B) in the Land and Natural Resources Division planned and directed the Government's position, drafted the complaint, and signed all motions. A does state that he conferred regularly with B and attended meetings with attorneys from the Department of the Interior Field Solicitor's Office and attorneys of the Native American Rights Fund. However, he is not of the view that he possesses any confidential information or that his participation in the case would prejudice the United States.

B states that A was "the Assistant United States Attorney with whom we worked in preparing and filing various papers." A may have attended a portion of a meeting attended by the Bureau of Indian Affairs, the Department of Justice, and Native American Rights Fund attorneys to prepare an initial draft of the complaint, although A had no substantive involvement in the drafting. After the complaint was filed, A attended a meeting in the U.S. Attorney's Office to discuss the litigation.

A memorandum written by B further indicates that A “probably signed” the Government’s memoranda opposing the defendants’ motion to dismiss,¹ but that he made no contribution to its contents. He was present for a portion of the hearing on this motion, but did not argue the Government’s position.

According to B, A was also present and was prepared to make a short statement of the Government’s position at a hearing on a motion filed by the Indian tribe relating to a class action issue, but he was not requested to state the Government’s position.

Finally, A was apparently present at a meeting attended by the Government’s soils, hydrology, and geology experts, who discussed their preliminary findings on matters relating to the case. B informed us that he believes some discussion of trial strategy occurred at this meeting as well.

It is not clear to what extent A’s account of his role is inconsistent with B’s statement, particularly regarding the meeting attended by the Government’s experts. But on the basis of B’s account, and at least in the absence of a showing by A that his involvement in and exposure to the case was more limited than now appears, we would advise that he not participate in the case.

The pertinent conflict-of-interest statute here is 18 U.S.C. § 207(a), providing that a former Government employee may not act as agent or attorney for anyone other than the United States in a particular matter involving the United States in which he participated “personally and substantially” as a Government employee.²

The word “substantial” in § 207(a) is intended to preclude coverage of mere casual exchanges with another employee about a matter, *cf.* B. Manning, *Federal Conflict of Interest Law* 71 (1964), and “participation by purely ministerial or procedural acts,” R. Perkins, *The New Federal Conflict-of-Interest Law*, 76 Harv. L. Rev. 1113, 1128 (1963), quoting Association of the Bar of the City of New York, *Conflict of Interest and Federal Service* 274 (1960). The word clearly was not designed to create an exemption for an individual who was involved but “may have not bothered to dig into the substance of the case.” *Id.*

Although B states that A’s “substantive participation was minimal,” and although we think this a close case, we are of the opinion that the pattern of personal involvement and responsibility described constitutes “substantial participation” for purposes of 18 U.S.C. § 207(a), rather than the type of “casual” or “ministerial or procedural” involvement intended to be excluded from the statute’s coverage. This is not a situation, for example, in which A was merely asked to file papers prepared in the Land and Natural Resources

¹It is not clear whether A’s statement in his letter that B signed all motions is inconsistent with the latter’s statement that A “probably signed” these particular memoranda. We are not in a position to resolve a factual dispute on this issue if indeed one exists.

²18 U.S.C. § 207(b) imposes a 1-year ban on personal appearances in particular matters that were under the former Government employee’s “official responsibility” during his last year of Government service. This provision clearly barred A for as long as it applied, because the case was apparently assigned to him when he was in the U.S. Attorney’s Office. But § 207(b) will have no practical impact here because it has been more than a year since A left the U.S. Attorney’s Office.

Division without any further exposure to the case. Indeed, he concedes that he conferred regularly with B and attended some meetings pertaining to the case.³

We need not determine the applicability of 18 U.S.C. § 207(a) here, however, because it appears from the Lands Division attorney's account that A is disqualified under Canon 4 of the ABA Code of Professional Responsibility. Disciplinary Rules 4-101(A) and (B) provide that, except with the consent of the client (or in certain other situations not relevant here), a lawyer may not reveal a confidence or secret of a client or use a confidence or secret to the disadvantage of the client. A lawyer violates these prohibitions only if he actually breaches the confidential relationship. Nevertheless, many authorities have held that as a procedural matter a lawyer is not qualified to represent a party in litigation if he formerly represented an adverse party in a matter substantially related to the pending litigation. ABA Formal Opinion 342, 62 A.B.A.J. 517 (1976) and cases cited.

Moreover, it is ordinarily not necessary to establish that the attorney did, in fact, receive confidential information in the earlier representation in order for an attorney to be disqualified under Canon 4. An exploration of this issue might destroy the very confidentiality that Canon 4 is intended to protect. ABA Formal Opinion 342, *supra*. 517 n. 6; *Emle Industries, Inc. v. Patentex*, 478 F. (2d) 562, 571 (2d Cir. 1973). It is sufficient if "it can reasonably be said that in the course of the former representation the attorney *might* have acquired information related to the subject matter of his subsequent representation." *NCK Organization, Ltd. v. Bregman*, 542 F. (2d) 128, 134 (2d Cir. 1976) [emphasis in original]. See also, *Richardson v. Hamilton International Corp.*, 469 F. (2d) 1382, 1385 (3d Cir. 1972).

In view of B's account of A's repeated involvement in and exposure to the case—particularly his apparent presence at a portion of the meeting with the Government's experts at which B informed us there was probably some discussion of trial strategy—would seem to be a case in which it may be said that A "might have acquired information related to the subject matter" of the lawsuit. As mentioned above, A did not merely perform the essentially ministerial act of filing papers prepared in Washington without having any occasion to consider the merits of the case.

³A related issue is whether A is barred by DR 9-101(B) of the ABA Code, which provides that a lawyer may not accept private employment in a matter in which he had "substantial responsibility" as a public employee. We have taken the position that whether a lawyer in a supervisory position had substantial responsibility under this rule depends on such factors as whether his relationship to the matter was merely formal, whether the subject matter was routine and involved no policy determination or was not otherwise of particular significance, and whether there were intervening layers of responsibility or other indications that the matter was not of a type with which the attorney would or should have had personal involvement. See, generally, *Kesselhaut v. United States* (Ct. Cl., March 29, 1976), slip opinion at 24-29, Opinion 889 of the Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York. *Contra*, ABA Formal Opinion 342, 62 A.B.A.J. 517, 520 (1976). Similar considerations would no doubt apply where, as here, the former Government lawyer had a nonsupervisory relationship to the case. As with the application of 18 U.S.C. § 207(a), the DR 9-101(B) issue is a close one on the facts thus far presented and need not be finally resolved.

A client ordinarily may waive the confidentiality requirement in Canon 4 and thereby permit an attorney to appear on behalf of an adverse party in a substantially related case, but a waiver is generally thought to be inappropriate where the public interest is at stake in a case, as where the United States is a party. ABA Informal Opinion 1233. On the facts as B described, we doubt that a waiver would be appropriate here in any event, because of the substantial question regarding A's representation that would be raised under 18 U.S.C. § 207(a) and DR 9-101(B).

For these reasons, we have strong reservations about the propriety of A's proposed representation. Obviously, however, we have not been privy to all of the factual details, particularly those that might color the ultimate judgment here. We have attempted to outline the considerations that we think are relevant. We propose that your Division share this memorandum with A and invite him to comment and to add any factual details he thinks pertinent. If he so elects, and if your Division thinks it would be helpful, we would be pleased to take a second look at this question.

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

July 20, 1978

**78-41 MEMORANDUM OPINION FOR THE COUNSEL
TO THE ASSOCIATE ATTORNEY GENERAL,
ATTORNEY PERSONNEL**

**Employee Selection Procedures—Use of LSAT Scores
in the Department's Honor and Summer Intern
Programs**

This responds to your predecessor's request for our opinion whether the Department may consider Law School Admission Test (LSAT) scores of applicants for the Honor and Summer Intern Programs. For the reasons that follow we recommend against such use.

In a memorandum from your predecessor to the Civil Rights Division, he explained how the Department uses and considers LSAT scores in these programs. The score, he maintains, is only a minor factor in the evaluation of program applicants. He also states that the score is considered a "rough indication of intellectual ability."

The use of tests and test scores for employment purposes is a major subject in employment-discrimination law. The Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), established the basic standards by which employee selection devices, including tests, were to be judged to determine whether they illegally furthered discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The Court held that employment practices that operate to exclude protected class members under Title VII¹ and that cannot be shown to be related to job performance are prohibited. *Id.*, at 431. If a practice operates disproportionately to exclude minorities, the employer must meet the heavy burden of proving that the practice "bear[s] a demonstrable relationship to successful performance of the jobs for which it is used." *Id.* The Equal Employment Opportunity Commission (EEOC) has published "Guidelines on Employee Selection Procedures." 29 CFR § 1607.1

¹Title VII prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a). Because our discussion relates to tests as employment devices and because racial minorities generally do not perform as well as the rest of the population on written tests our focus will be on how the Department's use of the LSAT affects racial minorities.

*et seq.*² One of the concerns which led to the publication of these guidelines is the common practice of "using tests as the basis for employment decisions without evidence that they are valid predictors of employee job performance." 29 CFR § 1607.1(b). Where such evidence is lacking "the possibility of discrimination in the application of test results must be recognized." Section 1607.3 of the guidelines, in defining discrimination, essentially restates the *Griggs* standard. It provides, in pertinent part, that the use of a test that disproportionately rejects minorities in the hiring process constitutes discrimination unless the test is predictive of, or significantly correlated with, actual job requirements. Even where the test is reasonably related to job requirements, if it disproportionately rejects minorities the employer must show that there is no suitable alternative hiring procedure that would impact less heavily on minorities. *Id.*

We now turn to the Department's use of LSAT scores to see whether its procedure comports with the above rules. The memorandum from your Office explains the Department's use of these scores as follows. The Department operates on the premise that the LSAT score is a rough indicator of intellectual ability. Proceeding from this premise it explains the significance that the Department attaches to these scores:

In order to evaluate the non-intellectual abilities of the candidate the LSAT score is compared to the applicant's academic record. If a person has a high LSAT score, but only average grades then it suggests that the person is an underachiever and we are therefore not interested in him. By the same token, a mediocre or low LSAT score coupled with high academic performance suggests that the candidate is a hard worker and self disciplined. The person did not achieve his excellent grades by intellectual ability alone. This weighs very heavily in the candidate's favor. Finally, a high LSAT score and high academic performance suggests that not only is the person very bright but he or she is also a hard worker.

This explanation may be illustrated by the following categorization of applicants:

- (1) high grades—high LSAT
- (2) high grades—average LSAT
- (3) average grades—average LSAT³
- (4) average grades—high LSAT

²These guidelines are entitled to great deference and have been followed by virtually every court dealing with these issues. See, *Douglas v. Hampton*, 512 F. (2d) 976, 986 (D.C. Cir. 1975), and cases cited. See also, *Washington v. Davis*, 426 U.S. 229, 247, n. 13 (1976).

³Although the memorandum does not state how this combination of grades and LSAT scores bears upon the employment decision, this category of applicants seems logically to fall between classes 2 and 4. Class 4 members are unfavorably viewed as "underachievers." That label would not fit class 3 members since their grades are commensurate with their LSAT scores. Thus, class 3 members would appear to be considered more desirable applicants than those in class 4. Class 3 members, however, are not viewed as favorably as class 2 members. Class 2 members are seen as hard working and self-disciplined. It would seem to follow that class 3 members do not warrant these labels because their grades were consistent with their LSAT scores.

We have listed the categories in the order of the most desirable applicants (class 1) to the least desirable applicants (class 4); desirability is based on the reasoning of the above quoted statement.

At this point it is important to keep in mind that the use of test scores where the test is not predictive of or correlated with job performance is a discriminatory practice only insofar as it operates to reject disproportionate numbers of protected class members. Therefore, we must consider the adverse impact that use of LSAT scores has on minority applicants. To proceed with our analysis we make two basic assumptions to determine whether there is a possible adverse effect on minority applicants. First, we assume that minority members as a general rule do not perform as well as nonminority persons on the LSAT. Second, we assume that minority members as a general rule receive lower law school grades than nonminority persons.⁴

Accepting these assumptions as valid, we can now evaluate how the Department's use of LSAT scores may affect minority applicants in the Honor and Summer Intern Programs.

I. Class 1 (high grades—high LSAT)

Class 1 would include very few minority members because the high grades and high LSAT score are inconsistent with assumed minority performance. Therefore, this class would, to a large degree, be composed of whites. A high LSAT score adds to their desirability since the Department would view an individual in this class as very bright and hard working. Thus, in this class the LSAT is considered as a positive factor. The effect of this is to give these predominantly white applicants an additional advantage based on their LSAT scores. Members of the other classes are adversely affected by this because the effect of increasing the ratings for class 1 members serves to make members of the other classes less desirable comparatively.

II. Class 2 (high grades—average LSAT)

Because of their high grades, members of this class would also be predominantly white. Interestingly, here the average LSAT would actually be considered favorably. The theory is that the class member received grades higher than expected. Thus, in this case, an average LSAT score is a positive factor. Although it seems anomalous, this favorable consideration of average LSAT scores adversely affects minority members. Most minorities would not

⁴Unfortunately, we do not have ready access to the actual statistics on this subject, if indeed any exist. However, we believe that these assumptions are fully warranted since there is a "substantial body of evidence that black persons and other disadvantaged groups perform on the average far below the norm for whites on generalized intelligence or aptitude tests." *Douglas v. Hampton*, 512 F. (2d) 976, 983, quoting from *Arrington v. Massachusetts Bay Transp. Auth.*, 306 F. Supp. 1355, 1358 (D. Mass. 1969). The LSAT concededly is a general intelligence test. Therefore minorities would not be expected to score as high as whites. See also, *Racial Bias and the LSAT: A New Approach to the Defense of Preferential Admissions*, 24 Buff. L. Rev. 439, 456 (1974), and Bell, *In Defense of Minority Admissions Programs: A Response to Professor Graglia*, 119 U. Penn. L. Rev. 364, 367 (1970).

receive the benefits connected with average LSAT scores because, not having received high grades, they would not be in this class. Thus, here again, it is fair to assume that whites would, to a disproportionate degree, benefit from the use of LSAT scores.

III. Class 3 (average grades—average LSAT)

Most black applicants would fall in this class. Consideration of the LSAT scores would result in no discernible advantage to blacks based upon the reasoning of the memorandum.

IV. Class 4 (average grades—high LSAT)

This is the one class where LSAT would adversely impact on predominantly white class members. The high LSAT would result in fewer black class members. The negative inferences drawn from the average grades—high LSAT combination would diminish employment opportunities for these applicants.

As the foregoing illustrations demonstrate, it is quite possible that the Department's use of LSAT scores may work to the disadvantage of minorities. Accurate data on the Department's use of these scores would be required before we could say, with any assurance, that this possible adverse impact is consistent with what actually occurs. However, it is surely a possibility.

Proceeding under the premise that the Department's use of the LSAT has a possible discriminatory impact, the issue becomes whether such use is reasonably predictive of job performance. The Educational Testing Service (ETS) prepares the LSAT. This organization has consistently warned against use of the LSAT in employment decisions since it is of doubtful validity as a predictor of success in practice. Your memorandum states that the Department's primary use of LSAT scores is to measure motivation. That is, the test results are used to see how an individual's grades stack up against his or her LSAT rating. The validity of the Department's assumption regarding applicant motivation has not been established. The EEOC guidelines state that:

Evidence of a test's validity should consist of empirical data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.
28 CFR § 1607.4(c).

It thus seems that the Department is obliged to determine whether its assumptions on applicant motivation are empirically supportable.

Congress, in passing the 1972 amendments to Title VII, Pub. L. 92-261, 86 Stat. 103, extended the protections of Title VII to Federal employees. Their legislative history shows that the Federal Government's use of unvalidated hiring criteria was a major concern to the Congress.

Civil Service selection and promotion requirements are replete with artificial selection and promotion requirements that place a premium on "paper" credentials which frequently prove of questionable value as a means of predicting actual job performance. *The problem is*

further aggravated by the [Civil Service Commission's] use of general ability tests which are not aimed at any direct relationship to specific jobs. The inevitable consequence of this, as demonstrated by similar practices in the private sector, and found unlawful by the Supreme Court, is that classes of persons who are culturally or educationally disadvantaged are subjected to a heavier burden in seeking employment. [Emphasis added.]⁵

Congress decried the use of such hiring criteria, stating that the "inevitable consequence" of this is to create an added and unwarranted burden on disadvantaged classes. The D.C. Court of Appeals in *Douglas v. Hampton*, 512 F. (2d) 976 (D.C. Cir. 1976), likewise condemned the use of unvalidated hiring criteria in holding that Federal employment tests must rationally measure required job skills. *Cf.*, *Washington v. Davis*, 426 U.S. 229, 247, n. 13 and accompanying text (1976).

Private employers covered by title VII are required to use validated selection criteria. It would be anomalous for the Federal Government not to meet this same requirement. The United States Commission on Civil Rights in a July 1975 report, *The Federal Civil Rights Enforcement Effort—1974*, Vol. V.—*To Eliminate Employment Discrimination*, stated:

The Federal Government must not be permitted the continued use of employment selection standards which close the doors to groups victimized by years of discrimination without any empirical proof of such standards' relation to job performance; to do so, would permit the Government to escape adherence to the requirements it, itself, imposes on private employers. Such policy decisions within the Government seriously erode the Government's own credibility as an enforcer of the law [footnotes omitted]. *Id.*, at 42-43.

We are not unsympathetic with the unique problems involved in formulating accurate predictors of attorney job performance. Nor do we fail to recognize that other employment criteria for attorneys are not purely objective. Law school grades⁶ and employment interviews are not validated as predictors, and we do not here address the question whether they should be. We agree, however, with the Civil Rights Division's view insofar as it maintains that:

In light of the difficulty in evaluating job performance, we are forced to use imprecise indicators of ability. Where, however, as here, we have reason to question the usefulness of an indicator, we believe it should be eliminated as a criterion of selection, particularly in light of the appearance it creates of the application of a lesser standard of compliance with Title VII in Department hiring than in hiring by other employers.

⁵H. Rept. No. 238, 92d Cong., 1st sess. 24 (1971), 1972 U.S. Code Cong. Admin. News, 2159.

⁶Grades in law schools are more reliable indicators than are LSAT scores, in that grades are given on the basis of legal work performed or questions answered. Therefore, a student is graded for activities similar in many respects to work he or she will do in practicing law.

Your memorandum states that the Department is not insensitive to the possibility of the LSAT being tainted by cultural biases. It is because of this concern, it maintains, that the LSAT score plays a less significant role in evaluating minority candidates. While this may be true, it fails to deal with the possibility of nonminority candidates' ratings being augmented because of LSAT considerations. This would have the same effect as penalizing minority candidates for their performance on the LSAT because even though they might not be negatively considered as a result of their scores, their ratings would be comparatively lower because of LSAT consideration.

A second and possibly more important issue is this. If a selection procedure impacts adversely on minorities as a result of a discriminatory practice, the degree of discrimination is irrelevant. *See, Bolton v. Murray Envelope Corp.*, 493 F. (2d) 191 (5th Cir. 1974); *Rowe v. General Motors Corp.*, 457 F. (2d) 348 (5th Cir. 1972). While we concede it to be far from clear that the Department's use of LSAT scores to measure motivation results in a disproportionate rejection of minority applicants, a plausible case can be made that this in fact occurs. In sum, we recommend that the Department abandon the policy of considering LSAT scores to determine employee motivation because of the procedure's (1) questionable reliability, (2) uncertain legality, and (3) apparent conflict with requirements of private employers.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

July 21, 1978

**78-42 MEMORANDUM OPINION FOR THE
CLASSIFICATION REVIEW COMMITTEE,
DEPARTMENT OF JUSTICE**

**Classification of Documents (28 CFR Part 17)—Effect
of a Tie Vote by the Department Review Committee**

This responds to a memorandum questioning the legal effect of a tie vote by the Department Review Committee (DRC) on the declassification of a document.¹ It is my conclusion that declassification is not appropriate where the DRC is equally divided. The question arises from an incident which took place in the course of reviewing an appeal from a denial of a request to declassify a document. One member recused himself; the remaining members split 2-2. The chairman ruled that the tie meant continued classification. The DRC upheld the ruling by a vote of 4-1.

The dissenting member argues that this ruling is contrary to 28 CFR § 17.39, reading as follows:

In making its determinations concerning requests for declassification of classified information or material, the Department Review Committee shall impose for administrative purposes the burden of proof on the originating division to show that continued classification is warranted.

He contends that a tie vote by the DRC evidences a failure by the originating division to meet its burden of proof. He also argues that a tie vote demonstrates "substantial doubt" that classification is appropriate under 28 CFR § 17.22, which provides:

If the classifying authority has any substantial doubt . . . as to whether the information or material should be classified at all, he should designate the less restrictive treatment.

The contention involving § 17.22 can be dealt with briefly. Part 17 of 28 CFR treats classification and declassification separately and establishes specific

¹Under § 7(c) of Executive Order No. 11652, 3 CFR 678 (1971-1975 Compilation), the Attorney General is authorized to render an interpretation regarding any question arising in the course of administration of the order.

standards to govern each. Classification is governed by subpart D. Under 28 CFR § 17.15, information must be classified in “the lowest . . . category consistent with its proper protection.” Section 17.22 guides the classifying authority in applying this standard. Subparts F and G provide parallel control over declassification. Under 28 CFR § 17.29, information must be declassified or downgraded “as soon as there are no longer any grounds for continued classification.” Section 17.39 guides the DRC in applying this standard to declassification. While the provisions governing classification, including § 17.22, may provide useful guidance in assessing declassification questions, the structure of the regulations suggests that those provisions are not designed to control declassification decisions.

The more substantial issue arises from the burden of proof provision in the portion of the regulations that relate directly to the declassification review process. Under 28 CFR § 17.29, the DRC must declassify if it finds that circumstances have changed so that classification is no longer warranted. Section 17.39 places “for administrative purposes the burden of proof” on the classifier to show that the information still requires protection. The term “burden of proof” is a general term of art which ordinarily includes within its meaning both the “burden of production” and the “burden of persuasion” and, depending on the context in which it is used, may refer to either. The first is the burden of presenting evidence; the party having the burden of production must go forward with his proof on an issue or lose it by default.² The burden of persuasion is the burden of ultimately convincing the finder of fact; that burden may, and often is, placed on a party other than the one bearing the burden of production.³

The issue, then, is whether the reference to the “burden of proof” in § 17.39 was intended to refer to the ultimate burden of persuasion or to the burden of going forward. It is my opinion that this section imposes on the originating division only the procedural burden of going forward with the production of evidence and argument in favor of retaining the classification. The language of the provision itself strongly suggests this conclusion—the burden is assigned for “administrative purposes.” The most logical connotation of those words is that the burden has been allocated for procedural purposes, *i.e.*, to govern the order of proof. This is consistent with the ordinary understanding that the allocation of the ultimate burden of persuasion to one or the other party in an adjudication is a matter of substance.⁴

This reading is also consistent with the familiar evidentiary principle that the party most likely to have information about a subject is required to come forward with it, and that a party ought not to be required to prove a negative.⁵ Since the DRC considers appeals from denial of declassification, the appellant-

²See generally McCormick, *Evidence* § 336 (1972 ed.), at 783-84; 9 Wigmore, *Evidence* § 2485, 2487 (3d ed.), at 271-74.

³For example, the State bears the burden of proof, including sanity, in a criminal case, but the defendant must first place sanity in issue. See 9 Wigmore, *Evidence* § 2501 (3d ed.), at 359.

⁴See Wigmore, *Evidence* § 2488 (3d ed.), at 284.

⁵See McCormick, *Evidence* § 336 (1972 ed.), at 786-87.

requester would normally have the burden of going forward with evidence that continued classification is unnecessary.⁶ This would require the requester to prove a negative in the face of the classifier's superior knowledge of why continued classification is needed. The regulation, therefore, requires the classifier to go forward, in order to clearly define the issue before the DRC.

This conclusion is consistent with the assigned function of the DRC, if that function is to declassify a document when it is satisfied that there are "no longer any grounds for continued classification." It takes action only when it has "determined" that classification is no longer appropriate. 28 CFR § 17.38(b)(4). Although the regulation reflects a sensitivity to the need of preventing excessive classification, its primary purpose, like the central purpose of Executive Order No. 11652, is to protect against the disclosure of national security information.⁷ 28 CFR § 17.1; Executive Order No. 11652, preamble 6(G). If the regulation had been intended to create a contrary presumption in favor of declassification, that purpose would have been more clearly expressed than in the burden-of-proof reference in § 17.39.

Relying upon the language of 28 CFR § 17.39, general principles of the law of evidence, the purpose of the regulation and the Executive order governing classified information, we conclude that an equally divided vote of the DRC does not result in declassification.⁸

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

⁶See McCormick, *Evidence* § 337 (1972 ed.), at 786.

⁷Section 3-301 of Executive Order No. 12065, of June 28, 1978, provides that information classified under that or previous Executive orders shall be declassified "as early as national security considerations permit." The new Executive order thus continues the primary emphasis on the protection of national security information from disclosure.

I also note that the leading case interpreting Executive Order No. 11652, under the Freedom of Information Act, 5 U.S.C. § 552(b)(1), holds that classification is presumed lawful until the requester shows otherwise. *Alfred A. Knopf Co. v. Colby*, 509 F. (2d) 1362 (4th Cir. 1975).

⁸This is consistent with appellate court practice that a tie vote results in an affirmance of the lower court. See, e.g., *Williams & Wilkins Co. v. United States*, 420 U.S. 376 (1975); *Bailey v. Richardson*, 341 U.S. 918 (1951).

July 27, 1978

**78-43 MEMORANDUM OPINION FOR THE
COMMISSIONER, INDIAN CLAIMS
COMMISSION**

**Act of August 13, 1946 (25 U.S.C. § 70b(c))—
Restriction on Activities of Former Members of the
Indian Claims Commission**

This is in response to your request for our opinion whether a certain restriction on activities of the Indian Claims Commission contained in § 2 of the Act of August 13, 1946, 25 U.S.C. § 70b(c), will remain in effect after September 30, 1978, when the Commission goes out of existence. We conclude that the statutory restriction will remain in effect.

The restriction reads:

No Commissioner shall engage in any other business, vocation, or employment during his term of office nor shall he, during his term of office or for a period of two years thereafter, represent any Indian tribe, band, or group in any matter whatsoever, or have any financial interest in the outcome of any tribal claim. Any person violating the provisions of this subsection shall be fined not more than \$10,000 or imprisoned not more than two years, or both.

The statute is not limited to prohibiting a former Commissioner from representing an Indian tribe, band, or group in a specific matter in which he participated personally and substantially or which was under his official responsibility as a Commissioner; that is independently required by 18 U.S.C. § 207 and rules of professional ethics for attorneys. Nor is the statute limited to the representation of an Indian tribe, band, or group before the Indian Claims Commission. The rationale of a prohibition of this type is to prevent a former Commissioner from using any residual influence he may have with his former colleagues or with Commission staff members or using inside knowledge of the Commission's procedures or tentative conclusions in pending cases for the benefit of a claimant.

The statute sweeps broadly, prohibiting a former Commissioner from representing an Indian tribe, band, or group "in any matter whatsoever" for a

2-year period after his term of office. The purpose is to remove any possible temptation for a Commissioner to take official action favoring a particular Indian group in the hope of obtaining private employment from them. By imposing an absolute bar, the statute also serves to assure the public that the integrity of the Commission has not been compromised in this manner. Most of these purposes are furthered by interpreting the 2-year bar in § 2 of the Act as remaining in effect even after the Commission goes out of existence.

Construing the prohibition to remain in effect after the Commission ceases to exist is also consistent with the language and structure of the Act establishing the Indian Claims Commission. Section 23 of the 1946 Act, 60 Stat. 1055, provided that the existence of the Commission would terminate within 10 years of its first meeting or at such earlier time after the expiration of the 5-year period of limitation in the Act. The date for dissolution of the Commission has been extended several times, most recently to September 30, 1978. (Pub. L. 94-465, 90 Stat. 1990), but reference to § 23 of the original Act indicates that eventual dissolution was foreseeable from the outset. If Congress had intended the restriction in § 2 of the Act to be of no effect after dissolution, it could have so provided.

Section 3(a) of the 1946 Act, 25 U.S.C. § 70b(b), provides that the Commissioners shall hold office during good behavior "until the dissolution of the Commission." Thus, the "term" of a Commissioner has always run until the dissolution of the Commission. In these circumstances, we believe that the prohibition against representation of any Indian tribe, band, or group during a Commissioner's term of office and "for a period of two years thereafter" must be read to remain in effect after dissolution of the Commission.

MARY C. LAWTON
Deputy Assistant Attorney General
Office of Legal Counsel

August 9, 1978

**78-44 MEMORANDUM OPINION FOR THE GENERAL
COUNSEL, UNITED STATES WATER
RESOURCES COUNCIL**

**Status of the Pacific Northwest River Basin
Commission Under the Federal Unemployment Tax
Act**

This responds to your request for our opinion concerning the status of the Pacific Northwest River Basin Commission (PNWRBC) under the Federal Unemployment Tax Act (FUTA), 26 U.S.C. § 3301 *et seq.* We understand the situation to be as follows: Pub. L. No. 94-566, 26 U.S.C. § 3309, requires that States provide unemployment compensation for State and local government employees in order to qualify for Federal benefits under FUTA. It also authorizes them to tax local governmental units for this purpose. The State of Washington has passed conforming legislation and contends that the PNWRBC is a taxable local governmental unit under State law. The Water Resources Council, on the contrary, contends that the PNWRBC is a "wholly or partially owned" Federal instrumentality exempt from State unemployment taxes under 26 U.S.C. § 3306(c)(6)(A).

Whether the PNWRBC is exempted from State taxation under that provision depends on whether its employees are eligible for unemployment compensation under the Unemployment Compensation for Federal Employees Program (UCFE), 5 U.S.C. §§ 8501 *et seq.*¹ Pub. L. No. 94-566 was intended to extend unemployment compensation to State and local government employees.² Its proponents understood that employees of the United States and wholly or partially owned Federal instrumentalities were already covered by UCFE; the

¹UCFE provides for payment of unemployment compensation, at Federal expense, to "federal employees" as if their "federal service" has been employment covered by the unemployment compensation law of the State of an employee's last duty station. See 5 U.S.C. §§ 8502-8504. A "federal employee" includes, with exceptions not relevant here, a person "in the employ of the United States or an instrumentality which is wholly or partially owned by the United States." 5 U.S.C. § 8501(1), (3). The language is identical to that in 26 U.S.C. § 3306(c)(6)(A).

²See S. Rept. 94-1265, 94th Cong., 2d sess., at 7-8; H. Conf. Rept. 94-1745, 94th Cong., 2d sess., at 11.

bill was meant to provide equivalent treatment for State and local employees.³ Therefore, if PNWRBC employees are eligible for Federal benefits under UCFE, the State has no obligation under 26 U.S.C. § 3309 to provide unemployment compensation for them and has no collateral authority to collect an unemployment tax from the Commission.

The UCFE program is administered by the Department of Labor (Labor). We requested Labor's opinion on whether employees of the PNWRBC are eligible for UCFE benefits. Labor has informed us that the PNWRBC "is covered by the UCFE program as a partially-owned federal instrumentality." Having reviewed Labor's ruling, we concur in its view of the status of the PNWRBC. Accordingly, it is our opinion that the Commission is exempted from the State of Washington's unemployment tax.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

³See 122 Cong. Rec. H. 7411-12 (July 20, 1976).

August 14, 1978

**78-45 MEMORANDUM OPINION FOR THE
ASSOCIATE ATTORNEY GENERAL**

Veterans Preference Act (5 U.S.C. §§ 2108, 3309-3320)—Application to Attorney Positions

In 1977 the Civil Service Commission undertook an evaluation of the employment procedures of the Department of Justice. It concluded that those procedures concerning Schedule A and B excepted-service position (*see* the Commission's regulations, 5 CFR § 213.3101 *et seq.*) did not satisfy the requirements of the Veterans Preference Act of 1944, as amended, 5 U.S.C. §§ 2108, 3309-3320. The Commission's Evaluation Manager informed the Department's Director of Personnel that the Department is required to:

. . . revise current internal procedures for processing Schedule A and B applications to include numerical ratings for best qualified [applicants] and crediting veterans preference in order to fully comply with the requirements of [the Veterans Preference Act].

After some ambivalence by Commission officials whether to insist on this numerical rating system, we understand that they now do insist on its implementation.

A number of other agencies have resisted the rating system, asserting that its adoption would effectively negate affirmative action efforts to hire women and minorities. We express no opinion as to how such a system would affect affirmative action efforts. The issue we do address is whether the Commission may require that attorneys be hired pursuant to such a system. For the reasons that follow we believe that the Commission does not have such authority.

Section 3309, title 5, U.S. Code, the key provision concerning veterans' preference, provides that:

A preference eligible who receives a passing grade in an examination for entrance into the competitive service is entitled to additional points above his earned rating, as follows—

- (1) a preference eligible under section 2108(3)(C)-(G) of this title—10 points; and
- (2) a preference eligible under section 2108(3)(A) of this title—5 points.

Section 2108, title 5, defines a "preference eligible" as an honorably discharged veteran who served in the Armed Forces under such conditions as are set forth in that section. The 10-point preference provided by § 3309(1) is directed to certain disabled veterans, and in some cases to their relatives or survivors. The 5-point preference is directed to certain nondisabled veterans.

The problem arises because under 5 U.S.C. § 3320 preference eligibles must be selected for appointment in the excepted service in the same manner as are preference eligibles in the competitive service. Literal compliance with this provision is impossible because positions in the excepted service are not filled pursuant to civil service examination. Thus, in the excepted service there are no examination scores to which preference points may be added.

In most instances the decision to examine for positions rests with the Commission. Section 3302, title 5, authorizes the President to except positions from the competitive service and Executive Order No. 10577, 3 CFR 218 (1954-1958 Compilation) delegated this authority to the Commission. *See* 5 CFR § 6.1. Therefore, the Commission may require examinations for most excepted-service positions simply by removing them from the excepted service. And, if the Commission could require that these positions be filled on the basis of examinations it appears that it could require a rating system, because the proposed rating system is actually a form of examination. *See* 2 discussion pp. 4-5, *infra*.

Attorney positions are unique, however, in that the Commission is prohibited by statute from requiring that they be filled pursuant to examination. Thus, Commission authority to require a rating system for attorneys cannot be said to derive from its authority to require examinations. Congress in the Commission's 1943 appropriation act, 57 Stat. 173, restricted the Commission's authority over attorney hiring. That restriction provided that:

No part of any appropriation in this Act shall be available for the salaries and expenses of the Board of Legal Examiners created in the Civil Service Commission by Executive Order Numbered 8743 of April 23, 1941.

An identical restriction has, to this date, been included in each Commission appropriation.¹ Thus, the Commission is barred from doing those things which previously fell under the authority of the Legal Examining Board. Subsection

¹*See*, for example, Pub. L. 94-363, 90 Stat. 968-69, which reads in pertinent part as follows:

No part of the appropriation herein made to the Civil Service Commission shall be available for the salaries and expenses of the Legal Examining Unit of the Commission established pursuant to Executive Order 9358 of July 1, 1943, or any successor unit of like purpose.

The reference to the "Legal Examining Unit of the Commission" rather than the Board of Legal Examiners was occasioned by Executive Order No. 9358, 3 CFR 256 (1943-1948 compilation), which vested the power of the Board in the Commission. Some Members of Congress had questioned whether the Board should be continued absent specific legislation. Thus, Executive Order No. 9358 transferred the Board's authority to the Commission "[p]ending action by the Congress with respect to the continuance of the Board." The 1943 appropriation restriction and subsequent restrictions, of course, barred further action by the Board.

3(d) of Executive Order No. 8743, 3 CFR 927 (1938-1943 compilation), set forth the functions of the Board as follows:

The Board in consultation with the Civil Service Commission, shall determine the regulations and procedures under this section governing the recruitment and examination of applicants for attorney positions, and the selection, appointment, promotion, and transfer of attorneys in the classified service.²

Administering examinations was but one of the functions of the Board. It was also charged with establishing attorney selection procedures. The Commission's proposed rating system constitutes an attorney selection procedure because attorneys would be selected on the basis of their ratings. Therefore, the appropriation restriction precludes the Commission from requiring the rating system it proposes for attorney applicants.³ Based on this, it may reasonably be argued that the Commission, in seeking to impose attorney selection procedures, is acting contrary to Congress' intent.⁴

The original debaters of the restriction did not fail to discern the implications of the appropriation restriction as it affects veterans' preference. Senator Burton stated:

. . . if we cut off all civil service examination, it seems to me that we then throw the whole matter open, do away with veterans' preference, and create a position which is not sound. [90 Cong. Rec. 2660 (1944)]

²Section 1 of that Executive order placed most attorney positions in the classified service.

³This view is not altogether free from doubt. Senator McKellar, the sponsor of the restrictive provision, indicated that "[i]t merely provides that no part of the money herein appropriated shall be used for the purpose of conducting such [civil service] examinations." 90 Cong. Rec. 2661. Accordingly, it can be fairly argued that only the examination of attorneys was proscribed by the restriction. But compare the broader language of Senator McKellar at 90 Cong. Rec. 2660, stating that the Commission has no business in determining the "relative qualifications" of attorneys. See also Senator McKellar's assertion that the Commission has no business in saying "who shall be the lawyers of this Government." *Independent Offices Appropriation Bill for 1945: Hearing on H.R. 4070 before the Senate Subcommittee of the Committee on Appropriation*, 78th Cong., 2d sess., 343-44 (1944).

Therefore, the Commission's proposed rating system may be viewed as an examination and thus improper for that reason. The rating system, like an examination, would purport to objectively measure the abilities of attorneys and seek to gauge the "relative qualifications" of attorneys. As such it would be an "examination," as Senator McKellar used that term. Legal Examining Board "examinations" were not limited to written tests; that term was construed to include oral interviews as well. *To Create a Board of Legal Examiners in the Civil Service Commission: Hearing on H.R. 1025 before the House Committee on the Civil Service*, 78th Cong., 1st sess., 4 (1943) (Statement of Solicitor General Fahy, an ex-officio member of the Board).

⁴The Commission might argue that it is not imposing selection procedures, but that it is only requiring that agencies establish their own procedures. However, the Commission's purported power of approval or rejection of such procedures is tantamount to Commission imposition of selection procedures for attorneys.

Congress, in considering the 1944 restriction, rejected any Commission role in determining the "relative qualifications" of lawyers. 90 Cong. Rec. 2660 (remarks of Senator McKellar). The rating system, however, would result in the Commission doing just that.

And, again at 90 Cong. Rec. 2661, Senator Burton cautioned that the restriction:

. . . would result in the return of lawyers to a patronage basis, making impossible the application to them of the veterans' preference provisions already in the statutes.

The only response to Senator Burton's cautionary statement was the suggestion that a legal examining board for all attorney applicants be established in the Department of Justice. Senator McKellar, 90 Cong. Rec. 2661 (1944). This, however, has never been done.

Thus, there is reason to doubt that the Commission may lawfully require an attorney rating system. As we mentioned above, 5 U.S.C. § 3320 requires that veterans' preference apply in the excepted service in the same manner as in the competitive service. However, attorney positions are unlike most others in the excepted service in that the Commission cannot remove them from the excepted service. Additionally, the restrictive appropriation provision casts doubt on the Commission's authority to require attorney-selection procedures.⁵

While the Commission's authority to enforce veterans' preference in attorney hiring may be dubious, the Department is bound to apply it in some fashion. In our opinion, it need not be applied through a numerical rating system; such a system for attorney hiring was considered and rejected as long ago as 1941. Thus, it was not viewed as essential to implementation of veterans' preference.

President Franklin D. Roosevelt, by Executive Order No. 8044, 3 CFR 456 (1938-1943 compilation) appointed a committee to study and make recommendations on civil service procedures. In February 1941 that committee submitted its report entitled *Report of the President's Committee on Civil Service Improvement*. H. Doc. 118, 77th Cong., 1st sess. (1941). The report stated two major views on attorney selection procedures—Plan A and Plan B.

Plan A recommended that attorneys be evaluated only to determine whether they were qualified for Federal service. If so, they would not be given a rating, but rather, all qualified applicants would be considered equally eligible for employment.

Plan B recommended, at least in the case of inexperienced attorneys, that they be examined and rated competitively.

The authors of Plan A reasoned:

[I]t seems to us highly unwise to force the unique problem of the attorney positions into any general pattern simply for the sake of uniformity. Wise administration of the civil service, as of other organizations, may often indicate the need for flexibility and ad hoc adjustments, even at the cost of uniformity and symmetry. . . .

. . . We therefore have considered and presented our recommendations on the assumption that the attorney positions present a unique

⁵As further evidence that the Commission's authority to enforce the Veterans Preference Act in attorney hiring is unclear, the Commission until recently was of the view that it had no authority to enforce that Act in the excepted service at all. We limit our disagreement with Commission enforcement authority to attorney selection.

problem in the professional service, which must be solved individually rather than by application of a general formula. [H. Doc. 118, *supra*, at p. 32-33]

As well as recommending against a rating system for attorneys, Plan A recommended against applying the competitive service procedure of certifying three applicants to the appointing officer. 5 U.S.C. § 3318. It was stated by those urging Plan A that:

We feel that any mechanical ranking and certification would operate in an undesirably arbitrary manner, that the superior officer who is responsible for the appointee's work should have more voice in his selection, and that *no principle of civil service or wise administration requires that there be an assumption of absolute accuracy in rating the candidates all of whom by definition are qualified to do legal work of a high order.* [*Id.*, at 38] [Emphasis added.]

President Roosevelt adopted Plan A in Executive Order No. 8743, 3 CFR 927 (1938-1943 compilation). That order directed the Commission to establish a register of eligibles from which attorney positions were to be filled. And, § 3(F) of the order directed that:

. . . registers shall not be ranked according to the ratings received by the eligibles, except that persons entitled to veterans' preference . . . shall be appropriately designated thereon.

Thus, a rating system was not required. Preference eligibles, however, were designated on the register. Therefore, under Executive Order No. 8743, because no numerical ratings were used in the selection process, veterans' preference was implemented only by considering it a positive factor in the employment decision. At the present, veterans' preference is positively considered in Department employment decisions. If all other factors are equal, or even close, the preference eligible will normally be selected over the nonpreference eligible.

The Department will soon adopt new procedures whereby applicants interviewed through the Department's Honor Graduate Program for attorneys will be given scores based on nine employment factors. Five or ten veterans' preference points, where applicable, will be added to these scores. Based on the scores, applicants will then be evaluated as best-qualified, qualified, or unqualified. All best qualified applicants will be eligible for Department employment. However, the scores received in the Honor Program rating system will not be considered in the final selection process.

The Department will soon formalize its present policy and issue a directive requiring that the final attorney selection process consider veterans' preference as a positive factor. Thus, in the Honor Program the veteran will twice benefit from the application of preference.

This procedure has been proposed in the Honor Program on an experimental basis. We understand that if it proves to be an accurate indicator of desirable attorney applicants, the procedure may be expanded to other attorney hiring practices in the Department. Veterans' preference will remain a positive factor

in hiring attorneys with or without the proposed point system. We feel that this practice will give adequate effect to the Veterans Preference Act.

We conclude that our practice reasonably gives effect to the Veterans Preference Act. In responding to the Commission's request that we establish a numerical rating system, we question its authority to require such a system for attorneys. It would be appropriate to explain to the Commission our procedure of positively considering veterans' preference and the new procedure to be used in the Honor Program. If the Commission is satisfied with this, the question of its enforcement authority may be mooted.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

August 18, 1978

**78-46 MEMORANDUM OPINION FOR THE
ASSOCIATE ATTORNEY GENERAL AND THE
DEPUTY ATTORNEY GENERAL**

**Voluntary Services (31 U.S.C. § 665(b),
5 U.S.C. § 3111)—Use of Student Volunteers**

This concerns the Civil Rights Division's memorandum to the Associate Attorney General and the Deputy Attorney General raising the issue of the legality of the Department accepting the uncompensated services of student volunteers. This is usually done incident to an academic program in which the student performs supervised outside work for academic credit.

The specific issue posed is whether 31 U.S.C. § 665(b) or any other authority precludes the Department from accepting uncompensated services by students who are "given assignments that would aid the Department in its mission." The Office of Management and Finance believes this is not permissible. We agree.

Section 665(b) provides that:

No officer or employee of the United States shall accept voluntary service for the United States or employ personal service in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property.

On its face, the statute appears to prohibit the acceptance of all nonemergency voluntary service. However, an opinion of the Attorney General construing this provision states:

[I]t seems plain that the words "voluntary service" were not intended to be synonymous with "gratuitous service" and were not intended to cover services rendered in an official capacity under regular appointment to an office otherwise permitted by law to be nonsalaried. In their ordinary and normal meaning these words refer to service intruded by a private person as a "volunteer" and not rendered pursuant to any prior contract or obligation. [30 Op. Att'y Gen. 51, 52 (1913)]

The Attorney General concluded that the prohibition was designed to prevent "the acceptance of unauthorized services not intended or agreed to be gratuitous and therefore likely to afford a basis for a future claim upon Congress." *Id.*, at 55. See also 27 Comp. Gen. 194, 195 (1947). Thus § 665(b) does not necessarily preclude an Agency from accepting uncompensated service where it is clear that there will be no subsequent claim for compensation.

It is important to note that the opinion further concludes that employees cannot waive statutorily fixed compensation or any part thereof. 30 Op. Att'y Gen., *supra*, at 56. See also, *Glavey v. United States*, 182 U.S. 595, 609-610 (1909); *United States v. Andrews*, 240 U.S. 90 (1916); 27 Comp. Dec. 131, 133 (1920).¹ In *Glavey*, the Court quoted with approval from the opinion of Judge Lacombe in *Miller v. United States*, 103 Fed. 413, 415 (S.D.N.Y. 1900). Judge Lacombe stated:

It is to be assumed that Congress fixes the salary with due regard to the work to be performed, and the grade of man that such salary may secure. It would lead to the grossest abuses if a candidate and the executive officer who selects him may combine together so as entirely to exclude from consideration the whole class of men who are willing to take the office on the salary Congress has fixed, but will not come for less. And, if public policy prohibit such a bargain in advance, it would seem that a court should be astute not to give effect to such illegal contract by indirection, as by spelling out a waiver or estoppel. [See 182 U.S. at 609.]

Reasoning from this, the Court in *Glavey* stated:

If it were held otherwise, the result would be that the Heads of Executive Departments could provide, in respect of all offices with fixed salaries attached and which they could fill by appointments, that the incumbents should not have the compensation established by Congress, but should perform the service connected with their respective positions for such compensation as the head of a Department, under all the circumstances, deemed to be fair and adequate. In this way the subject of salaries for public officers would be under the control of the Executive Department of the Government. Public policy forbids the recognition of any such power as belonging to the head of an Executive Department. The distribution of officers upon such a basis suggests evils in the administration of public affairs which it cannot be supposed Congress intended to produce by its legislation. [*ibid.*]

Thus, if a position falls under the classification provisions of 5 U.S.C. § 1501 *et seq.*, the compensation cannot be waived since compensation for the

¹The Attorney General stated:

"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."

position is statutorily fixed. See 26 Comp. Gen. 956, 958 (1947); Chap. 311-4, FPM (revised July 1969). If, however, a statute authorizes appointments to particular positions without regard to the civil service laws, or confers discretion in the appointing officer as to compensation, there is no bar to the acceptance of uncompensated services. 27 Comp. Gen. 194 (1947); 27 Comp. Dec. 131, *supra*.

The question of the propriety of an Agency accepting uncompensated services in student intern programs involving assignment to "productive work, *i.e.*, to the regular work of the Agency in a position which would ordinarily fall in the competitive service" was raised by the Civil Service Commission in 1947. The Comptroller General concluded that, absent specific statutory authority, an appointee to a position in the Federal service cannot legally waive the compensation fixed by law for that position. 26 Comp. Gen., *supra*, at 961.

It is worthy of note that the Civil Service Commission in requesting the opinion on the student intern program limited its request as follows:

This situation, of course, is distinguishable from a college student serving as an "intern" in the capacity of an outside student or investigator, observing the work of a government unit, performing tasks which fall outside the usual functions of the unit, or utilizing its facilities primarily for the benefit of his own educational advancement. Although the results of the intern's work would be interesting, and probably useful to the agency in such a case, the work would not be authorized as an official task or project and would ordinarily be incidental or supplemental to the intern's undergraduate or postgraduate study in the educational institution. The question does not involve the propriety of such arrangements. [*Id.*, at 957]

The Civil Service Commission in its Bulletin No. 308-15, July 12, 1974, deals with the subject of "Providing Work Experience for Students in a Nonpay Status." The Commission believes that, even absent statutory authority to accept voluntary services, such limited programs are permissible. The rationale is that a participant in such a program renders no service to the Government because his work does not further the Agency's mission. Therefore § 665(b) has no application.

We now consider the application of the above principles to the issue at hand. Section 665(b) is not a bar because it is understood by all concerned parties that no financial remuneration will be given for the students' services. But if the students fill positions having statutorily fixed minimum compensation, considerations other than § 665(b) preclude the acceptance of voluntary services. See 30 Op. Att'y Gen., *supra*, at 56; 26 Comp. Gen. 956, *supra*. It appears that the students fill such positions. Although we have been informed by the Office of Management and Finance that the students are not formally appointed in the Federal service, it is only this technicality that distinguishes them from other Agency employees.² This omission does not permit the acceptance of voluntary

²Section 2105(a), title 5 U.S. Code, defines an employee as one who (1) performs a Federal function, (2) is under the supervision of a Federal employee, and (3) has been appointed in the civil service by an appropriate official.

services. If it did, the prohibition against accepting voluntary services where there is a fixed compensation would be no prohibition at all. Because all of the requisites of employee status except formal appointment are met, a *de facto* appointment exists.³

The Department would prefer student programs that are both beneficial to the student and further the Department's mission. But those objectives can only be accomplished pursuant to legislative authority. The only uncompensated student services that the Department may accept are those in which student volunteers do not perform productive work for the benefit of the Department.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

³We have been unable to find any statute authorizing the Department to accept the services here involved without compensation. (It should be noted that by § 301(a) of the Civil Service Reform Act of 1978, Pub. L. 95-454 (Oct. 13, 1978), 92 Stat. 1144, 5 U.S.C. § 3111, Congress has now authorized Agencies to accept uncompensated services of student volunteers.)

August 22, 1978

**78-47 MEMORANDUM OPINION FOR THE GENERAL
COUNSEL, GENERAL SERVICES
ADMINISTRATION**

**Federal Excess Personal Property—Disposition Under
§ 608 of the Foreign Assistance Act of 1961 (22 U.S.C.
§ 2358)—Effect of 40 U.S.C. § 483(d)**

This responds to your request for our opinion as to how § 3(d) of Pub. Law No. 94-519,¹ 90 Stat. 2454, 40 U.S.C. § 483(d), affects Federal excess personal property disposition under § 608 of the Foreign Assistance Act of 1961, 75 Stat. 442, as amended, 22 U.S.C. § 2358. You contend that § 3(d) governs the disposition of such property in connection with both grants and loans made by the Agency for International Development (AID) under § 608. AID contends that § 3(d) governs only grants. We conclude that AID's contention is correct.

The Federal Property and Administrative Services Act of 1949, 63 Stat. 377, as amended, 40 U.S.C. § 471 *et seq.*, regulates the use and disposal of Federal excess and surplus property. Excess property is property not required by a Federal Agency for its needs and the discharge of its responsibilities. 40 U.S.C. § 472(e). General Services Administration (GSA) is required to make an Agency's excess property known to other Agencies for possible further use within the Federal Government. If no Agency requests the property it becomes surplus, *i.e.*, "excess property not required for the needs and discharge of the responsibilities of all Federal agencies." 40 U.S.C. § 472(g).

¹Public Law No. 94-519 amended the Federal Property and Administrative Services Act. Section 3(d) relates only to personal property. Accordingly, all references to property herein are to personal property, not real property.

Section 3(d) provides that Federal Agencies may not furnish excess personal property to their grantees except pursuant to its provisions.² It allows Agencies to furnish such property only to public agencies and nonprofit tax-exempt organizations under the conditions set forth therein.

Excess property furnished pursuant to § 608 is exempted from these conditions. However, such transfers may be made only insofar as the Administrator of General Services determines that the property is not needed for donation pursuant to § 203(j) of the Federal Property and Administrative Services Act, 40 U.S.C. § 484(j).³

Section 608 authorizes establishment of a \$5 million revolving fund for AID to acquire excess Government property for use in "United States-assisted projects and programs." Regarding the nature of the assistance to be provided under this fund, § 635(a), 22 U.S.C. § 2395(a), reads, in pertinent part, as follows:

Except as otherwise specifically provided in this Act [the Foreign Assistance Act], assistance under this Act may be furnished on a grant basis or on such terms, including cash, credit, or other terms of repayment . . . as may be determined to be best suited to the achievement of the purposes of this Act, and shall emphasize loans rather than grants wherever possible.

²The text of § 3(d) reads, in pertinent part, as follows:

Notwithstanding any other provisions of law, Federal agencies are prohibited from obtaining excess personal property for purposes of furnishing such property to *grantees* of such agencies except as follows:

(1) Under such regulations as the Administrator [of General Services] may prescribe, any Federal agency may obtain excess personal property for purposes of furnishing it to any institution or organization which is a public agency or is nonprofit and exempt from taxation under section 501 of the Internal Revenue Code of 1954, and which is conducting a federally sponsored project pursuant to a grant made for a specific purpose with a specific termination made: Provided, that—

(A) such property is to be furnished for *use in connection with the grant*; and

(B) the sponsoring Federal agency pays an amount equal to 25 percentum of the original acquisition cost (except for costs of care and handling) of the excess property furnished, such funds to be covered into the Treasury as miscellaneous receipts.

* * * * *

(2) Under such regulations and restrictions as the Administrator [of General Services] may prescribe, the provisions of this subsection shall not apply to the following:

(A) *property furnished under section 608 of the Foreign Assistance Act of 1961, as amended, where and to the extent that the Administrator of General Services determines that the property to be furnished under such Act is not needed for donation pursuant to section 203(j) [40 U.S.C. § 484(j)] of this Act;*

* * * * *

This paragraph shall not preclude any Federal agency [from] obtaining property and furnishing it to a *grantee* of that agency under paragraph (1) of this subsection. [Emphasis added.]

³This provision regulates the donation of surplus property to the States, territories, and possessions.

The use of excess property is encouraged in foreign assistance programs. Section 102(a) of the Foreign Assistance Act, 22 U.S.C. § 2151(a), reads in pertinent part, “. . . to the maximum extent practicable . . . disposal of excess property . . . undertaken pursuant to this or any other Act, shall complement and be coordinated with [international development] assistance . . .” Thus, the use of excess property is sanctioned in § 608 loan and grant programs. Further, the legislative history of § 608 states that as excess property is used, the revolving fund is to be “replenished from the appropriation applicable to the particular purpose of the assistance, *i.e.*, *development loans*, development grants, supporting assistance, etc.” S. Rept. No. 612, 87th Cong., 1st sess. 30 (1961). [Emphasis added.]

AID informs us that foreign countries acquire excess property under § 608 by paying part of the moneys they receive under the foreign assistance programs into the revolving fund. Thus, in those cases, the amount of monetary assistance is decreased depending on the cost of the excess property acquired. The acquisition of excess property by this method is particularly beneficial to foreign countries because they are only charged with the costs of administration, rehabilitation of the property, handling, etc. *See, Hearings on AID's Excess Property Program before a Subcommittee of the House Committee on Government Operations, 91st Cong., 2d sess. 13-16 (1970) (1970 Hearing)*. Thus, since excess property can be acquired for substantially less than new property, foreign assistance spending power is increased. This has been referred to as “stretching the foreign aid dollars.” *See, 1970 Hearing* at 14, 24. As indicated above, both foreign loan and grant programs may use excess property.

Under § 608(b) excess property not exceeding \$45 million (acquisition cost) may be transferred to AID each fiscal year without GSA approval. However, with respect to property exceeding that amount, GSA must first determine that it is not needed for donation pursuant to § 203(j).

The difference between AID's and GSA's interpretations of § 3(d) is that under GSA's view AID may transfer excess property under either § 608's loan or grant programs only if GSA first determines that the property is not needed for donation pursuant to § 203(j). While AID agrees with regard to § 608 grants, it contends that GSA has no role in excess property transfers in § 608 loan transactions unless these transactions involve more than \$45 million (original acquisition cost) of excess property in any fiscal year.

GSA advances two arguments to support its interpretation. First, it asserts that a principal purpose of § 3(d) is to provide as much property as possible for use by the States. Therefore, it concludes, it would be inconsistent with this purpose to read the law as not controlling excess property disposition in § 608 loan transactions. It further argues that:

It is difficult to discern whether there is any difference between AID's grant program and their development loan program in the use of excess property because in both instances the property is given to the foreign recipients.

However, GSA ignores the plain language and the legislative history of § 3(d). That provision expressly deals only with excess property transfers to *grantees* of Federal Agencies. Section 608's loan program deals with borrowers, not grantees. Moreover, § 3(d)'s legislative history shows that it was primarily intended to regulate the Agency's practice of lending excess property to organizations receiving grants. H. Rept. No. 94-1429, 94th Cong., 2d sess. 3-4 (1976); S. Rept. No. 94-1323, 94th Cong., 2d sess. 4-6 (1976). The foregoing reports expressed concern that this practice withdrew from circulation property that otherwise would have been eventually used in surplus property programs. H. Rept. No. 94-1429, *supra*, at 7; S. Rept. No. 94-1323, *supra*, at 7. Plainly, Congress was concerned about property diverted from the surplus property program, but only insofar as this resulted from grantor Agencies lending excess property to their grantees. The excess property provisions of § 3(d) were primarily designed to meet this problem.⁴

There is no evidence in § 3(d)'s legislative history that Congress intended to abolish § 608's mechanism covering both loans and grants, and replace it with a mechanism for utilizing excess property in connection with loans. It is a familiar principle of statutory construction that repeals by implication are disfavored. When two statutes are capable of coexistence, both must be regarded as effective absent a clearly expressed congressional intention to the contrary. *Administrator, FAA v. Robertson*, 422 U.S. 255 (1975); *Morton v. Mancari*, 417 U.S. 535 (1974). An intention to repeal a statute must be clear and manifest. *Morton v. Mancari*, *supra*, at 551. This rule applies to partial repeals as well as to complete ones. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974). Although Congress expressly restricted § 608's disposition of excess property in grant programs, there is no evidence that it also intended to so restrict excess property use in § 608's loan programs. Rather the language of § 3(d) and its legislative history point to a contrary intention. It must be assumed that Congress did not intend to alter § 608 as it applied to the use of excess property in loan programs.

We conclude that § 3(d) must be construed as affecting only the use of excess property in § 608 grant programs.

MARY C. LAWTON
Deputy Assistant Attorney General
Office of Legal Counsel

⁴See also, *Recommendations of the Ad Hoc Interagency Study Group on Utilization of Excess Federal Property* (1974), reprinted in *Distribution of Federal Surplus Property to State and Local Organizations: Hearings on H.R. 9152 and H.R. 9593 Before a Subcommittee of the House Committee on Government Operations, 94th Cong., 1st sess. 397 et seq.* (1975). These recommendations led to the excess property provisions of Pub. L. No. 94-519. The Ad Hoc Interagency Study Group studied the practice of grantor Agencies loaning excess property to grantees. Thus, it is not unreasonable to assume that this is the problem with which § 3(d) sought to deal.

September 1, 1978

**78-48 MEMORANDUM OPINION FOR THE CHIEF,
TORTS SECTION, CIVIL DIVISION**

**Trade Secrets—Federal Food, Drug, and Cosmetic Act
(21 U.S.C. § 331)—Disclosure—Swine Influenza
Immunization Program (42 U.S.C. § 2746)**

This responds to your request for our opinion whether the Department may release to a court trade secret information entitled to protection under § 301 of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 331(j), where the manufacturers owning the trade secrets consent to such release. The Department is defending certain personal injury and wrongful death actions arising out of the National Swine Influenza Immunization Program of 1976. *See* 90 Stat. 1114, 42 U.S.C. § 247b(k)(1)(A)(ii), which provides that the exclusive remedy under this program shall be against the United States. These actions have been consolidated for pretrial discovery purposes and are pending in the United States District Court of the District of Columbia. A relevant issue in the litigation will be the ingredients and manufacturing processes of the vaccine. The vaccine manufacturers claim that some of this information involves trade secrets.

The court has issued a protective order requiring that documents involved in this litigation be used for no other purpose. The order further provides that the documents or any information contained therein shall not be disclosed to anyone other than the attorneys and persons assisting them in litigation. Subject to the conditions in the protective order, the vaccine manufacturers have consented to use of the information in the litigation.

You ask whether the Department may, in light of § 301(j), release in discovery proceedings documents containing trade secret information acquired under the authority of the Federal Food, Drug, and Cosmetic Act. Section 301(j), 21 U.S.C. § 331(j), reads, in pertinent part, as follows:

The following acts and the causing thereof are hereby prohibited:

* * * * *

(j) The using by any person to his own advantage, or revealing, other than to the Secretary or officers or employees of [the Department of Health, Education and Welfare] when relevant in any judicial proceeding under this Act, any information acquired under authority

of sections 404, 409, 505, 506, 507, 510, 512, 513, 514, 515, 516, 518, 519, 520, 704, 706, or 708 of this title concerning any method or process which as a trade secret is entitled to protection.

It is conceded that the pending judicial proceeding is not one under the Federal Food, Drug, and Cosmetic Act. However, we believe that the Department may release the documents in question in the pending litigation.

The intention of § 301(j) is solely to protect the manufacturers' interests in their trade secrets and it is tied to their interest of maintaining the protection to which the trade secrets are entitled. A manufacturer can waive his right to this protection. The legislative history of § 301(j) shows that it was designed as a "safeguard to the property rights of manufacturers by making [a crime] the unauthorized use or disclosure of any information. . . concerning any method or process which is entitled to protection in equity as a trade secret." S. Rept. No. 493, 73d Cong., 2d sess. 18, 21 (1934). This is consistent with the terms of § 301(j) barring disclosure of only the information relating to trade secrets that is "entitled to protection." Other than protecting the manufacturers' proprietary interest, there is no general societal value in keeping this information confidential.

As mentioned above, § 301(j) only bars disclosure of such trade secrets information as is "entitled to protection." This entitlement runs to the owner of the trade secret who may waive it entirely or in part. *See, Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974); *Underwater Storage, Inc. v. United States Rubber Co.*, 371 F. (2d) 950 (D.C. Cir. 1966), cert. denied, 386 U.S. 911 (1967). Thus, the "entitled to protection" element of § 301(j) is determined by the intent and legitimate interests of the owner of a covered trade secret. Accordingly, the owner may consent to a limited waiver in the pending litigation, thereby permitting the disclosure of the information to be used therein. *Cf., Plastic & Metal Fabrications, Inc. v. Roy*, 163 Conn. 257, 303 A. 2d 725 (1972). This comports with the literal language and the spirit of § 301(j).

For these reasons the Department may properly release the above-described documents in the pending litigation.

MARY C. LAWTON
Deputy Assistant Attorney General
Office of Legal Counsel

September 6, 1978

**78-49 MEMORANDUM OPINION FOR THE GENERAL
COUNSEL, UNITED STATES WATER
RESOURCES COUNCIL**

**Water Resources Council (42 U.S.C. § 1962a)—
Authority to Expend Carried-Over Funds**

This responds to your request for our opinion regarding the existence and spending authority of the Water Resources Council after the end of fiscal year (FY) 1978.

The Council was created by § 101 of the Water Resources Planning Act of 1965 (the Act), as amended, 42 U.S.C. § 1962a. Its membership consists of the heads of eight Federal Agencies. Section 401 of the Act contains the authorization for the Council's appropriations. In 1977, § 401 was amended, and the provisions authorizing "annual" appropriations were replaced with authorizations limited to fiscal year 1978. *See* Pub. L. No. 95-41, 42 U.S.C. § 1962d.

The Senate passed S. 2701, legislation that would continue the Council's authorization for 1 year. The version passed by the House would have abolished the Council on September 30, 1978. A conference committee's report recommended the Council to continue for 1 year. *See* H. Rept. No. 95-1494, 95th Cong., 2d sess. (1978). The conference report has not yet received floor consideration.

For fiscal year 1978, a total of \$13,696,000 was appropriated for the Council. (*See* Title IV of the Public Works for Water and Power Development and Energy Research Appropriation Act for Fiscal Year 1978, Pub. L. No. 95-96.) The FY 1978 appropriation act (and its predecessors) expressly provides that the funds appropriated for the Council are "to remain available until expended." After September 30, 1978, the Council will have available funds carried over from prior fiscal years.

The conference report on the FY 1979 appropriation bill, H. Rept. No. 95-1490, 95th Cong., 2d sess. (1978), is now awaiting floor action. Under that report, no funds would be appropriated for the Council.

You assume that, as of October 1, 1978, no statute will have been enacted either authorizing or appropriating FY 1979 funds for the Council. You ask whether, in such circumstances, the Council would continue to exist and

whether it would have authority to spend funds carried over from previous fiscal years. Our opinion is that the Council would continue and that it could properly spend the carried-over funds.

The provision establishing the Council will still be in effect. Notwithstanding the absence of an FY 1979 authorization or appropriation, the Commission as an entity will continue. The primary issue is whether funds appropriated in FY 1978 or a prior year could be used in FY 1979, because the Commission's ability to carry out its functions depends upon the availability of funds.

Section 501 of the FY 1978 appropriation act states that: "No part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year unless expressly so provided herein." See also 31 U.S.C. §§ 712a and 718. As noted above, the appropriation for the Council is subject to such an express exception; that is, the funds are "to remain available until expended." Thus the Council can use carried-over funds after October 1, 1978.¹

No contrary result is called for by the Supreme Court's decision in the Tellico Dam case, *TVA v. Hill*, 437 U.S. 153 (1978). There, relying in part on the rule that repeals by implication are not favored, the majority held that the requirements of the Endangered Species Act were not overridden by Congress' action in appropriating funds for TVA, some of which were intended to be used for the Tellico Dam. There is no comparable question of implied repeal here.

The present issue involves reconciling an authorization provision that is silent regarding FY 1979 and an appropriation statute that expressly provides for the possibility of the Council's spending FY 1978 funds after October 1, 1978. The purpose of the latter provision is to change the effect of authorization statutes that "[do] not specifically authorize such extended availability." H. Rept. No. 95-379, 95th Cong., 1st sess. 105 (1977) (the House committee report on the FY 1978 appropriation act). Accordingly, in order to give effect to Congress' intent, the authorization statute and the FY 1978 appropriation act must be read together. The Council may properly rely upon the appropriation act's provision permitting extended availability of the funds. Cf. 40 Comp. Gen. 694 (1961) (expenditure of "no-year appropriations" by the FAA).

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

¹The FY 1978 appropriation act allocates the Council's appropriation among its various functions, e.g., \$1,158,000 for administration. If carried-over funds are used, these allocations must be observed. See 31 U.S.C. § 628.

September 6, 1978

**78-50 MEMORANDUM OPINION FOR THE COUNSEL
TO THE PRESIDENT**

**Freedom of Information Act (5 U.S.C. § 552)—
National Security Council—Agency Status Under
FOIA**

You have asked whether the National Security Council (NSC) is an Agency for Freedom of Information Act, (FOIA) purposes. We conclude, in general, that it is. This opinion does not, however, address the questions (1) whether the National Security Council, although an Agency under FOIA for most purposes, might be considered not an Agency for other purposes,¹ or (2) which records held by the Council are Agency records within the meaning of the Act.²

I. The Freedom of Information Act

The Freedom of Information Act, 5 U.S.C. § 552 (1976), places certain duties, responsibilities, and obligations relating to public access to Government information on "each agency" of the Government of the United States. For the purpose of the Act

. . . the term "agency" as defined in section 551(1) [of 5 U.S.C.] . . . includes any executive department, military department, Government corporation, Government-controlled corporation, or other establishment in the executive branch of the Government

¹*Cf., Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 188 n. 25 (1975). In that case the Supreme Court suggested that a Regional Renegotiation Board might be an "agency" in some of its work and not an "agency" in the rest of its work.

²It follows from the conclusion that NSC is an Agency for FOIA purposes that records belonging to NSC are Agency records under FOIA, but NSC may hold records that belong to persons or entities that are not Agencies for FOIA purposes. In this connection, it is pertinent to note that the NSC staff views itself as not only performing the functions prescribed in the National Security Act of 1947, 61 Stat. 495, but also serving as "the supporting staff to the President in the conduct of foreign affairs," 40 F.R. 47746 (1975); 32 CFR § 2102.1(b)(1976), and thus, as "an extension of the White House Office."

(including the Executive Office of the President), or any independent regulatory agency. 5 U.S.C. § 552(e).³

According to the definition of § 552(e), the term "agency," for FOIA purposes, includes establishments in the Executive Office of the President. The National Security Council (NSC) is an establishment,⁴ and it is within the Executive Office of the President.⁵ Thus, NSC is within the plain language of the above definition and were it not for the legislative history of the 1974 amendments it would have to be considered an Agency for FOIA purposes.

The Senate version of the 1974 amendments expanded the APA definition of "agency" only by adding to it the U.S. Postal Service, the Postal Rate Commission, and "any other authority of the Government of the United States which is a corporation and which receives any appropriated funds." The Senate report explained this expanded definition of "agency" as follows:

Section 3 expands on the definition of agency as provided in section 551(1) of title 5. That section defines "agency" as "each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, territories, or the District of Columbia." This definition has been broadly interpreted by the courts as including "any administrative unit with substantial independent authority in the exercise of specific functions," which in one case was held to include the Office of Science and Technology. *Soucie v. David*, 448 F. (2d) 1067, 1073 (1971).

Nonetheless, the U.S. Postal Service has taken the position that without specific inclusionary language, amendments to the FOIA "would not apply to the Postal Service." (*Hearings*, vol. II at 323.) To assure FOIA application to the Postal Service and also to include publicly funded corporations established under the authority of the United States, like the National Railroad Passenger Corporation (45 U.S.C. § 541), section 3 incorporates an expanded definition of

³This definition was added by the Freedom of Information Act Amendments of 1974, Pub. L. No. 93-502 § 3, 88 Stat. 1564. Prior to this amendment the FOIA definition of "agency" was exclusively that of the Administrative Procedure Act (APA), 5 U.S.C. § 551(1). In relevant part § 551(1) defines "agency" as

... each authority of the Government of the United States, whether or not it is within or subject to review by another agency.

The amended definition has been incorporated into the Privacy Act of 1974, 5 U.S.C. § 552a(a)(1) and the Government in the Sunshine Act, 5 U.S.C. § 552b(a)(1).

⁴The term "establishment" is not defined in § 552(e) or elsewhere in the FOIA or APA. However, the NSC must be considered an establishment because of its 99-member staff. (Of these, 69 are permanent employees of the NSC; 30 are detailed from other agencies.) The NSC and its staff are easily identifiable as a body separate from other entities within the Executive Office of the President. Money is appropriated for it and it "owns" its furniture, fixtures, and supplies. It pays its employees, keeps their administrative records, and handles its personnel matters. In short, it has a clear, independent administrative status.

⁵The NSC was created by the National Security Act of 1947, 61 Stat. 495. It was transferred to the Executive Office of the President by Reorganization Plan No. 4 of 1949, 5 U.S.C. App., 14 F. R. 5227, 63 Stat. 1067.

agency to apply under the FOIA. [S. Rept. No. 93-854, 93d Cong., 2d sess. 33 (1974).]

The House version of the amendments also contained an expanded definition of the term "agency." This definition was broader and more explicit than the Senate's version and it prevailed in conference to become, with slight modification, 5 U.S.C. § 552(e). Its language relating to establishments within the Executive Office of the President was identical to that agreed upon in conference. The House report explains the meaning of that language by citing examples of "functional entities" included within it:

The term "establishment in the Executive Office of the President," as used in this amendment, means such functional entities as the Office of Telecommunications Policy, the Office of Management and Budget, the Council of Economic Advisers, *the National Security Council*, the Federal Property Council, and other similar establishments which have been or may in the future be created by Congress through statute or by Executive order. [H. Rept. No. 93-876, 93d Cong., 2d sess. 8 (1974)] [Emphasis added.]

Speaking in more general terms the House report notes that the definition of "agency" was expanded

. . . to include those entities which might not be considered agencies under Section 551(1) of title 5, U.S. Code, but which perform governmental functions and control information of interest to the public. [*Id.*]

The conference report, after explaining the differences between the Senate and House versions of the expanded definition of "agency," notes that "*The conference substitute follows the House bill.*" H. Rept. No. 93-1200, 93d Cong., 2d sess. 14 (1974). [Emphasis added.] That report states that by the definition the conferees ". . . intend[ed] to include within the definition of 'agency' those entities encompassed by 5 U.S.C. § 551 and other entities including. . . ." ⁶ *Id.* The report reveals that "expansion of the definition of 'agency' in this subsection is intended to broaden applicability of the Freedom of Information Act. . . ." *Id.*, at 15. In addition, the conference report deals specifically with the meaning of "Executive Office of the President." It states:

With respect to the meaning of the term "Executive Office of the President" the conferees intend the result reached in *Soucie v. David*, 448 F. (2d) 1067 (C.A.D.C. 1971). The term is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President. [*Id.*]

A summary of the 1974 amendments and their history relating to the question whether Congress intended the NSC to be included in the FOIA definition of

⁶The list following "including" does not include the NSC, or any other unit in Executive Office of the President. Two entities are included by name. These are the United States Postal Service and the Postal Rate Commission, both of which were included by express language in the Senate version.

“agency” is as follows: (1) The language of the law is broad enough to be viewed as an expression of congressional intent that all establishments within the Executive Office of the President, including the NSC, be treated as Agencies for FOIA purposes.⁷ (2) The Senate report (and the Senate version of the legislation) continued to cover all Government entities included in the APA definition as interpreted by the courts. The black letter rule, as expressed in the Senate report, is that “any administrative unit with the substantial independent authority in the exercise of specific functions” should be viewed as an Agency under the FOIA. This language was explicitly linked to *Soucie v. David*, 448 F. (2d) 1067 (D.C. Cir. 1971), involving a unit within the Executive Office of the President. (3) The House report shows an unequivocal intention to include NSC in the FOIA definition of Agency. (4) The conference report, while stating generally that the intent of Congress in redefining “agency” was to expand the definition in order to broaden the applicability of the FOIA, declares that the conference bill follows the House version and expresses the specific intent that, with respect to the Executive Office of the President, entities within the “result reached” in *Soucie v. David* be included, but that those constituting the President’s personal staff or “whose sole function is to advise and assist the President” be excluded.

Thus, both the language of the Act and its explanation contained in the House report include, by literal application, the NSC as an Agency subject to the FOIA. The conference report, which states that the conferees followed the House version of the legislation, expresses the intent (as did the Senate report with respect to the term “agency” as used in the APA) that—at least for entities in the Executive Office of the President—a functional approach be adopted. That is, an establishment within the Executive Office should not automatically be classified an Agency (nor automatically excluded), but should be treated as such only if it has the authority to function at least in part as an Agency.

There is a very substantial risk that the NSC would be held to be an Agency on the basis of the unambiguous language of the Act and the House Report. Under conventional standards of statutory interpretation a court would be justified in so holding on these grounds alone. We believe, nevertheless, that to determine whether the NSC is included within the FOIA definition we must apply the conference report’s test and examine whether the NSC is invested with “substantial independent authority in the exercise of specific functions.”⁸ If it is either the President’s staff or a unit whose *sole* function is to advise and

⁷Although it is honored primarily in the breach, “the plain meaning rule” of statutory construction in which legislative history is ignored still has some vitality. See, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201 (1976). Its application becomes more likely when the legislative history is more ambiguous than the statutory language being construed.

⁸We view the reference to the “result reached” in *Soucie v. David* as a reference to the interpretation of that case in the Senate report. That is, entities within the Executive Office of the President may be treated as Agencies for FOIA purposes if they have “substantial independent authority in the exercise of specific functions.” An entity would not have substantial independent authority if it were either the President’s staff or a unit whose sole function is to advise and assist the President.

assist⁹ the President, it should not be viewed as having substantial independent authority.

II. The National Security Council

The National Security Council was created by the National Security Act of 1947, and together with its functions, records, property, personnel, and unexpended appropriations, allocations and other funds available or to be made available, was transferred to the Executive Office of the President by Reorganization Plan No. 4 of 1949, 5 U.S.C. App., 14 F. R. 5227, 63 Stat. 1067. As presently constituted, the statutory body consists of the President, the Vice President, and the Secretaries of State and Defense. It has a staff of 99 (69 permanent employees, 30 detailed from other departments) which, at present, is headed by a staff secretary.¹⁰

According to its statutory mandate

[t]he function of the Council shall be to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security so as to enable the military services and the other departments and agencies of the Government to cooperate more effectively in matters involving national security. [50 U.S.C. § 402(a)]

The National Security Act also assigned to the NSC, under the heading "additional functions," the following duties:

In addition to performing such other functions as the President may direct, for the purpose of more effectively coordinating the policies and functions of the departments and agencies of the Government relating to the national security, it shall, subject to the direction of the President, be the duty of the Council—

(1) to assess and appraise the objectives, commitments, and risks of the United States in relation to our actual and potential military power, in the interest of national security, for the purpose of making recommendations to the President in connection therewith; and

(2) to consider policies on matters of common interest to the departments and agencies of the Government concerned with the

⁹Within the context of the legislative history, which clearly expresses a general intent to expand the coverage of FOIA, "assist" must be read narrowly. We do not believe that units within the Executive Office can be viewed as "assisting" the President, in the same sense that the word "assist" is used in the conference report, when they perform substantive governmental functions, even if the purpose of their authority to perform such functions is to enable them to fulfill a primary role of assisting (or advising) the President. To conclude otherwise would make a dead letter of inclusion of establishments within the Executive Office of the President within the definition of an Agency for FOIA purposes, because the function of all the units within the Executive Office, and those of the Office itself is, in a broad sense, to assist the President.

¹⁰Section 402(c) of 50 U.S.C. directed that the NSC staff be headed by a Presidentially appointed Executive Secretary. This position, which in past administrations has often been filled by the President's Assistant for National Security Affairs, is presently vacant. As a practical matter, however, under current operating procedures the NSC staff works for the President's Assistant for National Security Affairs, in fact, if not in form.

national security, and to make recommendations to the President in connection therewith. [50 U.S.C. § 402(b)]

The Council is further authorized to “. . . from time to time, make such recommendations and such other reports to the President as it deems appropriate or as the President may require.” 50 U.S.C. § 402(d).

The House report on the National Security Act comments that “[t]his Council [the NSC] . . . gives us for the first time in our history a means for bringing together the responsible heads of Government charged with recommending and carrying out our foreign policies after making a careful appraisal of our domestic and military potentials.” H. Rept. No. 961, 80th Cong., 1st sess. 3 (1947). The Senate report characterizes the Council as “[e]ssentially . . . an advisory body to the President with respect to the integration of domestic, foreign, and military policies, so as to enable the military services and other departments and agencies of the Government to cooperate more effectively in matters involving the national security.” S. Rept. No. 239, 80th Cong., 1st sess. 10 (1947). The Senate committee that reported favorably on Reorganization Plan No. 4 of 1949 stated flatly that “[i]t [NSC] is an advisory body to the President and not one of the various agencies within the National Military Establishment.” S. Rept. No. 838, 81st Cong., 1st sess. 2 (1949). It also noted that “[t]he President as chairman controls NSC business . . .” *id.*, and that NSC and the National Security Resources Board (NSRB) “were made advisory agencies to the President by the National Security Act of 1947.”

It is clear from the statutorily prescribed functions of the NSC, from the legislative history of the Act which created it, and from nearly contemporaneous congressional commentary that the Council’s intended function is to be primarily an advisory body to the President that would help him or her to plan the effective and efficient unitary utilization of those various Departments and Agencies of the Government that have responsibilities for the Nation’s security. The question is, however, whether NSC is vested with substantial independent authority in the exercise of specific functions or whether its *sole* function is to advise and assist the President.

In addition to the establishment of the NSC, the National Security Act of 1947 created the Central Intelligence Agency (CIA). That Agency was “established under the National Security Council,” 50 U.S.C. § 403(a), and is given certain duties “under the direction of the National Security Council,” 50 U.S.C. § 403(d), including the duty “to perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct.” 50 U.S.C. § 403(d)(5).

The legislative history of the Act indicates that Congress intended the National Security Council to be the supervisory authority over the Central Intelligence Agency, by establishing the CIA “under” the NSC and making it subject to the Council’s “direction.”

According to the Senate report:

The Central Intelligence Agency provided for by Section 102 exists now as the Central Intelligence Group. *The bill establishes the*

agency under the National Security Council and assigns to that Council the supervisory authority and responsibility now exercised by the National Intelligence Authority created by Executive Order of the President and composed of the Secretaries of State, War, and Navy. [S. Rept. No. 239, supra, at 10] [Emphasis added.]

The Executive order referred to in the Senate report was actually a Presidential directive. It provided, in pertinent part:

To the Secretary of State, the Secretary of War, and the Secretary of the Navy.

1. It is my desire, and I hereby direct, that all Federal foreign intelligence activities be planned, developed and coordinated so as to assure the most effective accomplishment of the intelligence mission related to the national security. *I hereby designate you, together with another person to be named by me as my personal representative, as the National Intelligence Authority to accomplish this purpose.*

2. Within the limits of available appropriations, you shall each from time to time assign persons and facilities from your respective Departments, which person shall collectively form a *Central Intelligence Group and shall, under the direction of a Director of Central Intelligence, assist the National Intelligence Authority.* The Director of Central Intelligence shall be designated by me, shall be responsible to the National Intelligence Authority, and shall sit as a nonvoting member thereof.

3. *Subject to the existing law, and to the direction and control of the National Intelligence Authority, the Director of Central Intelligence shall:* [Presidential directive of January 22, 1946, 3 CFR 1080 (1943-1948 compilation)] [Emphasis added.]

In addition, the Senate report on Reorganization Plan No. 4 of 1949, while stating that NSC “is an advisory body to the President,” recognized that “[i]t also directs the Central Intelligence Agency which coordinates intelligence activities.” S. Rept. No. 838, *supra*, at 2, 4.

The National Security Council, which is an administrative unit¹¹ and is an establishment within the Executive Office of the President, has explicit statutory authority to supervise and direct the Central Intelligence Agency. We believe that NSC’s legal authority over the CIA constitutes substantial independent authority in the exercise of at least one (very important) specific function. Therefore, NSC is not a unit whose sole function is to advise or assist the President.

We have considered the possibility that NSC should be viewed as advisory only because the President, as a member, controls its actions and decisions. The argument runs that in all cases Council’s action must be viewed as Presidential action since the President will inevitably dominate in Council affairs. Thus, Council participation in national security matters is, at most, hortatory and not substantive. This argument fails for two reasons.

¹¹See footnote 4, *supra*.

The National Security Council was created by Congress as an entity distinct from the Presidency. It was transferred, still as a distinct entity, along with all of its functions to the Executive Office of the President by Executive Order No. 12036. As a legal matter, then, the independent authority which it possesses, it possesses as the National Security Council. To the extent that the Council's authority is exercised by the President,¹² it may reasonably be viewed as exercised by him in his capacity as Chairman of the NSC.¹³

Even if it were sound to say that NSC is capable of assuming an advisory role only (because of the President's statutory membership), the Council would not escape Agency status for FOIA purposes. From administration to administration, Presidents, invoking the authority granted them by 50 U.S.C. § 402(b) to assign to the NSC "such other functions as the President may direct," have themselves vested NSC committees on which they have retained membership, with legal authority to perform specific, substantive functions. Current examples are the two NSC committees created by PD/NSC-2, the Policy Review Committee (PRC) and the Special Coordination Committee (SCC), both of which are empowered by Executive order to perform important, substantive, and far-reaching governmental functions relating to intelligence matters and both of which are legally permitted to act without Presidential participation. See Executive Order No. 12036 §§ 1-2 (PRC) and 1-3 (SCC), 43 F.R. 3674, 3675 (1978). The existence of such delegated power¹⁴ in these committees (and other similar NSC committees which existed in prior administrations, such as the 303 and 40 committees, the Committee on Foreign Intelligence (CFI), and the Operations Advisory Group (OAG), see Executive Order No. 11905 §§ 3b (CFI) and 3(c) (OAG), 41 F. R. 7703, 7707-7709 (1976)), prevent the NSC from being viewed as solely advisory and without legal authority to exercise specific governmental functions.

Important, too, is the common understanding that the NSC is a body having functions, power, and authority of its own and is not simply an *alter ego* of the President. This understanding was expressed by the President himself in his statement accompanying the promulgation of Executive Order No. 12036. He said:

The National Security Council and its two standing Committees—the Special Coordination Committee (SCC) and the Policy Review Committee (PRC)—will, *short of the President*, provide the highest level of review and guidance for the policies and practices of the Intelligence Community. [14 Weekly Comp. of Pres. Doc. 214 (Jan. 30, 1978)] [Emphasis added.]

¹²NSC is subservient to the President as are all executive departments and agencies. This, however, does not mean that it, or they, are without independent authority.

¹³Under current practice Presidential decisions on national security matters are promulgated by directives in a series entitled "Presidential Directive (PD)/NSC." See PD/NSC-1.

¹⁴The fact that a Government entity exercises only delegated powers does not prevent it from being treated as an Agency for FOIA purposes. *Grumman Aircraft Engineering Corp. v. Renegotiation Board*, 482 F. (2d) 710 (D.C. Cir. 1973), *rev'd. on other grounds*, 421 U.S. 168 (1975).

We conclude that there is a substantial risk that NSC could be held to be an Agency by a simple, literal application of the language of 5 U.S.C. § 552(c). In our opinion, the better approach is to examine whether NSC is within the exception from inclusion stated in the conference report. This requires examining whether NSC has substantial independent authority in the exercise of specific functions or whether it is simply an establishment in the Executive Office of the President whose sole function is to advise and assist the President. Since NSC is given statutory authority to supervise and direct the CIA and because of the NSC functions provided in Executive Order No. 12036, we conclude that it has independent legal authority to exercise specific functions and that, as a legal matter, it cannot be viewed as existing solely to advise and assist the President. It is not, therefore, within the exception of the conference report, and, being an establishment in the Executive Office of the President not within that exception, is an Agency for FOIA purposes.¹⁵

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

¹⁵There is not a great deal of equity in the position that NSC is not an Agency for FOIA purposes. NSC, although reserving the question of the applicability to it of FOIA, has staff members assigned to process FOIA requests in accordance with its published FOIA guidelines. See 40 F. R. 7316 (1975), 32 CFR § 2101 (1976). Further, due to the nature of the work of the NSC and its staff it is clear that valid exemptions are available for the vast bulk of the material which constitutes NSC records. Yet, there may be records in the possession of the NSC staff which are not sensitive or advisory in nature and which may be of interest to the public, such as some fiscal records.

We have also considered whether NSC could raise a valid constitutional claim to general immunity from the FOIA, and we believe this possibility is very weak. Certain records of the NSC could, if necessary, be protected by a claim of executive privilege, but such a claim could not successfully be invoked to preclude Congress from opening to public view some NSC administrative records and other nonsensitive records to which the claim could not reasonably attach. Nor could it be shown on evidence now available that the Act's impact on NSC is so onerous that its ability to function in support of the President will be impaired.

September 8, 1978

78-51 MEMORANDUM OPINION FOR THE SPECIAL ASSISTANT TO THE ATTORNEY GENERAL

Government Officers and Employees—Department of Justice (5 U.S.C. § 3372)

This memorandum is in response to your request for our opinion concerning the legality of the furnishing of technical assistance by this Department to the State of Iowa, in litigation between the State of Iowa and a private party. It is our opinion that this constitutes a legitimate use of the Attorney General's authority pursuant to 5 U.S.C. § 3372.

The facts are as follows: The State of Iowa, with the encouragement and financial help of the Law Enforcement Assistant Administration (LEAA), hired the Planning Research Corporation (PRC) to design and implement a computer system for storing the State's criminal justice and traffic records. The computer system was to give Iowa law enforcement authorities a greater diversity of and a faster access to State law enforcement data than was possible with the State's existing records system. Also, since the system was to be compatible with the National Crime Information Center (NCIC) computers maintained by the FBI, the NCIC would benefit by obtaining better law enforcement data from Iowa. Because an investigation by the Iowa attorney general showed that the system built by PRC did not work properly, the State sued PRC to recover the damages incurred by it. However, Iowa did not have an expert qualified to evaluate the defects in the computer. Accordingly, the Iowa attorney general asked the U.S. Attorney General to give him the services of a computer expert. The Justice Department temporarily assigned a Department computer expert to give technical advice to the State regarding the faulty computer system. PRC questions the Justice Department's authority to provide such technical assistance.

The U.S. Attorney General has the following authority under 5 U.S.C. § 3372 (1976):

On request from or with the concurrence of a State or local government, and with the consent of the employee concerned, the head of an executive agency may arrange for the assignment of—

- (1) an employee of his agency to a State or local government. . .

for work of mutual concern to his agency and the State or local government that he determines will be beneficial to both.

There is no apparent limit to the type of assignments a Federal employee may be given under § 3372. The assignment possibilities are flexible; the magnitude of the employee's duties are limited only by the agreement between the Federal Agency and the State. The agreement with the State and this Department is that the expert will give the State technical advice regarding the State's criminal justice computer system to enable the proper prosecution of its civil claim. This assignment is within the broad language of § 3372.

Whether the technical services involved constitute work mutually beneficial to the State and the Department of Justice is a question which § 3372 leaves to the discretion of the Agency head. The reason why the work is mutually beneficial in this case is because a working computer in the State, when used in conjunction with the NCIC, will improve the Department's ability to collect and exchange law enforcement data,¹ an obvious benefit to this Department.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

¹28 U.S.C. § 534 (1976).

September 19, 1978

**78-52 MEMORANDUM OPINION FOR THE
EXECUTIVE DIRECTOR, NATIONAL
COMMISSION ON LIBRARIES AND
INFORMATION SCIENCE**

**National Commission on Libraries and Information
Science (20 U.S.C. § 1501 et seq.)—Quorum Under
Commission's Sunshine Act—Delegation of Authority
by the Librarian of Congress**

This responds to your request for our opinion whether the Librarian of Congress can delegate his duties as an *ex officio* member of the National Commission on Libraries and Information Science (Commission) to the Deputy Librarian of Congress, and whether the Commission's Sunshine Act regulations affect the Commission's quorum. We conclude that the Librarian can delegate his official duties, and that the Commission's Sunshine Act regulations do not affect the quorum.

I.

When former Librarian of Congress H.R. Spofford testified before the Joint Committee on the Library of Congress (Committee) in 1896, he told the committee its chairman had advised him that he had the authority to depute an assistant to whom he could delegate certain of his official duties.¹ In making recommendations to Congress on the reorganization of the Library, the Committee said that the Librarian of Congress should have complete control over the Library's management and expressly declined to propose a change in the Librarian's authority.² The Librarian's authority to delegate his official duties is also supported by the provision for compensation for a Deputy Librarian of Congress without specifying his duties.³

The Librarian of Congress has the statutory authority to "make rules and regulations for the government" of the Library of Congress.⁴ Substantially

¹S. Rept. No. 1573, 54th Cong., 2d sess. 129 (1897).

²*Id.*, at 1-2.

³2 U.S.C. § 136 a-1 (1976).

⁴2 U.S.C. § 136 (1976).

identical grants of rulemaking power to the heads of the executive departments are considered general authorizations for their delegation of authority,⁵ although certain powers have been held nondelegable where Congress has so indicated. In *United States v. Giordano*, 416 U.S. 505 (1974), the Court found that the legislative history of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20 (1976), shows that Congress did not intend to authorize the Attorney General's delegation of authority to approve wiretap applications to the Attorney General's Executive Assistant; it held that a wiretap application approved by the Executive Assistant was invalid. The legislative history of the National Commission on Libraries and Information Act, 20 U.S.C. 1501-1506 (1976), shows no intent by Congress to limit the delegation of authority by the Librarian of Congress. We believe that the grant of rulemaking power to the Librarian of Congress implies the authority to delegate his official duties. This authority is also strongly suggested by Congress's provision for compensation for a Deputy Librarian, without specifying the Deputy's duties, and Congress' earlier tacit approval of the Librarian's delegation of authority.

The Librarian of Congress is a member of the Commission *ex officio*; his membership is an extension of his duties as Librarian of Congress.⁶ Because the Librarian of Congress can delegate his official duties, he can also delegate his duties stemming from his membership on the Commission to his Deputy, and allow the Deputy both to vote and to be included in the Commission's quorum.

II.

The Commission's Sunshine Act regulations define the Commission's quorum to be "a majority of the Commission's members who have been appointed by the President and confirmed by the Senate." You ask whether this definition of a quorum in the Commission's regulations is authority to allow less than 8 members, which is a majority of the Commission's statutory 15 members,⁷ to conduct the Commission's business when the Commission has less than 15 members confirmed by the Senate.

The National Commission on Libraries and Information Science Act, 20 U.S.C. §§ 1501-6 (1976), does not specify a quorum for the Commission. The courts have uniformly held that a failure of Congress to specify a quorum authorizes the adoption of no less than a common-law quorum, a majority of the statutory membership of a collective body.⁸ We can find no authority for the Commission's authorizing a quorum of less than a majority of its statutory 15 members. We must therefore conclude that the Commission cannot adopt a quorum of less than 8 members; thus the Commission's regulation defining the

⁵*E.g.*, *Fleming v. Mowhawk Wrecking & Lumber Co.*, 331 U.S. 111, 121 (1946); *Wirtz v. Atlantic States Construction Co.*, 357 F. (2d) 442, 445 (1966); *Plapao Labs. Inc., v. Farley*, 92 F. (2d) 228, 229 (D.C. Cir. 1937), cert. denied, 302 U.S. 732 (1937).

⁶20 U.S.C. § 1505 (1976).

⁷20 U.S.C. § 1505 (1976).

⁸*E.g.*, *FTC v. Flotill Products, Inc.*, 389 U.S. 179, 182-184 (1967).

Commission's quorum must be interpreted to require a majority of the Commission's statutory 15 members for a quorum.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

**78-53 MEMORANDUM OPINION FOR THE
SECRETARY OF LABOR**

**Service Contract Act of 1965 (41 U.S.C. § 351 et. seq.)
—Applicability to Federal Reserve Banks**

The Attorney General has asked me to respond to your request of January 23, 1978, for an opinion on the question whether the Service Contract Act of 1965, 41 U.S.C. §§ 351-358, 79 Stat. 1034, as amended (Act), is applicable to the Federal Reserve banks. For the reasons hereafter set forth we conclude that the Federal Reserve banks are subject to the provisions of the Service Contract Act.*

Section 2 of the Act, as amended, 41 U.S.C. § 351, provides in substance that every contract entered into "by the United States" in excess of \$2,500, the principal purpose of which is to "furnish services in the United States through the use of service employees," shall contain the following:

- (1) A provision specifying the minimum wage to be paid to the various classes of service employees as determined by the Secretary of Labor, or in accordance with an applicable collective bargaining agreement,
- (2) A provision specifying fringe benefits similarly determined, and
- (3) A provision that no part of the services shall be performed in buildings or surroundings furnished by the contractor or subcontractor which are unsanitary or hazardous to the health or safety of the service employees.

In no case are the wages to be less than the minimum wages provided for by § 6 of the Fair Labor Standards Act, 29 U.S.C. § 206.

The term "service employee" is defined in § 8(b) of the Act, as amended, 41 U.S.C. § 357(b). It includes guards, watchmen, and persons employed in laundry, dry cleaning, custodial, janitorial, cafeteria, and miscellaneous housekeeping operations. *See* Rept. No. 798, 89th Cong., 1st sess. pp. 2, 3 (1965) (hereafter S. Report).

*The court in *Brink's Inc. v. Board of Governors, etc.*, 466 F. Supp. 116 (D.C. D.C. 1979), discussed this opinion and agreed with its conclusion.

The purpose of the Act is to provide “much needed labor standard protection for employees of contractors and subcontractors furnishing services to or performing maintenance service for Federal agencies”; at the time of its enactment “the service contract was the only remaining category of federal contracts to which no labor standard protections apply.” H. Rept. No. 948, 89th Cong., 1st sess., p.1 (hereafter H. Report); *see also* S. Report, p.1. The perceived need for protection resulted from the fact that service employees frequently were not covered by the Fair Labor Standards Act and State minimum wage laws, and often were not members of unions. Consequently, they were “one of the most disadvantaged groups of our workers and little hope exists for improvement of their position without some positive action to raise their wage level.” H. Report, p. 2; S. Report, p.3. Members of Congress had expressed their concern over the status of the employees of contractors having service contracts with the United States for several years prior to the adoption of the Act in 1965. H. Report, p.2. These concerns were epitomized by the statement on the floor of the House of Representatives by Representative O’Hara, who was in charge of the bill:

. . . the purpose of this bill is to extend the long-standing policy of Congress that the Federal Government shall not be a party to the depressing of labor standards in any area of the Nation. [111 Cong. Rec. 24387 (1965)]

And Representative Burton pointed out:

When a Government contract is awarded to a service contractor with low wage standards, the Government is, in effect, subsidizing subminimum wages. [111 Cong. Rec. 24388]

Your Department takes the position that in the light of the purpose and policy of the Act and the governmental functions exercised by the Federal Reserve banks, the latter are sufficiently identified with the United States so as to be embraced by the term “United States” in § 2 of the Act. The Federal Reserve banks contend otherwise on three grounds:

First, they assert that the banks, although possessing a hybrid character, are essentially private banking corporations and not Agencies of the United States; *second*, the Act does not apply to Agencies such as the Federal Reserve banks, which do not conduct their business through appropriated funds; and *third*, when statutes are intended to assimilate the Federal Reserve banks to the United States they do so expressly.

1.

It is generally recognized that the Federal Reserve banks do possess a hybrid character. While in some aspects their activities are like those of private banking corporations, they are under strict governmental control and perform important governmental functions. Although the United States does not own any part of their capital stock, which is subscribed to by their member banks, 12 U.S.C. § 284 note, and does not elect a majority of their boards of directors, 12 U.S.C. § 302, the stockholders’ rights are strictly limited. Thus, the

directors elected by the stockholders are not eligible for the positions of chairman or vice chairman of boards of directors, 12 U.S.C. § 305; the stockholders are limited to a dividend of 6 percent, 12 U.S.C. § 289; in the event of liquidation any surplus goes to the United States and not to the stockholders. The banks are under the supervisory control of the Board of Governors of the Federal Reserve System. 12 U.S.C. § 248.¹ In addition, they perform important functions of a governmental nature, acting as fiscal agents of the United States pursuant to 12 U.S.C. § 391, and engaging in open "market operations" under the rules and regulations prescribed by the Board of Governors of the Federal Reserve System. 12 U.S.C. §§ 353-358. Indeed, as stated in *The Federal Reserve System, Purposes and Functions* (1974), a publication issued by the Governors of the Federal Reserve System, the important governmental operations of the Federal System are conducted through the 12 Federal Reserve banks; the Office of the Board of Governors in Washington, D.C., is a headquarters-type facility, and no ordinary operations of a banking character are conducted there. At p. 15. The mixed nature of the Federal Reserve banks is illustrated by 12 U.S.C. § 531, pursuant to which they are covered by the customary exemption of the Federal Government and its Agencies from State and local taxation except with regard to real estate taxes.

The courts have also recognized that the Federal Reserve banks perform important governmental functions, and hence have refused to treat them as private banks with respect to their governmental operations, *See, e.g., Raichle v. Federal Reserve Bank*, 34 F. (2d) 910 (2d Cir., 1929); *Federal Reserve Bank of Richmond v. Kalin*, 77 F. (2d) 50, 51 (4th Cir., 1935); *Schmoll, Inc. v. Federal Reserve Bank*, 286 N.Y. 503 (1941), or for the purpose of taxation. *E.G., Geery v. Minnesota Tax Commission*, 202 Minn. 366, 373-378 (1938);² *Federal Reserve Bank of Minneapolis v. Delta County Register of Deeds*, 288 Mich. 120 (1939). The Attorney General ruled that Federal Reserve banks are entitled to Government telegraph rates for their operation as fiscal agents of the Government. 33 Op. A.G. 54 (1921).

The recent decisions in *Federal Reserve Bank of Boston v. Commissioner of C. & T.*, 449 F. (2d) 60 (1st Cir., 1974); 520 F. (2d) 221 (1st Cir., 1975), are highly pertinent here. The issue in those cases was whether a Federal Reserve bank had a sufficiently governmental character to overcome the prohibition of 28 U.S.C. § 1341, pursuant to which the Federal "district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."³

The court held that Federal Reserve banks "are plainly and predominantly

¹For a more detailed analysis, see the quotation from *Federal Reserve Bank of Boston v. Commissioner of C. & T.*, *infra*.

²See pages 373-375 for the careful analysis of the powers of the Federal Reserve banks.

³In *Department of Employment v. United States*, 385 U.S. 355, 358 (1966), the Supreme Court concluded "... in accord with an unbroken line of authority and convincing evidence of legislative purpose, that § 1341 does not act as a restriction upon suits by the United States to protect itself and its instrumentalities from unconstitutional exactions."

fiscal arms of the federal government," 499 F. (2d) 62, and therefore not subject to the statute. This was based on the following analysis of the structure and functions of the Federal Reserve banks:

There are twelve such banks in the nation, of which the plaintiff is one. They were created and are operated in furtherance of the national fiscal policy. They are not operated for the profit of shareholders, and do not provide ordinary commercial banking services; their stockholders, the member banks, lack the powers and rights customarily vested in shareholders of a private corporation. Federal reserve banks act as depositories for money held in the United States Treasury and as fiscal and monetary agents of the United States. 12 U.S.C. § 391. They hold the legal reserves of member banks, issue currency, facilitate check clearance and collection and have supervisory duties as to member banks. They also provide important services for the Treasury with respect to the public debt and the issuance, handling and redemption of government securities. The limited income generated is used to pay expenses and dividends limited to 6 percent. Any remaining earnings are paid into the surplus fund, 12 U.S.C. § 289, where they may be used by the United States Treasury to supplement the gold reserve. Should a federal reserve bank go into liquidation, any surplus becomes the property of the United States, 12 U.S.C. § 290. *See generally* Board of Governors, *The Federal Reserve System: Purposes and Functions* (5th ed. 1969). [499 F. (2d) 62, 63]

Indeed, the court held that the interests of the Federal Reserve banks are "indistinguishable from those of the sovereign and there are good reasons to relieve them of any symbolic joinder with and by the United States," as would be required of Federal savings and loan associations. 499 F. (2d) 62.

At a later stage of the proceedings the court explained its earlier decision stating:

We reversed, holding that a federal reserve bank belonged to the very narrow class of entities forming an integral part of the United States Government which were entitled to a federal forum even with respect to a state tax claim. [520 F. (2d) 223]

We believe that an entity so closely integrated with the Federal Government as to be able to litigate its exemption from State taxes in the Federal courts despite 28 U.S.C. § 1341, and to do so without the normal requirement of a joinder of the United States, should also be considered the United States for the purposes of a statute designed in the words of its sponsor, Congressman O'Hara, *supra.*, "that the Federal Government shall not be a party to the depressing of the labor standards in any area of the nation."

II.

The Federal Reserve banks argue that the Service Contract Act is limited to Agencies operating with appropriated funds and therefore does not apply to

them because their funds are not derived from the Treasury of the United States. The Act does not provide any pertinent specific limitation to its coverage. The argument is based in part on passages in the legislative history of the Act to the effect that the United States Government should not subsidize substandard wages⁴ and in part on a statement of the Solicitor of Labor before the Senate Committee on Labor and Public Welfare and a passage in the Senate report.

With respect to the subsidization point, we cannot perceive in those passages any intent to limit the scope of the Act to contracts financed by appropriated funds. The gist of the statutory purpose appears in the statement made by Congressman O'Hara that the United States should not be a *party* to the depressing of labor standards. Congress apparently was not concerned with the technical fiscal, and to some extent the fortuitous, question whether specific contracts were financed by appropriated or nonappropriated funds. If anything, as shown below, those legislators aware of the distinction between appropriated and nonappropriated funds believed that it was irrelevant to the purposes which the Act was designed to accomplish.

During the hearings on the Act before the Senate committee, Senator Javits asked the Solicitor of Labor whether the Act had the effect of closing all gaps in the statutes providing for labor standard protections to all employees of the Federal Government and its contractors.⁵ The Solicitor explained that one group would still lack the badly needed protection, namely, those employees of the Federal Government who were paid out of nonappropriated funds, such as employees of the Post Exchanges. At that time they were not covered by any wage standards legislation, and, as *direct* employees of the Federal Government, would not be entitled to the benefit of the Act, which is limited to employees of Government contractors.⁶ When Senator Javits suggested that thought be given to the protection of direct Government employees paid from nonappropriated funds, apparently by broadening the scope of the Act, he replied that this goal could be achieved by administrative action.

The Senate report referred (at pp. 2-3) to the failure of the Act and of related legislation to cover certain direct service employees of the Department of Defense and "strongly urged that the appropriate directive be issued by the Department of Defense or any other appropriate Federal Agency to give such service employees the coverage provided for by the bill."

The above legislative discussion does not support the proposition that the Act does not extend to the employees of contractors with the Government in the case of contracts financed by nonappropriated funds. It merely point out that the Act does not cover direct employees of the Federal Government, and, of course, was not intended to do so. To the contrary, it demonstrates a

⁴See, e.g., H. Report, pp. 2-3; S. Report, pp. 3-4; 111 Cong. Rec. 24388 (Burton).

⁵*Service Contract Act of 1965*, Hearing before the Subcommittee of Labor of the Committee on Labor and Public Welfare, United States Senate, 89th Cong., 1st sess. p. 15 (1965).

⁶Presidential directives and Civil Service regulations providing for prevailing rates for blue-collar direct employees of the Federal Government were inapplicable to employees of non-appropriated fund activities.

congressional purpose that all Government employees ought to be covered by legislation prohibiting substandard wages and working conditions, that it should not make any difference whether employees work directly for the Government or for Government contractors or subcontractors, and as to the latter whether the money paid to them is derived from appropriated or nonappropriated funds.

III.

Finally, the argument is made that when Congress means the term "United States" to include the Federal Reserve banks it does so expressly; hence, that a failure to do so here indicates a legislative intent that the Act should not apply to the Federal Reserve banks. It is true that some statutes expressly state that a provision applicable to the United States or to Federal Agencies encompasses the Federal Reserve banks. *See, e.g.*, § 2(2) of the Labor-Management Relations Act, 29 U.S.C. § 152(2); § 101(1) of the Uniform Assistance and Real Property Acquisition Act of 1970, 42 U.S.C. § 4601(1). To those statutes have been added within the last year the Act of November 16, 1977, amending 18 U.S.C. § 208, one of the conflict-of-interest statutes, to include specifically the directors, officers, and employees of the Federal Reserve banks; and the Federal Banking Agency Audit Act, Pub. L. No. 95-320, 92 Stat. 391-2, amending § 117 of the Accounting and Auditing Act of 1950, 31 U.S.C. § 67, which subjects the Federal Reserve banks to a limited extent to an audit by the General Accounting Office. On the other hand, the Federal Reserve banks have informed us that they have submitted themselves to the operation of certain statutes which exempt the United States from their operation but do not in terms extend the exemption to the Federal Reserve banks. *See, e.g.*, § 3(d) of the Fair Labor Standards Act, 29 U.S.C. § 203(d) of the Fair Labor Standards Act, 29 U.S.C. § 203(d); § 3(5) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 652(5); § 701(b) of Title VII (Equal Employment Opportunities) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b).

These legislative precedents show that Congress has at times expressly indicated that the term "United States" includes the Federal Reserve banks, and there may be additional instances to that effect. This, however, does not demonstrate a consistent drafting technique of Congress to the effect that a statute applicable to the United States never applies to the Federal Reserve banks in the absence of a specific provision to that effect.

The legislative history of the Act shows that the specific question whether the coverage of the Act should include the Federal Reserve banks was not brought to the attention of Congress nor considered by it. A noteworthy analysis of such a situation may be found in Chief Justice Marshall's opinion in *Dartmouth College v. Woodward*, 4 Wheat. 518, 644 (1819). That case involved the question whether the Contract Clause of the Constitution (Art. I, § 10, cl. 1) applied to corporate charters. After having stated that it was "more than possible" that the Framers of the Constitution did not have the preservation of such charters in mind when they drafted the Contract Clause, the Chief Justice stated:

It is not enough to say, that this particular case was not in the mind of the convention, when the article was framed. . . . It is necessary to go further, and to say that had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception.

See also, *Ozawa v. United States*, 260 U.S. 178, 195-198 (1922); *United States v. Thind*, 261 U.S. 204, 207-208 (1923);⁷ *Puerto Rico v. Shell Co.*, 302 U.S. 253, 257-259 (1937); *United States v. Standard Oil Co.*, 404 U.S. 558, 559-560 (1972).

Particularly pertinent in the context is *Puerto Rico v. Shell Co.*, *supra*, concerning the question whether the term "any Territory of the United States" in § 3 of the Sherman Act, 15 U.S.C. § 3, included an unincorporated insular dependency, such as Puerto Rico, which did not exist when the Sherman Act was enacted in 1890. The Court answered the question in the affirmative in view of the congressional purpose to "deal comprehensively with the subject of contracts, combinations, and conspiracies in restraint of trade, 'and to that end to exercise all the power it possessed.'"⁸

The test, established by those decisions of the Supreme Court, is whether Congress would have excluded the Federal Reserve banks from the coverage of the Act, if that question had been brought to its attention. In our view, this question must be answered in the negative, based on the following: *First*, the close connection, if not the identity, of the Federal Reserve banks with the United States and the important governmental functions performed by them; *second*, the purpose of the Act evidenced by the House debate, the Senate hearings, and the Senate report, to protect the labor standards of all those working directly or indirectly for the Government who were not already covered by pertinent legislation.⁹

A related consideration is that the Act constitutes highly remedial legislation designed to benefit, as stated in the House and Senate reports, "one of the most disadvantaged groups of our workers." A familiar canon of statutory construction requires that such legislation "should be construed broadly to effectuate its purposes." See, e.g., *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967).

In summary, it is our opinion that the Act applies to the Federal Reserve banks. We add as a word of caution that we reach this result because of the purposes the Act was designed to achieve and its legislative history. This

⁷These two cases involved the question whether the Congress which enacted the Naturalization Act of 1790 would have included Japanese and high-caste "aryan" Hindus in the term "free white person," who alone were eligible for naturalization. The Court answered the question in the negative.

⁸*United States v. Standard Oil Co.*, 404 U.S. 558 (1972), decided on the basis of the same considerations that § 3 of the Sherman Act applied to American Samoa.

⁹The congressional awareness of the predominantly governmental character of the Federal Reserve banks has been underscored by the recent legislation, referred to above, extending to them some aspects of the conflict-of-interest statutes and of the Comptroller General's auditing authority. Legislation was required for those purposes since 18 U.S.C. § 208 is a criminal statute, and because a statute, 31 U.S.C. § 53, had precluded auditing by the Comptroller General of nonappropriated fund Agencies such as the Federal Reserve banks.

opinion therefore does not necessarily stand for the proposition that the term “United States” as used in other statutes equally applies to the Federal Reserve banks.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

September 29, 1978

78-54 MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION

Federal Aviation Administration—Federal Bureau of Investigation—Air Transportation Security (49 U.S.C. § 1357(e))—Management of Aircraft Hijacking (49 U.S.C. § 1472(o))

This is in response to your inquiry for our views on several questions in connection with the management of a commercial aircraft hijacking. You informed us that the Federal Aviation Administration (FAA) is authorized to direct the management of a hijacking situation while an aircraft is in flight. 49 U.S.C. § 1357(e).¹ The Federal Bureau of Investigation (FBI) is responsible under 49 U.S.C. § 1472(o) for the remaining aspects of the management of a hijacking by the Federal Government. You ask the following specific questions about the tort liability of the United States and a commercial air carrier arising from the activity of these Federal agencies once an aircraft has been hijacked.

1. Assuming either some specific legislative authority or inherent power exists—

- (a) is an air carrier liable for the actions of the U. S. Government taken with the consent and/or cooperation of an air carrier during an aircraft hijacking in progress?
- (b) is an air carrier liable for the actions taken by the U.S. Government without the consent and/or cooperation of an air carrier during an aircraft hijacking in progress?

2. Does the FBI and/or the FAA, either under question 1(a) or 1(b) above, have any authority to enter into a hold harmless agreement or otherwise make certain commitments which may legally bind the U.S. Government?

3. Is the U.S. Government liable for governmental action taken—

- (a) with the consent and/or cooperation of the air carrier during an aircraft hijacking in progress?
- (b) without the consent and/or cooperation of the air carrier during an aircraft hijacking in progress?

We answer in sequence.

¹An aircraft is "in flight" from the time the last door is closed after embarkation until the first door is opened for disembarkation. 49 U.S.C. § 1357(e)(3). Under the FAA/FBI Memorandum of Understanding, the FAA determines whether or not an aircraft is "in flight" under this definition.

I. Carrier Liability

The initial issue concerns the liability of the carrier for actions of the United States in the management of a hijacking, whether taken with or without the consent of the carrier. Significant difference exists in the liability of the carrier for domestic and international air transportation.

A carrier's liability for personal injury occurring in international air transportation to, from, or through the United States is governed by the Warsaw Convention,² as modified by the Montreal Agreement.³ In essence, these two international agreements provide that the carrier is liable up to \$75,000 per person, absent negligence, for death or bodily injury on board an aircraft or in the process of embarking or disembarking.⁴ It has been uniformly held that an "accident" imposing liability within the meaning of the Warsaw Convention extends to the intentional acts of third parties, including hijacking and sabotage.⁵ While the courts have split on the issue, district courts in New York and California have held that the Convention permits recovery for mental distress caused by a hijacking regardless of physical injury.⁶ Thus, a carrier would be strictly liable to a passenger covered by the Warsaw Convention⁷ for no more than \$75,000, irrespective of fault. Its consent or lack of consent to acts of Federal employees would not affect this liability.

The liability of a carrier to a passenger not covered by the Warsaw Convention is a matter of State tort law.⁸ Because we are aware of no reported cases involving the management of a domestic hijacking,⁹ we can only state those general principles of tort law that would apply to a carrier in responding to the criminal act of a third person. As a general rule, a common carrier, including an air carrier, has a common law duty to use the highest degree of

²49 Stat. 3000, 49 U.S.C. § 1502 note.

³Agreement CAB 18900 (May 13, 1966), 49 U.S.C. § 1502 note.

⁴See, *Husserl v. Swiss Air Transport Co.*, 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd*, 485 F. (2d) 1240 (2d Cir. 1974); *Rosman v. TWA*, 34 N.Y. 2d 385, 314 N.E. 2d 848 (1974).

⁵E.g., *Reed v. Wiser*, 555 F. (2d) 1079 (2d Cir. 1977); *Krystal v. BOAC*, 403 F. Supp. 1322 (C.D. Cal. 1975); *Evangelinov v. TWA*, 396 F. Supp. 95 (E.D.Pa. 1975); *Husserl v. Swiss Air Transport Co.*, 351 F. Supp. 702 (S.D. N.Y. 1972), *aff'd*, 485 F. (2d) 1240 (2d Cir. 1973).

⁶*Krystal v. BOAC*, 403 F. Supp. 1322 (C.D. Cal. 1975); *Husserl v. Swiss Air Transport Co.*, 388 F. Supp. 1238 (S.D.N.Y. 1975); *Contra, Burnett v. TWA*, 368 F. Supp. 1152 (D.N.M. 1973); *Rosman v. TWA*, 34 N.Y. 2d 385, 314 N.E. 2d 848 (1974).

⁷We note that under Article I(3) of the Warsaw Convention, a flight entirely within the United States may be subject to the Convention if the carrier and passenger regard it as part of a single, undivided international transportation. A passenger on a domestic flight with a through ticket connecting with an international flight would come under the Convention while other passengers on the flight would be covered by domestic law. See generally 1 Kreindler, *Aircraft Accident Law* 361-63.

⁸See, e.g., *Gatenby v. Altoona Aviation Corp.*, 407 F. (2d) 443 (3d Cir. 1968); *United Air Lines v. Wiener*, 335 F. (2d) 379 (9th Cir. 1964); *Garrett v. American Air Lines*, 332 F. (2d) 939 (5th Cir. 1964).

⁹We have identified only one case concerning a hijacking not covered by the Warsaw Convention which involved the carrier's alleged negligence in preventing the incident. The case was dismissed on the ground that plaintiff's injuries were not proximately caused by the hijacking. *Edwards v. National Air Lines*, 336 So. 2d 545 (Fla. 1976).

care in protecting its passengers from injury,¹⁰ such as the duty to take reasonable action to defend passengers after it has been notified that an assault is occurring.¹¹ What would be reasonable action in response to such an assault depends on the particular facts of the case, and at least one commentator indicated that the carrier's employees have a duty to refrain from any action that reasonably may provoke greater violence or expose passengers to greater risk of harm.¹² In the light of the high standard of prescribed care imposed upon common carriers, we may argue that an air carrier could be liable for those of its actions during a hijacking which unreasonably increased the risk of harm to the passengers.

Assuming that the carrier is liable for negligent mishandling of a hijacking, the question presented is how the actions of the United States would affect that liability. As a rule, the carrier would not be liable for independent Government action which it did not request and has no power to prevent.¹³ When the Government acts in conjunction with the carrier, however, the matter is more complex.

Several cases involve the negligence of a person acting under the command of a law enforcement officer to render assistance in apprehending a criminal. At common law, and by statute in many States, an individual is obliged to obey a law enforcement officer's request for assistance.¹⁴ However, it appears that an individual assisting a law enforcement officer is still required to exercise the due care appropriate to the circumstances.¹⁵ Thus, in *Jones v. Melvin*, it was held that a driver engaged in pursuit under the direction of a police officer was

¹⁰*See, e.g., Catenby v. Altoona Aviation Corp.* 407 F. (2d) 443 (3d Cir. 1968); *United Air Lines v. Wiener*, 335 F. (2d) 379 (9th Cir. 1964). *See generally* 8 Am. Jur. "Aviation" § 68, at 689-691; Abramovsky, Compensation for Passengers of Hijacked Aircraft, 21 Buffalo L. Rev. 339, 344-45 (1972).

¹¹*See, e.g., Hanback v. Seaboard Coastline Railroad*, 396 F. Supp. 80 (D.S.C. 1975). *See generally* Restatement, Torts 2d § 314A(1)(a); 14 Am. Jur. "Carriers" § 1067, at 492 n. 8; *id.*, § 1072, at 496-97.

¹²*See Note, Aircraft Hijacking; Criminal and Civil Aspects*, 22 U. Fla. L. Rev. 72, 96 (1969); *cf., Louisville Ry. Co. v. Dott*, 161 Ky. 759, 171 S.W. 438 (1914); *Miller v. Mills*, 257 S.W. 2d 520 (Ky. App. 1953).

There are a number of cases in the related area of injury to business invitees in the course of an armed robbery. The courts have split on whether it is reasonable under the circumstances for a storekeeper to use force against a robber or to summon the police when the merchant's action results in injury to a customer. *Compare, Genovay v. Fox*, 29 N.J. 436, 149 A. 2d 212 (1959); *Yingst v. Pratt*, 139 Ind. App. 695, 220 N.E. 2d 276 (1966); *Helms v. Harris*, 281 S.W. 2d 770 (Tex. Civ. App. 1955) with *Kelly v. Kroger Co.*, 484 F. (2d) 1362 (10 Cir. 1973). In the *Kelly* case, the court held that it was a question for a jury to decide whether a store manager was negligent in summoning the police by a silent alarm, resulting in a gun battle that killed a customer.

We also note a few cases where bank customers have been injured when employees refuse to obey a robber's instructions. These have held that the employees acted reasonably in not obeying a criminal demand, even when the robber directly threatened a customer. *Boyd v. Racine Currency Exchange, Inc.*, 56 Ill. 2d 95, 306 N.E. 2d 39 (1974); *Noll v. Marian*, 347 Pa. 213 (1943).

¹³*Northern Railway Co. v. Page*, 274 U.S. 65, 74-75 (1927); *England v. Kinney*, 272 Ky. 33, 113 S.W. 2d 838 (1938).

¹⁴*See, generally, United States v. New York Telephone Co.*, 434 U.S. 159, 175 N. 24 (1977); *Babington v. Yellow Taxi Corp.*, 250 N.Y. 14, 164 N.E. 726 (1928).

¹⁵*Jones v. Melvin*, 199 N.E. 392 (Mass. 1936). *See also, Balinovic v. Star Evening Newspaper Co.*, 133 F. (2d) 505, 507 (Rutledge, J. dissenting); *Babington v. Yellow Taxi Corp.*, 250 N.Y. 14, 16, 164 N.E. 726, 727 (1928) (dictum).

negligent because he operated the vehicle at a faster speed than his ability to maintain control. We are aware of no common law authority excusing an individual's negligence, even when acting under the direction of law enforcement officers.¹⁶

Federal law governing the operation of aircraft has reaffirmed this principle. As a general rule, the pilot in command of an aircraft is the final authority for its operation, and instructions from Government air traffic controllers do not relieve him of his responsibility.¹⁷ In 1974, Congress enacted 49 U.S.C. § 1357(e)(2), which provides that the FAA "shall have exclusive responsibility for the direction of any law enforcement activity affecting the safety of persons aboard aircraft in flight" involved in a hijacking.¹⁸ The legislative history expressly allocates responsibility between the FAA and FBI but does not change the paramount authority of the pilot. Representative Kuykendall, the manager of the bill in the House, explained it to the House as follows:

The gentleman . . . has asked possibly one of the most important questions we have discussed in this bill. That is actually, not so much what the jurisdiction of the FBI and FAA may be, but what the jurisdiction of the air crew is [W]e decided that the pilot—from the moment he boards the aircraft until the moment he departs, is in charge. The passengers or the crew may be gone during this period.

This is in the report, it is not in the law, but unless the ground forces have reason to know that this pilot is disabled and is unable to operate the aircraft, then he is in charge and the aircraft cannot be disabled from outside unless permission is given.¹⁹

Similarly, the Senate committee report states:

Finally, of course, the aircraft commander is the person who must acquiesce to the hijacker in the execution of his demands. We are concerned that in some instances the aircraft commander has not been consulted or been given an opportunity to make input into decisions being made on how to deal with a hijacking in progress The aircraft commander must not be ignored because, as is usually the case, the ultimate safety of all aboard during a hijacking incident is dependent upon the skill, courage, and decisions of the aircraft commander.²⁰

Thus, Federal law enforcement officials were not authorized to direct the pilot in command in the management of a hijacking. While they may request or

¹⁶Actions which could ordinarily be considered negligence may be found to be consistent with due care in assisting law enforcement officers. See, *Babington v. Yellow Taxi Corp.*, 250 N.Y. 14, 16, 164 N.E. 726, 727 (1928) (dictum), depending on the facts of the particular case.

¹⁷14 CFR § 91.3(a), see, e.g., *American Airlines v. United States*, 418 F. (2d) 180 (5th Cir. 1969); *Spaulding v. United States*, 455 F. (2d) 222 (9th Cir. 1972); *In re Air Crash Disaster at New Orleans (Moisant Field)*, 422 F. Supp. 1166 (M.D. Tenn. 1975), *aff'd*, 544 F. (2d) 270 (6th Cir. 1976).

¹⁸An aircraft is "in flight" from the time when all external doors are closed after embarkation until "one such door is opened for disembarkation." 49 U.S.C. § 1357(e)(3). See note 1, *supra*.

¹⁹120 Cong. Rec. 6521 (1974), see H. Rept. 93-885, 93rd Cong., 2d sess., at 23.

²⁰S. Rept. 93-13, 93rd Cong., 1st sess., at 20.

advise that he should take action, final decisionmaking remains with him. Under general principles of *respondeat superior*, the carrier would be liable for any negligent decision he makes.

A carrier, therefore, would be strictly liable for up to \$75,000 in damages per person for injuries in a hijacking, covered by the Warsaw Convention, regardless of the actions of the United States. To persons not covered by the Warsaw Convention, the carrier would be liable for its own negligence in the handling of a hijacking. While the carrier and its employees may have a legal duty to cooperate with Federal law enforcement officials in managing a hijacking, the available case law indicates that the carrier would nevertheless be liable for negligence in the course of such cooperation. The legislative history of 49 U.S.C. § 1357(e)(2) clearly reserves final authority to the pilot in command, and the advice or suggestions of Federal law enforcement officials would not relieve the carrier of liability for the pilot's negligence.

II. Indemnity Agreements

You further inquire whether the FAA or the FBI has authority to indemnify a carrier for its liability in connection with the management of a hijacking incident. We conclude that, with certain limited exceptions, they do not.

While the Constitution does not preclude the Government from entering into an indemnity contract, the Anti-Deficiency Act, R.S. § 3732, 41 U.S.C. § 11, prohibits a contractual arrangement by the Government "unless the same is authorized by law or is under an appropriation adequate to its fulfillment." A general contract of indemnity, by its nature, would obligate the Government to pay an indefinite sum in the event that a hijacking incident resulted in widespread personal injury or property damage. The Comptroller General has ruled that indemnity agreements of this type are void²¹ unless authorized by an express statute. We have been unable to find any statute that would specifically authorize the FBI or FAA to enter into an open-ended indemnity agreement.

However, an indemnity agreement for a specific sum may be authorized by an agency's general appropriation. The Comptroller General upheld the validity of indemnity clauses in which the potential liability of the United States was limited to a specific amount not exceeding the available appropriation.²² The rationale is that a general appropriation is available for any expense reasonably necessary to accomplish its purpose, unless prohibited by law. Since the indemnity in question would be for a definite sum not exceeding the appropriation, it is permitted by 41 U.S.C. § 11 as being under "an appropriation adequate for its fulfillment."²³ The general appropriations for the FAA and FBI would be available if it were necessary to obtain the cooperation of a carrier in the management of a hijacking.²⁴

²¹35 Comp. Gen. 85; 16 Comp. Gen. 803; 8 Comp. Gen. 647; 7 Comp. Gen. 507.

²²See 54 Comp. Gen. 824; 42 Comp. Gen. 708.

²³See 42 Comp. Gen. 708, 709.

²⁴See 49 U.S.C. §§ 1357(e), 1472(o); Department of Transportation Appropriation Act, 1978, 91 Stat. 404; Department of Justice Appropriation Act, 1978, 91 Stat. 425; cf. 42 Comp. Gen. 708, 709.

We note, however, that 31 U.S.C. § 665(a) places two further restrictions on a permissible indemnity agreement. The agreement, in addition to being limited to a definite maximum, must provide (1) that only the amount of appropriated funds actually available at the time of loss will be paid, and (2) that it creates no obligation to appropriate additional funds.²⁵ Therefore, the FAA or FBI may indemnify a carrier only for the lesser of a definite amount within their general appropriations or the funds actually on hand at the time of a loss.

III. Liability of the United States

Your third question is whether the United States would be liable for any Government action taken in the management of a hijacking, either with or without the concurrence of the carrier. This resolves itself into two separate problems: direct tort liability for personal injury or property damage and liability to the carrier for contribution or indemnity as a joint tortfeasor.

Absent any agreement with the carrier, liability of the United States would be governed by the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80. Under the Act, the United States is liable for the negligence of its employees in the same manner as a private person according to the law of the State where the negligent act or omission occurred, unless it has retained its sovereign immunity under one of the exceptions in 28 U.S.C. § 2680. *See, Laird v. Nelms*, 406 U.S. 797 (1972); *Richards v. United States*, 369 U.S. 1, 11 (1962); *Rayonier, Inc. v. United States*, 352 U.S. 315, 319 (1957). Thus, the issues in any tort claim against the United States arising from managing a hijacking would be, first, has the Government retained its sovereign immunity and, if not, did it show due care in the handling of the incident?

Sovereign immunity is retained by 28 U.S.C. § 2680(a) for:

Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

In *Dalehite v. United States*, 346 U.S. 15, 35 (1953), the Supreme Court defined the "discretionary function" exception to include "initiation of programs or activities" and also "determinations made by executives or administrators in establishing plans, specifications, or schedules of operation." The boundary drawn by the exception is between "decisions made at a planning rather than at an operational level." *Id.*, at 42. The Court clarified this decision in *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955), and *Rayonier, Inc. v. United States*, 352 U.S. 315, 318 (1957), by holding the Government liable for its negligent conduct. However, the line between the "policy" and "operational" levels of decisionmaking is not clear, and the courts tend to resolve doubts in favor of liability.²⁶

²⁵54 Comp. Gen. 824.

²⁶*See, e.g., Driscoll v. United States*, 525 F. (2d) 136, 139 (9th Cir. 1975); *Downs v. United States*, 522 F. (2d) 990, (6th Cir. 1975).

In the conduct of law enforcement activities, the mere exercise of judgment by a Federal officer does not invoke the discretionary-function exception. The courts have distinguished between policy and operational decisions in law enforcement on the basis of several related factors: the status and authority of the individual making the decision, the existence of regulations or guidelines governing his actions, and the precedential effect his decision would have for other law enforcement officers. Thus, decisions made by Cabinet and sub-Cabinet level officers that a particular situation warranted the use of force to suppress disorder have been held to be matters of policy.²⁷ Similarly, a decision by subordinate officials to use force in accordance with policy determined at a higher level is within the discretionary-function exception.²⁸ In contrast, *Downs v. United States*, 522 F. (2d) 990, 998 (6th Cir. 1975), held that a decision by an FBI Assistant Special Agent in Charge to use force rather than outwait a hijacker was operational in nature. The court found it significant that the agent acted contrary to written FBI policy. It distinguished the cases arising out of the disorders at the University of Mississippi²⁹ on the ground that the decision to use force there was an "exemplary" one made by the Deputy Attorney General in a relatively unprecedented situation that "was meant to influence and did inevitably guide the actions of other government officials faced with similar situations." 522 F. (2d) at 998.

Based on these decisions, we believe that the United States would not be liable for negligence in the formulation of general policy for the management of hijackings, including, for example, the circumstances in which force may be used, the circumstances in which a hijacker's demands should be met, and the relative importance of capturing the hijacker and protecting the safety of innocent persons. Written instructions for general guidance fall clearly within the discretionary-function exception. *Ad hoc* decisions and interpretation of written policy made by senior FAA or FBI officials generally responsible for hijackings or by their superiors would most likely be considered policy matters. Decisionmaking by subordinate officials, however, would more likely be considered operational so that the United States would be responsible for the negligence of these officials in their decisions in the management of a hijacking. In any case, this distinction has not been clearly established and the facts of each case would determine whether decisions were considered policy matters or were made on an operational level.

²⁷*United States v. Faneca*, 332 F. (2d) 872, 874 (5th Cir. 1964) (Deputy Attorney General's decision to use tear gas to disperse a mob that was obstructing admission to the University of Mississippi); *Smith v. United States*, 330 F. Supp. 867, 868 (E.D. Mich. 1971) (decision by Secretaries of Defense and Army to federalize the Michigan National Guard for the 1967 Detroit riots); cf., *Monarch Ins. Co. v. United States*, 353 F. Supp. 1249, 1256-60 (D.D.C. 1973), *aff'd* 497 F. (2d) 684 (D.C. Cir. 1974) (decision by Secretary of the Army not to use deadly force in the 1968 District of Columbia riots).

²⁸*Nichols v. United States*, 236 F. Supp. 60 (N.D. Miss. 1964) (use of tear gas at the University of Mississippi).

²⁹*United States v. Faneca*, 332 F. (2d) 872 (5th Cir. 1964); *Nichols v. United States*, 236 F. Supp. 260 (N.D. Miss. 1964).

In a case involving “operational” decisions, the standard level of required care by FAA or FBI agents will be governed by the law of the State where the incident occurred. However, there are several elements of the opinion in *Downs v. United States*, 522 F. (2d) 990, 999-1003 (6th Cir. 1975), which applied Florida law in a way that may govern the application of the law in other States. The first element is that law enforcement personnel will be required to exercise the prudent judgment that an individual with the requisite special training should have.³⁰ Failure to follow written FBI or FAA procedures for handling these incidents will likely be considered strong evidence of negligence. Finally, the Government will be expected to maximize the safety of passengers to the extent consistent with the aim of apprehending the hijacker and resisting his unreasonable demands.³¹ As the Sixth Circuit summarized the standard of care, 522 F. (2d) at 1003:

Where one trained in the field of law enforcement is called upon to make a judgment which may result in the death of innocent persons, he is required to exercise the highest degree of care commensurate with all facts within his knowledge. Such care must be exercised in order to ensure that *undue* loss of life does not occur. [Emphasis added.]

This, we believe, means that when the life of a third party is at stake, due care will consist of trying to outwait a hijacker until he presents an imminent threat to the passengers. The facts of the particular case would determine the point at which intervention would be appropriate.

Finally, we note the possibility that both the carrier and the United States would be found negligent with respect to passengers or third persons.³² In that event, liability for contribution or indemnity between the United States and the carrier would depend on the substantive law of the State where the negligence occurred.³³

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

³⁰See generally Restatement, Torts 2d § 289(b), comment m.; § 299, comment f.

³¹See generally Restatement, Torts 2d § 292, comment c.; § 302B, comment e.

³²*Cf.*, *Ingham v. Eastern Air Lines, Inc.*, 373 F. (2d) 227 (2d Cir. 1967); *United Air Lines v. Wiener*, 335 F. (2d) 379 (9th Cir. 1964).

³³See, e.g., *United States v. Yellow Cab Co.*, 340 U.S. 543 (1951); *Certain Underwriters at Lloyd's v. United States*, 511 F. (2d) 159 (5th Cir. 1975); *Ingham v. Eastern Air Lines, Inc.*, 373 F. (2d) 227 (2d Cir. 1967).

October 6, 1978

78-55 MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION

The President—Authority to Participate in International Negotiations—Trade Act of 1974 (19 U.S.C. § 2101)—Participation in Producer-Consumer Fora

You have requested our views on two questions presented by the State Department's participation in "producer-consumer fora" and certain other international negotiations aimed at stabilizing international commodity markets. The first question is whether the President, through the Secretary of State, has authority to participate in such negotiations absent statutory authorization. The second question is whether the Trade Act of 1974 (*See* 19 U.S.C. § 2101 *et seq.*) authorizes or permits such participation.

It is our opinion (1) that the President has constitutional authority to participate in negotiations of this kind through the Secretary of State, and (2) that the Trade Act of 1974 does not prohibit such participation. We should add, however, that the question of the President's authority in that regard is quite distinct from the question whether any agreement or recommendation accepted by the President or the Secretary of State would have any effect under the law of the United States. We understand that your principal concern is with the impact of these agreements under the antitrust laws. Because there is considerable uncertainty regarding the legal effect of naked executive agreements generally, legislation prescribing this impact may be desirable as a matter of policy.

I. The Background

The facts are as follows: A producer-consumer forum (PCF) is an intergovernmental body convened for the purpose of making recommendations or agreements concerning international trade in particular commodity markets. Representatives of private industry are in attendance, but their official role is limited to rendering advice to Government delegates. Recommendations or

agreements reached at a PCF are made by and among the government delegates and are submitted for implementation to each member government. Member governments and private parties within member countries are not bound by these recommendations or agreements. Whenever a government agrees with a PCF recommendation, it may take informal, nonmandatory action to implement the recommendation. This action would normally be directed at the affected industry within that country. Formal implementation by treaty or legislation is uncommon. As a matter of practice, the United States takes no steps, either formal or informal, to implement PCF recommendations or agreements within the United States.

II. The Constitutional Issue

Since the founding of our Nation the President and his representatives have engaged in negotiations with representatives of foreign countries over matters of national and international concern. Many of these negotiations have produced formal or informal agreements, and many have never been submitted to the Senate for approval under the treaty clause or to the full Congress for implementation or approval by statute or joint resolution. See L. Henkin, *Foreign Affairs and the Constitution* 173 (Foundation Press 1972).

The legal status of executive agreements that have not been authorized or approved by Congress or by the Senate under the treaty clause is a subject of considerable complexity, but we think there can be no real argument over the threshold issue: The President and his representatives have authority to engage in international negotiations on any subject that has bearing on the national interest, even in the absence of prior statutory authorization. The source of this negotiating authority is the Constitution itself. Negotiation is a necessary part of the process by which foreign relations are conducted, and the power to conduct foreign relations is given to the President by the Constitution.¹

The real question in any given case is whether and to what extent the President's action in negotiating or concluding an international agreement affects the law of the United States, the legal obligations or powers of the United States, or the rights of its citizens or other persons subject to Federal law. In the absence of prior statutory authorization, the answer to this question turns in large part upon the procedures that are followed *after* an international agreement has been concluded. If the agreement is submitted to the Senate for

¹Indeed, quite apart from the question of authorization, we think it doubtful that the President's power to negotiate with foreign governments over subjects of national concern can ever be subject to unqualified restriction by statute. The President can make treaties on virtually any subject, and treaties can supplant prior statutes. See, *Cook v. United States* 288 U.S. 102 (1933). We think it follows that Congress could not make it unlawful for the President to conclude treaties on particular subjects (even on subjects within the legislative jurisdiction of Congress), or to participate in the antecedent negotiations. Moreover, we think it doubtful that Congress could make the legality of a particular negotiation depend upon the submission of any resulting agreement to the Congress or to the Senate under the treaty clause. See, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (Congress "powerless" to invade field of international negotiation).

approval under the treaty clause, it becomes a law of the United States upon the approval of two-thirds of the Senators present; and, as a matter of municipal law, it then has the same force and effect as an act of Congress if it is self-executing. If the agreement is submitted to the full Congress and is approved by joint resolution or is implemented by statute, it is likewise entitled to the force and effect of an act of Congress to the extent of the approval or implementation.

Finally, if the agreement is approved neither by the Senate (as a treaty) nor by the Congress (through joint resolution or statute), it may yet have some legal effect, depending on the subject matter, *see, United States v. Belmont*, 301 U.S. 324 (1937). But here we encounter a series of problems for which, as Professor Henkin has said, there is no real legal solution. As a matter of domestic law the legal effect of a naked executive agreement is uncertain. On the negative side, in one of the few cases on this subject the Fourth Circuit held that in the face of a valid, conflicting statute a naked executive agreement can have no force or effect as a law or obligation of the United States. *United States v. Guy W. Capps, Inc.* 204 F. (2d) 655 (4th Cir. 1953) (Parker, J.), *aff'd on other grounds*, 348 U.S. 296 (1955).

The agreements or recommendations made as a result of the negotiations conducted in a PCF do not purport to be self-executing or binding on the parties themselves or on the private participants. The participating governments are free to take whatever action they wish to implement the recommendations or agreements. The United States generally takes no action, formal or informal, to implement them. In accordance with the principles we have just described, we think that the President, through the Secretary of State and his representatives, has constitutional authority to participate in PCF negotiations. The fact that the President does not elect to submit the ensuing agreements to the Senate or the Congress for approval does not in our judgment deprive him of such negotiating authority.² Under both the agreements and the Constitution, the President is free to decide what implementing action, if any, he will take. The legal effect of these agreements or actions taken pursuant to them upon public or private rights or liabilities under the antitrust laws will depend largely on those laws. To the extent that this impact is determined by the status of these agreements as laws or obligations of the United States, we think there is substantial doubt that agreements of this kind can be regarded as laws or obligations of the United States absent implementing legislation or approval under the treaty clause.

²We are supported in this conclusion by *Consumers Union of U.S., Inc. v. Kissinger*, 506 F. (2d) 136 (D.C. Cir. 1974), which is very nearly in point. We express no opinion on the question whether any "agreement" concluded pursuant to PCF negotiations is an "international agreement" in the Case Act sense. *See* 1 U.S.C. § 112b.

III. The Statutory Issue

You asked whether the Trade Act of 1974 authorizes or permits the President to participate in PCFs through the Secretary of State. Since we have already concluded that the Constitution provides a source of negotiating authority, this question is significant only if Congress, by enacting the Trade Act of 1974, preempted the field and provided, through legislation, the exclusive means by which negotiations of this kind may be conducted.

As noted above, we believe that there may be a constitutional limitation on the power of Congress to restrict the power of the President to negotiate with foreign governments over matters of national concern. For that reason alone, we would be very reluctant to construe an act of Congress as an attempt to dictate in advance either the mode of an international negotiation or the criteria for ultimate agreement. The legal force of a particular international agreement may depend upon the presence or absence of congressional authorization; but, as a matter of constitutional principle, the President must be free to negotiate agreements in his conduct of foreign affairs and to subject them to ratification or legislative implementation if he wishes them to have a desired force or effect under our law.

In any case, we do not construe the Trade Act of 1974 as an attempt to prevent the President from engaging in informal, nonbinding negotiations such as those involved in a PCF. The Act provides a mechanism for negotiation and administrative action with respect to many trade-related questions, including the ones dealt with in PCFs. In addition, the Act gives the President powers that he clearly would not have in the absence of some congressional authorization (*see, e.g.*, 19 U.S.C. § 2253) (power to increase duties on imported articles causing serious competitive injury to domestic industry). It is plain that if the President wishes to exercise the specific powers conferred by the Act, he must do so pursuant to the procedures and in accordance with the standards prescribed in the Act. But we find no intent to restrict Presidential participation in international negotiations leading to recommendations which do not bind the United States and do not purport to have the force and effect of law. *See, Consumers Union of U.S. Inc. v. Kissinger, supra.*

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

October 10, 1978

**78-56 MEMORANDUM OPINION FOR THE GENERAL
COUNSEL, LAW ENFORCEMENT ASSISTANCE
ADMINISTRATION**

**Government Officers and Employees—Standards of
Conduct (28 CFR 45.735.12)—Outside
Employment—Teaching Law School Course**

This is in response to your request for our advice whether you may teach a course at George Washington University Law School next spring on the subject of Federal grant-in-aid programs. We understand that you would receive a standard fee of approximately \$1,000 for the course, which will meet twice weekly for a period of 15 weeks. You have informed us that the course will deal with Federal grant programs generally and will touch only incidentally on matters relating to the Law Enforcement Assistance Administration (LEAA).

The Department's regulations provide that no employee may receive compensation for any writing, teaching, or similar activity "the subject matter of which is devoted substantially to the responsibilities, programs, or operations of the Department, or which draws substantially on official data or ideas which have not become part of the body of public information." 28 CFR 45.735.12(b). The general subject of Federal grants-in-aid may be thought to touch on the activities of your Agency—a major grantor Agency—and therefore on the activities of the Department. However, because your course will not concentrate on LEAA-related matters, we do not think it should be deemed to be "devoted substantially to the responsibilities, programs, or operations of the Department" in the specific sense that the regulation was intended to impart.

We believe this construction of the regulation is consistent with § 202 of Executive Order No. 11222, which notes that teaching, lecturing, and writing by Federal employees are generally to be encouraged, although any appearance of conflict of interest is of course to be avoided. A Federal employee will naturally be requested and inclined to teach in an area of his professional expertise. To this extent, teaching may always be related to the activities of the employing Government agency. In our view, it is only where the course focuses more specifically on departmental responsibilities, where the employee

may be perceived as conveying departmental policy, where the fee is out of line with the effort entailed, *see also* 28 CFR 45.735.2(c)(1), or where the activity interferes with the performance of official duties, *see also* 28 CFR 45.735.9(d)(1), that teaching should be discouraged.

Absent the above factors and without the use of confidential information, we see no objection to your teaching the course and receiving the fee therefor.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

October 10, 1978

**78-57 MEMORANDUM OPINION FOR THE
DIRECTOR, BUREAU OF PRISONS**

**Bureau of Prisons—Involuntary Transfers of
Prisoners to Segregation—Due Process Safeguards in
Administrative and Disciplinary Segregation**

This responds to your memorandum requesting clarification and reconsideration of our May 10 and May 16 memoranda to the Assistant Attorney General of the Office of Legislative Affairs. Those memoranda expressed our views as to the due process safeguards required with respect to involuntary transfers of prisoners from the general prison population to segregated status.

(1) You state that you understand that our memoranda deal only with transfers from the general prison population to segregation rather than placement in segregation in all situations. Your understanding is correct. We expressly stated that our consideration was limited to transfers from the general prison population to segregation. Although we do not consider situations in which inmates are placed in segregation awaiting classification or transfer, we note that other considerations may call for a procedure different from that required in transfers to segregation from the general prison population.

(2) You also ask whether the Bureau of Prisons' procedure regarding administrative detention pending either disciplinary proceedings or investigation is constitutionally acceptable. You state that these inmates are given full hearings pursuant to *Wolff v. McDonnell*, 418 U.S. 539 (1974), within 2 to 4 days following imposition of segregation, if they are to be kept in segregation beyond this period. In this context you ask whether we believe an independent hearing on the reclassification issue is required. Two hearings are not required in such situations. Your use of administrative detention in disciplinary cases is actually a part of the disciplinary proceeding. Where due process safeguards attach to the disciplinary proceeding no purpose would be served by conducting two independent hearings on the same basic facts. Our opinion is that administrative segregation cannot properly serve as a substitute for disciplinary segregation so as to avoid the requirements of *Wolff*.¹ Thus, as long as the pending hearing for the segregated inmate is not unreasonably

¹You state that you agree that it would be wrong to use administrative detention to circumvent *Wolff's* due process requirements in disciplinary proceedings.

delayed, the hearing on the charged violation would accord the inmate any process to which he is due.²

(3) Finally, you express concern over our equating involuntary administrative segregation³ with disciplinary segregation. You point out that inmates subjected to administrative segregation are extended the same benefits as inmates in the general prison population, to the extent that such segregated status allows. You state that administrative detainees are permitted "reading materials, personal property, visits, correspondence, commissary-purchase privileges," and that many work in the unit out of their cells.⁴ Further, you indicate that such segregated status is not a negative factor in parole or later programming decisions. And finally, you stated that "[i]n no case are these people considered undergoing sanction."⁵

In cases where involuntary administrative detention is ordered "for the inmate's own protection," we understand your position to be that no due process hearing is required. The view you urge would accord a hearing prior to the imposition of segregation to one who, no matter how egregiously, violated prison rules, but would not extend the opportunity for a hearing to one who had violated no rule. Such a result is inconsistent with the appearance of even-handed administration of prison rules and notions of fair play.⁶ The focus should not be on the punitive or nonpunitive intent of prison officials; but on the deprivation itself. In *Powell v. Ward*, 392 F. Supp. 628 (S.D.N.Y. 1975), *aff'd* 542 F. (2d) 101 (2d Cir. 1976), the court noted that:

In New York, there are two basic types of disciplinary procedures, Superintendent's Proceedings and Adjustment Committee Proceedings. 7 N.Y.C.R.R. §§ 252, 253. *The Adjustment Committee Proceeding is "said to be marked by flexibility and nonpunitive intent in attempting to effectuate changes in inmate attitude,"* whereas the

²We are assuming that such prehearing detention would be imposed consistent with the Bureau of Prisons' Policy Statement No. 7400.5D (July 7, 1975), *i.e.*, only where the continued presence of the inmate in the general population poses a serious threat to life, property, persons, or the security of the institution.

³We use this term as synonymous with "administrative detention."

⁴These same privileges are not available to those in a disciplinary status.

⁵It may prove helpful at this point to identify the types of administrative segregation that we are not discussing. First, we are not concerned with administrative segregation that is an adjunct of a disciplinary proceeding involving a *Wolff*-type hearing within a reasonable interval after the imposition of administrative segregation. Neither are we discussing segregation imposed pending classification, transfer, or where an inmate is in a holdover status during transfer. And, inmate requests to be placed in administrative segregation are not relevant to our discussion because they do not involve involuntary confinement. Thus, there is only one class of cases in which our discussion of the distinction between administrative and disciplinary segregation applies. That is, where the prison staff, against the inmate's protest, determines "that admission to or continuation of Administrative Detention is necessary for the inmate's own protection."

⁶It appears that in both cases there is a factual predicate for imposition of segregation. For administrative segregation to be imposed it must be established that the inmate's presence in the general population poses a danger to himself, others, institutional security, etc. Because of this there should be minimum procedural safeguards to protect against an arbitrary determination of this factual predicate. *Cf.*, *Wolff v. McDonnell*, *supra*, at 571, n. 19, and *Wright v. Enomoto*, *infra*; *contra*, *Bills v. Henderson*, 446 F. Supp. 967, 973 (E.D. Tenn. 1978).

Superintendent's Proceeding is "solely disciplinary in nature." [Citation omitted.] Despite different goals and procedures, both types of proceedings may result in solitary confinement. [Emphasis added.]

The court held that because both the punitive and the nonpunitive proceedings may result in solitary confinement, "inmates subject to either type of proceeding must be accorded the procedural safeguards set forth in *Wolff v. McDonnell* [418 U.S. 539 (1974)]." See also, *McKinnon v. Patterson*, 568 F. (2d) 930, 938 (2d Cir. 1977); *Crooks v. Warne*, 516 F. (2d) 837, 839 (2d Cir. 1975).

While the above-cited cases do not excuse due process requirements for administrative segregation, it is recognized that the hearings required in administrative proceedings need not be identical to disciplinary proceeding hearings; the institutional concerns in the two proceedings are not necessarily the same. Accordingly, the court in *Crooks v. Warne*, 516 F. (2d) 837, *supra*, held that:

. . . there must be a mutual accommodation between institutional needs and generally applicable constitutional requirements, and to the nature of a hearing before an adjustment committee which has the duty of determining whether the particular prisoner may safely be returned to the general population, as distinguished from finding whether the inmate has violated a particular rule. [*Id.*, at 839]

Thus, the Court of Appeals for the Second Circuit reversed the district court's order that "[n]o member of any Adjustment Committee meeting to which Plaintiff is a party shall discuss the pending matter with other administrative or superior officers in advance of the hearing," *id.*, reasoning that the nature of such an administrative hearing required previous consultation between prison officials. However, the court affirmed the lower court's ruling that the inmate must be notified prior to the hearing as to the basis for the proposed transfer to segregation. The prison procedure at issue in *Crooks* afforded the inmate an opportunity to respond at the hearing. The basic question at issue was whether prior notice to the prisoner was required. While the basic due process requirements were held to apply to administrative detention (*see also, McKinnon v. Patterson*, 568 F. (2d) 930, 938 (2d Cir. 1977)), the court ruled that the requirement of an impartial administrative officer to preside over the hearing was not identical in administrative and disciplinary hearings.

Apart from the punitive versus nonpunitive intent distinction, administrative and disciplinary segregation are also distinguished, based on the facts that inmates in administrative segregation retain more privileges than those in disciplinary segregation and are not stigmatized to the same degree as disciplinary detainees. Thus, the issue is whether these facts remove administrative segregation from the kind of segregated status requiring due process safeguards. In *McKinnon v. Patterson*, *supra*, the Second Circuit viewed situations involving prisoners confined to their cells and deprived of almost all contact with the rest of the prison population and participation in the normal

routine of the institution, as requiring the due process guarantees of *Wolff*. The court noted that the deprivation was less severe than solitary confinement or confinement in a special housing unit. The confinement at issue in *McKinnon* could not exceed 2 weeks. Further, prisoners in such confined status retained access to their personal belongings. Thus, they enjoyed reading material and the use of any other personal property generally permitted in prison cells.

The Court of Appeals in *McKinnon* compared the confinement there with that in *Walker v. Mancusi*, 467 F. (2d) 51 (2d Cir. 1972), affirming 338 F. Supp. 311 (W.D. N.Y. 1971). There the district court found that a due process hearing was required in the segregation process even though the prisoners retained several benefits, including receipt of the minimum wages paid to inmates unassigned to jobs through no fault of their own, commissary privileges, receipt of packages from outside the prison, and recreation during their first week of punitive confinement.⁷ *McKinnon v. Patterson*, *supra*, 938, n. 7. In *McKinnon* no mention was made of the segregation as it affected parole, eligibility for future rehabilitative programs, etc. The court focused on the restrictive confinement as the key factor in deciding whether an inmate's custody status amounted to solitary confinement. Most of the cases you have cited do not undermine *McKinnon*. They merely stand for the proposition that due process is not triggered in decisions affecting furloughs, inmate access to institutional programs, and other like programs conferring "privileges."⁸

However, *Walker v. Hughes*, 558 F. (2d) 1247 (6th Cir. 1977), held that short of cruel and unusual punishment, due process is not triggered by any deprivation of an inmate's freedom unless a "liberty interest" is conferred by statute or prison rules or regulations. *But see* the dissenting opinion of Judge Edwards, who opined that a *Wolff* hearing "must be provided when a prisoner is placed in segregation." *Id.*, at 126. Following the *Walker v. Hughes* holding, a court in the Sixth Circuit also found no liberty interest, absent statute or rule, in remaining in the general prison population. *Bills v. Henderson*, 446 F. Supp. 967 (E.D. Tenn. 1978). Under the rationale of these cases prison officials could impose disciplinary or administrative segregation for any reason or for no reason unless the exercise of their discretion were circumscribed by statute or rule.

This conclusion, however, conflicts with *Wright v. Enomoto*, No. C-73-1422 SAW (N.D. Cal. 1976) (3-judge court), *aff'd*, 434 U.S. 1052, 98 S. Ct. 1223

⁷While it is true that *Mancusi* was pre-*Wolff*, *McKinnon* endorses the approach taken in that case. 568 F. (2d) at 935-36.

⁸*Moody v. Daggett*, 429 U.S. 78 (1976) (classification and institutional programs affected. Court held that no due process hearing required in such circumstances); *Solomon v. Benson*, 563 F. (2d) 339 (7th Cir. 1977) (classification of prisoner as special offender does not require due process protections); *Smith v. Saxbe*, 562 F. (2d) 729 (D.C. Cir. 1977) (furlough termination and transfer to another institution requires no due process hearing).

(1978),⁹ and *Wolff v. McDonnell*, 418 U.S. 539 (1974). In *Enomoto*, the 3-judge court's unpublished order and opinion condemned the arbitrary imposition of segregation, whether labeled disciplinary or administrative.¹⁰ The court in *Enomoto* viewed administrative segregation as an even greater deprivation than disciplinary segregation. And although the court did not reach the question "whether even more procedural protections must be required" for administrative segregation, it noted:

The deprivation suffered by a prisoner confined for administrative reasons is greater than that suffered by one confined on a disciplinary charge. The latter is for a definite term, generally for a maximum of ten days. In contrast, administrative segregation is for an indefinite period—the prisoner may be confined for months, even years, without hope of release. The charges at a disciplinary hearing are definite and narrow. The inmate is accused in writing of violating a prison rule. In contrast . . . the charges at a hearing resulting in administrative confinement tend to be vague, and are frequently based on mere rumor, suspicion, or conjecture. In this connection we deem it appropriate to note that the circumstances and issues involved in decisions leading to administrative segregation may well, upon a proper showing, demonstrate the necessity for additional procedures to make hearings adequate. (Footnote omitted.) [See generally *Tobriner & Cohen, How Much Process is "Due"?* *Parolees and Prisoners*, 25 *Hastings L.J.* 801 (1974); *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973); *N. Morris, The Future of Imprisonment* 30-34, 67-73 (1974). *Enomoto, supra*, slip opinion at 17-18.]

Although *Enomoto* is not without contrary authority (see, *Walker v. Hughes, supra*), it is the only case on this subject we have found that has been reviewed by the Supreme Court after its decisions in *Meachum v. Fano*, 427 U.S. 215

⁹In a May 23, 1978, memorandum from you to the Associate Deputy Attorney General, you stated that you ". . . have been advised that the rules of the Ninth Circuit [Court of Appeals] bar the citation of an unreported opinion within that circuit." Based on this advice, you question our reliance on an "unreported and uncitable District Court opinion." The advice you were given regarding the rules is erroneous. The relevant rule is Rule 21 (as amended through February 7, 1977). This rule establishes a rather detailed policy as to how the court disposes of matters before it. We note that "publication," under Rule 21, carries a different meaning than your memorandum implies by use of the term "unreported." It suffices here, however, to point out that the rule applies only to cases decided by the Ninth Circuit Court of Appeals. Subsection (c) of Rule 21 states that:

A disposition which is not for publication shall not be regarded as precedent and shall not be cited to or by this court or any district court of the Ninth Circuit, either in briefs, oral argument, opinions, memorandums, or orders, except when relevant under the doctrines of law of the case, *res judicata*, or collateral estoppel.

This provision expressly applies only to dispositions by the Ninth Circuit Court of Appeals. It does not purport to impose rules concerning the precedential value of decisions by district courts within that circuit. See subsection (a) of that rule.

¹⁰You have provided the example of procedures required in classifying "central Monitoring cases (those who must be carefully followed, to make sure they are not confined in the same place as certain others, etc.)." It is our understanding that these cases are not equivalent to segregation. Accordingly, we express no opinion on the adequacy of the procedures afforded in those areas.

(1976), and *Montanye v. Haymes*, 427 U.S. 236 (1976). There is always a question about the precedential weight that should be accorded Supreme Court summary affirmances of three-judge court decisions. To be sure, a reasonable argument can be made that *Enomoto* is wrongly decided. On the other hand, the due process analysis embraced by the *Enomoto* court is, we think, compatible with the Supreme Court's other recent due process decisions, and the arguments against extending the notice and hearing protections to the category of involuntary confinement addressed here are less persuasive. For these reasons we adhere to our previously stated view that involuntary placement in administrative segregation, even absent statute or rule,¹¹ triggers due process guarantees.¹²

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

¹¹As we stated in our May 10, 1978 memorandum to the Office of Legislative Affairs, we believe that the Bureau of Prisons' Policy Statement No. 7400.5D and 18 U.S.C. § 4081 create a protected interest in remaining in the general prison population whether or not such interest derives from the Constitution.

¹²However, as we stated above, we only comment on those transfers to segregation from the general population that are not part of a proceeding for which a *Wolff*-type hearing is afforded within a reasonable period after imposition of segregation.

October 20, 1978

**78-58 MEMORANDUM OPINION FOR THE
DIRECTOR, COUNCIL ON WAGE AND PRICE
STABILITY**

**Federal Property and Administrative Services Act of
1949 (40 U.S.C. § 481)—Government Contracts—
Wage and Price Standards in Government
Procurement**

This responds to your request for our opinion on several legal questions concerning an administration proposal to require the observance of wage and price guidelines by corporations and individuals as a condition for doing business with the Federal Government. We believe that the President has the statutory authority to require Government contractors to comply with wage and price guidelines as a prerequisite for doing business with the Government. This view was upheld in *AFL-CIO v. Kahn*, 48 U.S.L.W. 2005 (D.C. Cir. June 22, 1979), cert. denied, 443 U.S. 915 (July 2, 1979). We also believe that the Government can require Government contractors to receive from their subcontractors and suppliers certificates that the latter are in compliance with wage and price guidelines with regard to the products and services involved in contracts related to the contractors' Government work.

I. The President's Power to Establish Procurement Policies

In § 201 of the Federal Property and Administrative Services Act of 1949 ("1949 Procurement Act"), 40 U.S.C. § 481, Congress established that Government procurement policies must be designed to promote "economy" and "efficiency" in Government procurement. In § 205(a) of the 1949 Procurement Act, 40 U.S.C. on § 486(a), Congress specifically conferred on the President the power to

. . . prescribe such policies and directives, not inconsistent with the provisions of this Act, as he shall deem necessary to effectuate the provisions of said Act, which policies and directives shall govern the Administrator [General Services] and executive agencies

As interpreted by the United States Court of Appeals for the Third Circuit, § 205(a) grants broad discretion to the President to protect and advance a range

of governmental interests, including “the interest of the United States in all procurement to see that its suppliers are not over the long run increasing its costs” *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F. (2d) 159, 170 (3d Cir. 1971), cert. denied, 404 U.S. 854 (1971).

In the *Contractors* case, the Third Circuit considered and affirmed the validity of the “Philadelphia Plan” promulgated pursuant to Executive Order No. 11246, 3 CFR 406 (1969), 42 U.S.C. § 2000e note. The Third Circuit, as well as other courts of appeals, have consistently upheld the principle that § 205(a) of the 1949 Procurement Act confers on the President the power to require nondiscrimination provisions in all Government contracts. *See, e.g., Farkas v. Texas Instrument, Inc.*, 375 F. (2d) 629 (5th Cir. 1967), cert. denied, 389 U.S. 977 (1967); *Southern Illinois Builders Association v. Ogilvie*, 327 F. Supp. 1154 (S.D. Ill. 1971), *aff’d*, 471 F. (2d) 680 (7th Cir. 1972). Prior Attorneys General have also opined that Executive Order No. 11246 and its predecessors were valid exercises of statutory authority. *See* 42 Op. A.G. 97 (1961) (sustaining validity of Executive Order 10925); 42 Op. A.G. 405 (1969) (sustaining validity of revised “Philadelphia Plan”).

In its most recent encounter with a challenge to Executive Order No. 11246, the United States Court of appeals for the Fifth Circuit observed that decisions of other courts of appeals had “candidly acknowledged the validity of the use by the President or Congress of the procurement process to achieve social and economic objectives.” *United States v. New Orleans Public Services, Inc.*, 553 F. (2d) 459, 466-67 (5th Cir. 1977), *vacated on other grounds*, 436 U.S. 942 (1978).¹ We believe that the backdrop formed by *New Orleans Public Service* and prior cases interpreting § 205(a) of the 1949 Procurement Act suggests that in order to assess the general validity of a program requiring compliance with the wage and price guidelines as a condition for doing business with the Government, two questions must be considered. First, is such a program authorized under the 1949 Procurement Act? Second, is such a program inconsistent with any other statutes?

A. Authority Under the 1949 Procurement Act. We conclude that the 1949 Procurement Act authorizes the proposed requirement of compliance with the wage and price guidelines. The general purpose of the proposed program—to lower costs to the Government of the goods and services it purchases—is clearly consistent with the purposes of the Act. Nor does the program conflict with any specific provision of the Act.

¹In support of this statement, the court cited *Rosetti Contracting Co. v. Brennan*, 508 F. (2d) 1039, 1045 n. 18 (7th Cir. 1975), and *Northeast Construction Co. v. Romney*, 485 F. (2d) 752, 760 (D.C. Cir. 1973).

B. Inconsistency With Other Statutes. The question whether the program as devised is inconsistent with other statutes raises more subtle and difficult problems. In the *New Orleans Public Service* case discussed above, the Fifth Circuit accepted the Government's contention that Executive Order No. 11246 was authorized not only by § 205(a) of the 1949 Procurement Act, but also by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Equal Employment Opportunity Act of 1972, 86 Stat. 103, which amended Title VII. The court concluded that the order represented "a long standing program which Congress has recognized and approved." 553 F. (2d) at 467.² The court's analysis suggested that the 1949 Procurement Act, standing alone, did not provide sufficient authority for the order but for the fact that it was supported by a long history of the use of the procurement process to combat discrimination against minorities, a use that had been, in effect, ratified by the Congress.

We are unaware of any statute other than the 1949 Act which might be viewed as a source of statutory authority for this program. Implicit in the Fifth Circuit's opinion and its discussion of *Youngstown Sheet & Tube*, note 2, *supra*, was the assumption that if Congress had passed some other statute which was inconsistent with the order, then the court may have ruled differently on the validity of the order.³ It follows that a statute inconsistent with this wage and price program would be viewed as a limitation on the power conferred by § 205(a) of the 1949 Procurement Act.

The lack of other supportive statutory authority to implement this program does not pose a significant problem, primarily because the program is demonstrably more closely related to the purposes of the 1949 Procurement Act than the antidiscrimination programs established by Executive Order No. 11246 and its predecessors. Thus, while courts may have felt obliged in Executive Order No. 11246 cases to look for additional statutory support for the antidiscrimination policies embodied in the order, we believe that the 1949 Procurement Act itself provides an ample statement of relevant national policy and authority—to procure goods and services for the Government in an economical fashion.

We now turn to the more difficult question, whether the program would conflict with some other statute. We believe that those aspects of the program requiring individuals and companies doing business with the Government to

²In a footnote accompanying this conclusion, the court dismissed an argument that Executive Order No. 11246 constituted executive "lawmaking" of the type prohibited by the Court's decision in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). See 553 F. (2d) at 467-68, n. 8.

³Such an assumption has been adopted in virtually all cases prior to *New Orleans Public Service* in which the validity of Executive Order No. 11246 has been challenged and upheld. See, *Southern Illinois Builders Ass'n v. Ogilvie*, 327 F. Supp. 1154, 1162 (S.D. Ill. 1971), *aff'd*, 471 F. (2d) 680 (7th Cir. 1972); *Joyce v. McCrane*, 320 F. Supp. 1284, 1291 (D. N.J. 1970); *Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor*, 442 F. (2d) 159, 171-175 (3d Cir. 1971), cert. denied, 404 U.S. 854 (1971).

avoid price increases beyond a specified level may be inconsistent with 50 U.S.C. App. § 645b. That provision reads as follows:

Nothing contained in this Act or any other Federal Act (except the Emergency Price Control Act of 1942, as amended, the Stabilization Act of 1942, as amended, or the District of Columbia Emergency Rent Act, approved December 2, 1941, as amended), shall be construed to authorize the establishment by any officer or agency of the Government of maximum prices for any commodity or maximum rents for any housing accommodations.

The provision would appear to impose on the executive and judicial branches a rule of statutory construction that would prohibit a finding of implicit, as opposed to explicit, power in any Federal statute to establish "maximum prices" for "any commodity,"⁴ whether the commodity is sold solely within the private sector or to the Government. Because the setting of a percentage guideline beyond which a contractor may not increase his prices charged to the Government would appear as the setting of a "maximum price," it could be argued that § 645b, on its face, bars the President from utilizing the 1949 Procurement Act, or any other statute, to establish and enforce price guidelines even with regard to those who do business with the Government.

The legislative history of § 645b does not clearly indicate whether the Congress passing the provision necessarily intended it to condition a subsequently enacted statute, here § 205(a) of the 1949 Procurement Act. In June of 1946, President Truman vetoed a bill which would have extended, as amended, the Emergency Price Control Act of 1942 (EPCA), 56 Stat. 23, because of his view that the bill was inadequate. Under the 1942 Act, discussed in greater detail below, the President was empowered to establish maximum prices with regard to a wide range of goods and services sold within the private sector and to the Government. In apparent anticipation of the President's veto, a late amendment was added by Senator Moore to a bill extending various powers under the Second War Powers Act, 56 Stat. 176.

Most titles of the Second War Powers Act expired or were repealed by June 30, 1950, but the Moore amendment had no express expiration date and it has never been repealed. Later in 1946, a law extending the EPCA (but not the Stabilization Act of 1942) was adopted. That law provided for ceilings on rents and most prices but added a number of important exceptions.

We believe that the intent of Senator Moore and the Congress in adopting § 645b was limited to placing a prohibition on President Truman's construing any *then existing* Federal statutes as conferring on him power to control prices until such time as he and the Congress resolved their dispute over the extension of the EPCA. We find nothing inconsistent with this interpretation of § 645b in the congressional debates on the Moore amendment, 92 Cong. Rec. 7312

⁴The meager legislative history of the provision suggests that its reference to prices of "any commodity" was intended to include the full range of goods and services included in the Emergency Price Control Act of 1942, 56 Stat. 23. See H. Rept. No. 2395, 79th Cong., 2d sess. (1946); 92 Cong. Rec. 7312, 7872, 7926 (1946).

(1946). In addition, we are unable to find any evidence that any Congress subsequent to the Seventy-ninth has viewed § 645b as having continued vitality.⁵

With regard to those aspects of the proposed program that require compliance with wage guidelines by employers doing business with the Government, a potential problem is presented by the Davis-Bacon Act, 40 U.S.C. § 276a, which generally requires Government contractors to pay minimum levels of wages to their employees. Should wages in the private sector rise at a greater rate than that established by the wage guidelines to be issued under this program by the Council on Wage and Price Stability, it may become necessary for the President to exercise his authority under 40 U.S.C. § 276a-5, § 6 of the Davis-Bacon Act, to suspend application of the Act.⁶ In addition, under Title II of the National Emergencies Act of 1972, Pub. L. No. 94-412, a Presidential declaration of national emergency required in order to suspend Davis-Bacon would be subject to veto by a concurrent resolution of the Congress. We believe that the so-called legislative veto device such as that contained in the 1976 Act is unconstitutional. However, this issue has not yet been resolved by the courts and, therefore, were Congress to pass such a concurrent resolution, we may anticipate a suit to be filed attempting to block the suspension.

In considering whether the use of wage and price guidelines to control the price of goods and services to the Government is inconsistent with statutes other than the 1949 Procurement Act, we believe it is important to recognize that there is no history of the use of such guidelines. This is important because most of the decisions upon which we would rely in litigation—those upholding Executive Order No. 11246—were decided several decades after President Roosevelt first implemented an anti-discrimination program in 1941. See Executive Order No. 8802. When the courts finally came to pass on the validity of Executive Order No. 11246, the authority to issue that order and its predecessors was historically well established. In contrast, the history of mandatory wage and price controls from World War II to the present suggested a pattern of tight congressional control over both the delegation of power to the President and over its exercise. Moreover, control of the wages and prices of Government contractors has always been treated as part of general controls over the entire economy.

On April 11, 1941, President Roosevelt established the Office of Price Administration and Civilian Supply. Executive Order No. 8734, 6 Fed. Reg.

⁵It could not be successfully contended that the 1949 Act implicitly repealed the Moore amendment given the burden usually imposed on those arguing that a statute has been repealed by implication. See, *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 187 (1978).

⁶The experience of this office with a previous suspension of Davis-Bacon in 1971 suggested several problems that we may expect to arise should that Act or any one of some 61 other similar statutes identified in 1961 require suspension. First, any suspension should be applied prospectively. Second, some contractors who deal with the Government may also be subject to State laws similar to Davis-Bacon. See, e.g., N.Y. Labor Law, Art. 8; Cal. Labor Code §§ 1771 *et seq.* This office concluded in 1970 that suspension of Davis-Bacon would have the effect of suspending or preempting any applicable State laws.

1917. That agency was empowered to issue formal price schedules, but relied for enforcement solely on publicity and persuasion. One of the functions conferred on the agency by § 2(d) of the order was to

Advise and make recommendations to other departments and agencies . . . in respect to the purchase or acquisition of materials and commodities by the Government [and] the prices to be paid therefor

On July 30, 1941, President Roosevelt transmitted to Congress a message requesting legislative authority to deal with the impact of inflationary price rises.⁷ The President pointed out that one consequence of the inflationary spiral was the increase in “[c]osts to the Government.” In asking for the legislation, the President also stated that, “[l]ike other defense legislation, it should expire with the passing of the need, within a limited time after the end of the emergency.”

The 77th Congress responded by enacting the Emergency Price Control Act of 1942. Section 1(a) declared two purposes of that Act to be: (1) insuring “that defense appropriations are not dissipated by excessive prices”; and (2) preventing “hardships” that would befall “Federal, State, and local government, that would result from abnormal increases in prices.” But Congress did not grant power to control wages, and in the Senate report on the Act it was stated that wage controls

. . . could, in no event, be acceptable unless coupled with direct and specific determination of the salaries of management, the dividends of stockholders, the interest payments received by bondholders, the incomes of farmers or merchants of professional persons and of all others.⁸

The EPCA also dealt specifically with the regulation of the prices of agricultural commodities, proscribing any control until those prices exceeded 110 percent of parity or the levels reached during any one of three previous periods, whichever was highest.

On October 2, 1942, Congress passed the Stabilization Act, 56 Stat. 765, which gave the President the power to impose ceilings over agricultural prices and to forbid wage raises that had not been approved by the War Labor Board. Under § 5(a), the Government was entitled to disregard wage payments ruled to be illegal for several purposes, including, *inter alia*, “compensation under cost-plus contracts and other governmental transactions.” *See, Allen v. Grand Central Aircraft Co.*, 347 U.S. 535 (1954).⁹

In September of 1950, Congress passed the Defense Production Act (DPA), which granted authority to the President to control prices either selectively

⁷See H. Doc. No. 332, 77th Cong., 1st sess. (1941).

⁸See S. Rept. No. 931, 77th Cong., 2d sess. 12 (1942).

⁹Under the regulations published pursuant to the Stabilization Act, a determination by the National War Labor Board that wage payments were in contravention of that Act was “conclusive upon all Executive Departments and agencies . . . for the purpose of determining costs or expenses under any contract made by or on behalf of the United States.” 7 F.R. 8749 (1942).

within one industry or sector of the economy or across the board.¹⁰ If prices were controlled, then wages would also be required to be controlled. The DPA, as had the Stabilization Act, contained an explicit provision empowering the President to determine whether "any wage, salary, or other compensation" had been paid in violation of the controls and to "prescribe the extent" to which such illegal payments could be "disregarded by the executive departments and other governmental agencies" with regard to Government contracts. The Supreme Court later observed that the "substance" of these two provisions was "inescapably the same." *Allen v. Grand Central Aircraft Co.*, *supra*, at 546.¹¹

In the *Allen* case, the Government contractor argued that the regulations mandating the disallowance of illegal wages in computing the sums owed for work or goods sold to the Government were not authorized by the DPA. The Government's brief discussed in detail the history of administrative sanctions to enforce the wage provisions of the Stabilization Act¹² and noted the degree of oversight which Congress had exercised during its existence.¹³

In 1970, Congress reentered the field of wage and price controls by enacting another Economic Stabilization Act, 84 Stat. 799, which generally empowered the President to impose wage and price controls even though President Nixon had specifically opposed the grant of such authority.¹⁴ Nothing in the legislative history of the 1970 Act suggested that Congress believed that there was any other statutory authority in the Executive to impose wage and price controls.

In 1971, after the President had used the authority under the 1970 Act to freeze wages and prices for a 90-day period, Congress considered administration and other proposals to extend the wage and price control authority beyond the expiration date of April 30, 1972. As finally enacted, the Stabilization Act Amendments of 1971 added to the President's arsenal the power to "stabilize" interest rates, corporate dividends and "similar transfers."¹⁵

In enacting the 1971 amendments, Congress did much to fill in the details that had not been addressed by the 1970 Act. This was done at least partially in response to the decision in *Amalgamated Meat Cutters & Butchers Workmen v. Connally*, 337 F. Supp. 737 (D.D.C. 1971) (three-judge court), in which a claim that the 1970 Act constituted an unconstitutional overbroad delegation of legislative power to the Executive had been rejected. Nothing in the *Amalgamated* case suggested any source of power in the President to impose wage and price controls other than the 1970 Act, which the Court upheld largely on the theory that its "fair and equitable" standard and other statutory details were

¹⁰The DPA, like its predecessors, contained a termination date (June 30, 1951) for wage and price control authority, an authority subsequently extended, 64 Stat. 822, to April 30, 1953.

¹¹Under the regulations promulgated pursuant to the DPA the "sanction" against employers who paid illegal wages to their employees in connection with work performed on Government contracts was disallowance of the illegal wages paid in computing the money due under the contract or from the Government. See 16 F. R. 6028, 6029, 7284 (1951).

¹²Brief, at 43-58.

¹³*Id.*, at 43-49.

¹⁴See H. Rept. No. 1330, 91st Cong., 2d sess. 16 (1970) (minority views).

¹⁵S. Rept. No. 507, 92d Cong., 1st sess. (1971).

sufficiently particular when the Act was read in the context of the legislation discussed above.

Finally in 1974, after the expiration of the 1970 Act, as amended, Congress enacted legislation establishing the Council on Wage and Price Stability. In hearings on the legislation, the administration made clear that

. . . we are not requesting the statutory authority to impose mandatory wage and price controls or the authority to delay wage and price increases. The mere existence of such authority has in our opinion an adverse impact on expectations. The name of the game becomes "raise prices and wages now before the Government intervenes." Statutory authority to delay wage and price increases would lead to the belief that the Government was on its way back to mandatory controls. This could result in anticipatory wage and price increases that would be highly inflationary.¹⁶

As enacted, this legislation contained an explicit provision that nothing in it "authorizes the continuation, imposition, or reimposition of any mandatory economic controls."¹⁷

The history recounted above involved wage and price controls applicable to the entire economy or to specific sectors of the economy. The question of special efforts to impose wage and price restraint on Government contractors as part of procurement policy has never been addressed. Successful defense of the proposed program may well turn on the Government's ability to show that the requirement of compliance with wage and price guidelines by those doing business with the Government does not constitute the kind of regulation of wages and prices in the general economy which Congress has assumed can be authorized only through a specific delegation of power to the President, or perhaps by direct statutory regulation by Congress itself.

The Senate recently adopted, as an amendment to S. 3077, a "sense of the Senate" resolution which expressed the view that no statute, including specifically the 1949 Procurement Act, was intended by prior Congresses to confer on the President the authority for the program you have proposed. See 124 Cong. Rec. S. 16781-82 (daily ed. Sept. 30, 1978). But the resolution merely expresses the "objection" of the Senate to implementation of a program like the one at issue here. It is not a law and it is not legally binding. Furthermore, the Supreme Court has indicated that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Philadelphia National Bank*, 374 U.S. 321, 348-49 (1963), quoting *United States v. Price*, 361 U.S. 304, 313 (1960).

¹⁶See, *Hearings on Cost of Living Task Force before the Senate Committee on Banking, Housing, and Urban Affairs*, 93d Cong., 2d sess. 67 (1974).

¹⁷S. Rept. No. 1098, 93d Cong., 2d sess. 3 (1974). That same report had taken the position that the bill "would grant no mandatory or standby control authority over the economy." *Id.*, at 1.

II. Legality of the Options Under Consideration

You asked us to address the following two questions: (1) "would a directive by the President that federal agencies not procure from firms which are on the CWPS list be upheld in court," and (2) "would a directive be upheld if it precluded awards to firms which although in compliance with the standards for the products which the agency was procuring, was not in compliance for its other products."

Under the first type of directive, a contractor is generally barred from doing business with the Government if its business activities as a whole are found to be in noncompliance with the wage and price guidelines established by the Council. Thus, a contractor whose Government-related operations are in compliance could nevertheless be barred because its overall operations are not in compliance. Under the second type of directive, a contractor who can convincingly separate his non-Government from his Government operations is bound to adhere to the wage and price guidelines only with regard to the latter operations.

We believe that the difference between the two types of directives will probably have little impact on the validity of the overall program if the principles established in the Executive Order No. 11246 cases are applied by the courts to this program. We conclude this because, under the reasoning of *Rosetti Contracting Co. v. Brennan*, 508 F. (2d) 1039, at 1045, n. 18 (1975), a program will be upheld even if the relationship between prices paid by the Government and the objectives of the program itself are somewhat "attenuated." See generally, *United States v. New Orleans Public Service, Inc.*, 553 F. (2d), at 467-68, n. 8.¹⁸

However, the more direct the connection between compliance with wage and price guidelines and lower costs to the Government, the stronger is your argument that the program is in furtherance of the purpose of the 1949 Procurement Act to procure goods and services for the Government more economically and efficiently. Therefore the case with respect to goods and services supplied to the Government will be stronger than for other products of a Government contractor.¹⁹

Next, you raised a question whether "a contractual requirement in a prime contractor's contract that it require certification of compliance of its subcontractors and suppliers" would be upheld. A similar provision is contained in § 203 of Executive Order No. 11246. We believe that such a provision would be upheld along with the basic program; neither provision would place any enforcement responsibility on the contractor himself.

¹⁸Under this principle, we think a court would probably accept the argument that applying wage and price guidelines to all phases of a corporation's business would, over the "long run," *id.*, at 170, decrease procurement costs to the Government.

¹⁹We note that in cases where a contractor cannot satisfactorily segregate his Government and non-Government related operations, debarment of the contractor should be possible under the second type of directive without implicating the broader reach of the first type of directive.

You also asked whether "the exclusion from this program of contracts awarded under formally advertised procedures significantly improves" the chances that either program would be upheld. Because there is no requirement that formally advertised contracts be awarded to the lowest bidder, *see* 41 U.S.C. § 253(b), we believe that the inclusion of such contracts within the reach of the program should not significantly affect the legality of the program one way or the other. Again, it may be that the degree to which the total economy is directly affected by this program would be a factor in judicial consideration of an argument that the program is in effect a general, mandatory wage and price system which can be imposed only pursuant to congressional authorization.

Finally, we address the implicit issue whether debarment is an appropriate and authorized sanction for violation of wage and price guidelines. Under analogous case law, *e.g.*, *Copper Plumbing & Heating Co. v. Campbell*, 290 F. (2d) 368 (D.C. Cir. 1961), as well as those cases upholding Executive Order No. 11246, we believe that debarment is an appropriate remedy. At the same time, in at least one case sustaining debarment in the absence of explicit statutory authority, the court added that debarment cannot occur "without either regulations establishing standards and a procedure which are both fair and uniform or basically fair treatment" of those debarred. *Gonzalez v. Freeman*, 334 F. (2d) 570, 580 (D.C. Cir. 1964). This case strongly suggested that if debarment is utilized as a remedy, scrupulous attention must be given to insure that the standards for exceptions are clearly established by regulation and that those standards are applied uniformly.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

November 6, 1978

78-59 MEMORANDUM OPINION FOR THE SPECIAL REPRESENTATIVE FOR TRADE NEGOTIATIONS

**Constitutional Law—U.S. Tariffs and Customs—
Procedures for Levying *ad valorem* Rates of
Customs Duties—Cost-Insurance-Freight (CIF)
Customs Valuation System**

The Attorney General has asked this Office to respond to your request for our opinion regarding the constitutionality of a contemplated adoption of a CIF (“cost-insurance-freight”) basis of customs valuation. In particular, you ask the following three questions:

- (1) Whether a CIF basis of customs valuation would contravene Article I, section 8, clause 1, of the Constitution;
- (2) Whether such a system of valuation would run afoul of Article I, section 9, clause 6; and
- (3) Whether a CIF method is inconsistent with the Fifth Amendment of the Constitution.

We believe the United States can constitutionally adopt a CIF basis of customs valuation. Even though the Supreme Court has not provided definite guidelines regarding the precise application of article I, sections 8 and 9, to the matter in question, the Court’s basic interpretation of these provisions, taken together with the relevant constitutional history, persuades us that the adoption of a CIF system would not violate those provisions. Moreover, we believe that the Fifth Amendment does not proscribe a CIF basis of valuation.¹

The details of such a system and its actual impact on the structure of trade throughout the United States, however, could have a significant bearing on the outcome of any judicial challenge. We can only articulate the governing principles to which any implementation of a CIF system of customs valuation must conform.

¹Our discussion is limited to the questions posed. The question whether the President, as opposed to Congress, is empowered to institute such a system is not addressed.

I. Customs Valuation

In levying *ad valorem* rates of customs duties—the type in question here²—the amount of the duty depends on the customs value to which the rate is applied as well as upon the rate itself. The customs value of an imported article may be assessed in one of two ways. Under the present FOB (“free-on-board”) standard, United States customs officials assign the dutiable value to an imported commodity in isolation from the transportation charges.³ An FOB system requires officials in general to assess the value of the imported article at the time it was exported, in accordance with applicable guidelines.⁴

In contrast, the CIF (“cost-insurance-freight”) system calls for an assessment of the value of the article and also of the total of freight, insurance, and other transportation charges.⁵ The latter costs are included in the final figure setting the imported item’s dutiable value, to which an *ad valorem* rate is applied.⁶

A shift by the United States from an FOB to a CIF method would have two primary effects. First, dutiable values would be increased⁷ and thus, unless an offsetting decrease in rates or a similar alteration would accompany the switch, customs duties as a whole would rise. A second effect, more directly relevant for constitutional purposes, is that certain inequalities in the valuation of articles imported into this country would result from including variable transportation and other charges in the calculation.

An FOB system of customs valuation itself may result in unequal valuation when physically identical commodities imported into the United States are valued differently because of their varying points of foreign origin. For example, two identical articles from two different sources could have widely dissimilar costs, which therefore would be reflected in different appraisals of the items’ dutiable value in an American port due to their disparate “foreign values”;⁸ the disparities would not result from varying costs of transporting the articles to the port of entry. Thus, although under an FOB arrangement, two physically identical items imported from two *different* sources might be valued differently in the same port of entry in the United States, the valuation of such articles from the *same* source—in which, *arguendo*, the cost of the articles is

²Customs duties can be levied in terms of either *ad valorem* rates, under which a given percentage of the imported article’s value is assessed; specific rates, according to which so much is assessed per unit of the imported article; or compound rates, which combine *ad valorem* and specific rates.

³See R. Vernon, *The Economic Environment of International Business*, 110-111 (1972).

⁴See, *Customs Valuation*, Report of the U.S. Tariff Commission to the Committee on Finance, U.S. Senate, 93d Cong, 1st sess., 27-28 (1973).

⁵See Report, footnote 4.

⁶While most nations apply a CIF standard of customs valuation, the United States, Canada, Australia, and a few other countries employ an FOB system, *Id.*, at 28.

⁷*Id.*, at 17.

⁸Historically, a number of standards have been utilized to measure the value of a commodity in the country of origin, including the price charged by the exporter for the shipment of goods in the country of origin; its foreign market value; its cost of production, to be attested to by the manufacturer; and its “United States value,” a constructed foreign value. See Elliott, *Tariff Procedures and Trade Barriers*, 143-47 (1955).

basically similar—would tend to be fundamentally uniform throughout this country, regardless of the port of entry.

Under a CIF system two physically identical items from the *same* source could be valued unequally in two *different* points of entry in the United States. The variance in the cost of freight and insurance between the exportation point and the respective American ports might be sufficiently great to generate significantly dissimilar valuations at the two different points of entry.⁹

We observe that while an FOB arrangement would not tend to generate inequalities among different States, or among different ports of the same State, with regard to the value assigned to physically identical articles imported from the *same* source, such imbalances could well follow from the adoption of a CIF system.

II. The “Uniformity” and “No Preference” Clauses

Concern about the constitutionality of a CIF system arises from the requirements of Article I, section 8, clause 1, and Article I, section 9, clause 6, of the Constitution. Clause 1 (the Uniformity Clause) states:

The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; *but all duties, imposts and excises shall be uniform throughout the United States.* (Emphasis added.)

And clause 6 provides:

No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another.

A. *The Uniformity Clause.*¹⁰ Since a CIF system of customs valuation, by its very nature, is designed for even-handed application in all States, such a system facially would not discriminate against particular States or ports. You have

⁹See Report, note 4, at 85.

¹⁰The language of the Uniformity Clause first confers on Congress the power to assess and collect “taxes, duties, imposts and excises,” and then qualifies the power to impose “duties, imposts and excises” by requiring that they be “uniform throughout the United States.” The omission in the qualifying phrase of the broadest term, “taxes,” indicates that the strictures of the uniformity provision are designed to apply only to a subclass of taxes, denominated “duties, imposts and excises.” In a “general sense, all contributions imposed by the government upon individuals for the service of the State are called taxes,” whether they are termed a “tribute, talliage, impost, duty, gabel, custom, subsidy, aid, supply, excise, or other . . .” I.J. Story, *Commentaries on the Constitution of the United States* § 950, at 699 (5th ed., 1891). In particular, “duties, imposts and excises” are “indirect” taxes in the constitutional sense, and are to be distinguished from “direct” taxes, which are required by Article I, section 2, to be “apportioned among the several States . . . according to their respective numbers.” Thus, the rule of uniformity applies to “duties, imposts and excises” as indirect taxes, and the rule of apportionment pertains to direct taxes. See Story, *supra*, §§ 750-51.

stated that whatever valuation arrangement is adopted by this country, "that method of valuation will be applied uniformly throughout the United States."

Consequently, any constitutional challenge of a CIF valuation system on the basis of the Uniformity Clause must look to its predictable effects, notably, the differentials between total customs duties paid on articles imported at different ports resulting from varying transportation and related charges.

It is a long-established doctrine that the type of uniformity required under the Uniformity Clause is "geographical," not "intrinsic." See, e.g., *Fernandez v. Wiener*, 326 U.S. 340, 359 (1945); *Steward Machine Co. v. Davis*, 301 U.S. 548, 583 (1937); *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1, 24 (1916); *Billings v. United States*, 232 U.S. 261, 282 (1914); *Flint v. Stone Tracy Co.*, 220 U.S. 107, 158 (1911); *Patton v. Brady*, 184 U.S. 608, 622 (1902); *Knowlton v. Moore*, 178 U.S. 41, 83-106 (1900). While the judicial elaboration of this distinction has not always been complete, some discussions, notably that in *Knowlton v. Moore*, have set forth the doctrine's core.

In *Knowlton*,¹¹ the Supreme Court described the principle of "intrinsic" uniformity as requiring that duties, imposts, and excises shall "operate precisely in the same manner upon all individuals," and must be "intrinsically equal and uniform in . . . operation upon individuals." 178 U.S., at 84-85. Thus, the "intrinsic" uniformity requirement looks primarily to the effects of a tax on individuals in different States, and restricts the effects to a strictly circumscribed range.

But if one construes the language "all duties, imposts and excises shall be uniform throughout the United States" as dictating that all such levies shall be "intrinsically equal and uniform," even taking into account a small margin of inevitable variation, then, in effect, one has rendered nugatory the meaning of the words, "throughout the United States." For if intrinsic equality were required, it would apparently be expected to obtain as to all individuals or entities taxed, without any special reference to the States as such. Thus, there would have been no reason for specifically mentioning them. Since a fundamental dictum of constitutional interpretation is not to read the document so as to view some terms in it as surplusage,¹² it seems that "uniform" cannot easily assume the narrow meaning ascribed to it by the "intrinsic" uniformity interpretation.¹³

It is somewhat anomalous to require that only "duties, imposts, and excises," and not other taxes authorized by the Constitution,¹⁴ must be

¹¹An inheritance tax levied by Congress during the Spanish-American War was objected to in *Knowlton* on alternative grounds; if it was a "direct" tax, it was not properly apportioned among the States; and if an "indirect" tax, it was not sufficiently uniform throughout the United States. The Supreme Court concluded that the levy was not direct, but indirect.

¹²See I.J. Story, *supra*, § 910, at 664 (5th ed., 1891) ("The common principles of interpretation would seem to instruct us that the different parts of the same instrument ought to be so expounded as to give meaning to every part which will bear it."); and § 980, at 719 ("... no part of the Constitution can be considered as useless, no sentence or clause in it without a meaning").

¹³See, *Knowlton*, 178 U.S. at 87.

¹⁴See note 10, *supra*, for the point that the uniformity requirement applies only to a subset of all taxes Congress is constitutionally authorized to levy.

“intrinsicly” uniform in their effects. Especially since customs duties and excises are often highly particularistic in their subjects, as well as extraordinarily varied, it would be quite difficult in practice, even if theoretically possible, to be certain that every such Federal tax has intrinsicly equal impact on individuals throughout the Nation.¹⁵

Moreover, an interpretation of the Uniformity Clause which requires Congress to guarantee that the multifarious consequences of a duty, impost, or excise must be identical throughout the United States suffers from the circumstance that Congress is quite unlikely to be certain in advance about the varied consequences of any given taxing system. The full implementation of such a test would demand either extraordinary foresight, or a rigorous retrospective analysis that would effectively render the validity of taxing arrangements directly conditional on the outcome of a subsequent review of the results of a tax. Such a stringent requirement may also significantly constrict the Federal taxing power, perhaps so much—as *Knowlton* feared—as virtually to deny it, even while nominally recognizing it. See 178 U.S., at 89.

These difficulties, considerable as they are, may be avoided by interpreting the Uniformity Clause as stipulating, not that the effects of customs duties must be intrinsicly equal, but that the *rules* established for levying and collecting them must be generally applied and must be neutral with regard to the States. Such an interpretation is supported by the relevant constitutional history, which shows that the Framers were primarily concerned about the singling out of particular States for favored or disfavored treatment.¹⁶ The Framers’ conception of the Uniformity Clause’s protection against explicit favoritism was thus elaborated by Joseph Story:

Unless duties, imposts, and excises were uniform, the grossest and most oppressive inequalities . . . might exist (A) combination of a few States in Congress might secure a monopoly of certain branches of trade and business to themselves, to the injury, if not to the destruction, of their less favored neighbors If this provision as to uniformity of duties had been omitted . . . New York and Pennsylvania might, by an easy combination with the Southern States, have destroyed the whole navigation of New England. A combination of a different character, between the New England and the Western States, might have borne down the agriculture of the South; and a

¹⁵As the Supreme Court said in *Knowlton*, 178 U.S., at 88, “Excises usually look to a particular subject, and levy burdens with reference to the act of manufacturing them, selling them, etc. They are or may be as varied in form as are the acts or dealings with which the taxes are concerned. Impost duties take every conceivable form, as may by the legislative authority be deemed best for the general welfare. They have been at all times often specific. They have sometimes been discriminatory, particularly when deemed necessary by reason of the tariff legislation of other countries. The claim of intrinsic uniformity, therefore, imputes to the Framers a restriction as to certain forms of taxes, where the restraint was least appropriate and the omission where it was most needed.” Cf. *Head Money Cases*, 112 U.S. 580, 595 (1884) (“Perfect uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it, is a baseless dream.”).

¹⁶This point is made clear in the elaboration of the debates at the Constitutional Convention set forth in *Knowlton*, 178 U.S., at 101-06.

combination of yet different character might have struck at the vital interests of manufacturers. So that the general propriety of this clause is established by its intrinsic political wisdom, as well as by its tendency to quiet alarms and suppress discontents.

To counter the dangers of such "alarms and . . . discontents," the Constitution requires, as *Knowlton* indicates, the even-handed application of duties, imposts, and excises. The "geographical uniformity" that the Uniformity Clause demands "looks to the forbidding of discrimination as between the States, by the levying of duties, imposts or excises upon a particular subject in one State and a different duty, impost or excise on the same subject in another." *Knowlton*, 178 U.S., at 89. As the Supreme Court noted in *Florida v. Mellon*, 273 U.S. 12, 17 (1927), "[a]ll that the Constitution (Art. I, § 8, cl. 1) requires is that the law shall be uniform in the sense that by its provisions the rule of liability shall be the same in all parts of the United States."¹⁷

It might be argued that there is a central distinction between a variable excise rate, as in *Knowlton*, and a CIF customs valuation scheme, since in the former case inequalities may arise because of the uneven *distribution* of items taxed throughout the United States, whereas in the latter case, inequalities may follow simply from the application of a variable *valuation* standard. Such an argument, however, is specious. The ultimate practical effects of variable rates leading to different amounts of tax levied depending on the quantity and value of imported articles available to be taxed in given States, on the one hand, and of a variable element in the valuation formula, on the other hand, are essentially the same. Moreover, we can discern no support for the notion that the Framers contemplated differentials in the rates of tax, such as those in *Knowlton*, but chose to draw the line at the inclusion of variable factors in calculating the tax base.¹⁸

Rather, the proceedings at the Constitutional Convention relating to Article I, section 8, clause 1, and Article I, section 9, clause 6, confirm that the Framers sought to prevent direct discrimination against States, not to guard against the incidental side effects of a uniformly applied set of customs regulations. For instance, on August 25, 1787, Messrs. Carroll and Martin, members of the Convention, expressed the apprehension "that, under the power of regulating

¹⁷See B. Schwartz, *A Commentary on the Constitution of the United States*, at 171 (1963) (the rule of uniformity means "only that the same principles must be used to define the existence, the amount, and the enforceability of the liability for the tax throughout the entire territorial area of the United States"); H. Rottschaefer, *Handbook of American Constitutional Law* 186-87 (1939).

¹⁸An unwillingness to draw any such line, grounded apparently on the lack of a serviceable principled distinction, may be seen in lower court decisions permitting as "uniform" differences in taxes resulting from a changing tax base. See, *Standard Oil Co. v. McLaughlin*, 67 F. (2d) 111, 114, (9th Cir. 1933) (holding that a Federal tax on the transportation of oil in pipelines does not violate the Uniformity Clause, even though the base on which the tax is computed may vary in different cases, because "[t]he amount of the tax in each case will depend upon the amount of oil transported and the reasonable charge therefor, but all those under the same circumstances will pay the same tax"); *Minature Vehicle Leasing Corp. v. United States*, 266 F. Supp. 697, 700 (D.N.J. 1967) (holding that an excise tax on the importation of automobiles with a tax base predicated on their selling price is not unconstitutionally nonuniform, despite natural inequalities resulting from differences in the importers' costs).

trade, the general legislature might favor the ports of particular States, by requiring vessels destined to or from other States to enter and clear thereat, as vessels belonging or bound to Baltimore, to enter and clear at Norfolk, etc."¹⁹ Because of this, they moved and had seconded the following proposition, the forerunner of the No Preference Clause:

The legislature of the United States shall not oblige vessels belonging to citizens thereof, or to foreigners, to enter or pay duties or imposts in any other State than in that to which they may be bound, or to clear out in any other than the State in which their cargoes may be laden on board; *nor shall any privilege or immunity be granted to any vessel on entering or clearing out, or paying duties or imposts in one State in preference to another.* [Emphasis added.]²⁰

Also on August 25, General Pinckney and Mr. McHenry submitted what was the predecessor of the Uniformity Clause as follows:

All duties, imposts, and excises, prohibitions or restraints, laid or made by the legislature of the United States, shall be *uniform and equal* throughout the United States.²¹ [Emphasis added.]

After these two proposals had been submitted to the Committee on Detail, the Committee issued a report in which both were embodied in one section,²² and the words "and equal" were struck from the phrase "uniform and equal" in the Uniformity Clause as originally proposed. That deletion may be fairly interpreted, as indeed the Supreme Court has done, to indicate an intent to erase any implication that strict equality among the States must be achieved.²³

The final version of the clauses submitted to the Committee of Style provided as follows:

. . . Nor shall any regulation of commerce or revenue give preference to the ports of one state over those of another, or oblige vessels bound to or from any state to enter, clear, or pay duties in another.
And all duties, imposts, and excises, laid by the Legislature, shall be uniform throughout the United States.²⁴

By the time the Committee of Style issued its report, however, the language dealing with the power to lay and collect duties, imposts, and excises had been transferred to a separate section,²⁵ and the Uniformity Clause in its final form remained distinct from the No Preference Clause.²⁶ Thus, the Uniformity and

¹⁹5 Elliot's Debates 478-79 (1845).

²⁰*Id.*, at 103.

²¹*Id.*, at 479.

²²That section provided, *id.*, at 502:

"Nor shall any regulation of commerce or revenue give preference to the ports of one state over those of another or oblige vessels bound to or from any state or enter, clear, or pay duties in another: And all tonnage, duties, imposts, and excises, laid by the Legislature shall be uniform throughout the United States." [Emphasis added.]

²³*See, Knowlton*, 178 U.S., at 104.

²⁴2 Farrand, *The Records of the Federal Convention of 1787*, at 571 (1937).

²⁵*See, id.*, at 594, 596.

²⁶*See, id.*, at 610 n. 2 & 614.

No Preference Clauses, although unified in their intent and original adoption, became separated during the stylistic arranging of the Constitution. Both clauses are fundamentally directed toward guarding against attempts by Congress to enact an explicitly discriminatory taxing system benefiting given ports or States.²⁷

Accordingly, to the extent that the language and purpose of a CIF system of customs valuation establish the same governing principles throughout the country, the CIF system is not barred by the Uniformity Clause.

B. *The No Preference Clause.* In applying the restriction of Article I, sec. 9, cl. 6, that no "preference" be given to the "ports of one State over those of another," it appears that to the extent that the development of a CIF system of valuation requires only the articulation of entirely general rules with respect to all States, no particular port would need to be provided for, much less preferred, in terms. Once again, the issue is whether that clause bars a CIF customs valuation scheme with somewhat variable effects in absolute or "intrinsic" terms.

In the first place, the precise consequences of a CIF system of valuation would appear to be both unpredictable and changeable. Thus, it is implausible to view such a system as a method of systematically preferring any particular port over any other. Such a specific preference is what the No Preference Clause's language and history, as canvassed above, are primarily directed against. A CIF system of customs valuation confers no special advantages on any particular ports; *a fortiori* it would escape the proscriptions of that provision.

Furthermore, to the extent that certain incidental benefits may be directed to some ports from a CIF system of valuation, such preferences would result from geography, and, as the Supreme Court put it in *Alabama G.S.R. Co. v. United States*, 340 U.S. 216, 229 (1951), quoting with approval, *ICC v. Duffenbaugh*, 222 U.S. 42, 46 (1911), "[t]he law does not attempt to equalize fortune, opportunities or abilities" in this regard.²⁸

We consider that any preference that may accrue to a port as a result of a CIF system of valuation would be incidental and permissible under the No Preference Clause.

²⁷See, *Knowlton*, 178 U.S., at 106. A customs valuation system taking into account variable transportation costs is not proscribed. The tariff levied by the First Congress included, in addition to the basic *ad valorem* rate, an increment of ten or twenty percent, which was to correspond roughly to the cost of transporting merchandise from the country of origin. See Customs Administration Act, July 31, 1789, 1 Stat. 29. Section 17 of that Act provided:

And be it further enacted, that the ad valorem rates of duty upon all goods, wares and merchandise, at the place of importation, shall be estimated by adding twenty per cent to the actual cost thereof, if imported from the Cape of Good Hope, or from any place beyond the same; and ten per cent on the actual cost thereof, if imported from any other place or country, exclusive of all charges.

²⁸*Cf.*, *Armour Packing Co. v. United States*, 209 U.S. 56, 80 (1908). ("The fact that a regulation, within the acknowledged power of Congress to enact, may affect the ports of one State more than those of another cannot be construed as a violation of this constitutional provision [the No Preference Clause].")

III. The Fifth Amendment

You are also concerned that a CIF system of valuation may, in its application, draw classifications in violation of the Equal Protection principle implicit in the Due Process Clause of the Fifth Amendment.²⁹ Such a challenge would rest on the premise that classifications generated by a CIF system are substantively unreasonable and arbitrary in their inequalities.³⁰

Since this is not a case involving one of the so-called "fundamental rights" or "suspect" classifications—such as classification based on race—to which the Supreme Court has demonstrated special sensitivity by engaging in different forms of heightened scrutiny,³¹ the basic question is whether the classifications resulting from a CIF system are rational in the sense of serving the ends for which the system is designed.³²

Any distinctions in the amounts of customs duty levied in different American ports on identical articles under a CIF system would be related to variations in transportation and similar charges incurred from the point of origin to the ports of entry. A CIF system is, of course, constructed precisely to take these costs into account. In the absence of a discriminatory intent against any State or port, which, if it existed, would in any event fly in the face of the Uniformity and No

²⁹See, *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

³⁰Since *Bolling v. Sharpe*, considerations of equality have been found to be implicated in the Due Process Clause of the Fifth Amendment. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 93 (1976). ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.") Cf., *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976). (The Court noted, in the context of a challenge to a Civil Service Commission regulation barring noncitizens from employment in the Federal competitive civil service, that although both the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment "require the same type of analysis," nevertheless "the two protections are not always co-extensive," and "there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State.")

³¹Political choices resulting in classifications burdening fundamental rights or indicating prejudice against racial or other minorities have been subjected by the courts to closer analysis, or stricter scrutiny, in an effort to preserve the ideal of equality. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969) (the fundamental right to travel); *Hunter v. Erickson*, 393 U.S. 385 (1969) (race as a suspect classification); *Reitman v. Mulkey*, 387 U.S. 369 (1967) (race as a suspect classification). See generally Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972).

³²The basic requirement of Equal Protection analysis is that a legislative classification be minimally rational. "The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose" *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964).

Preference Clauses, a CIF system may not be said to lack the requisite minimum rationality required by the Fifth Amendment.³³

We are therefore of the view that the Fifth Amendment does not bar the adoption of a CIF system.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

³³It cannot be said definitely that distinctions resulting from a CIF system of valuation have no conceivable basis in fact, or that they are not grounded "upon a state of facts that reasonably can be conceived to constitute a distinction, or difference in . . . policy." *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 530 (1959). See generally Tribe, American Constitutional Law §§ 16-2, 16-3 (1978).

November 16, 1978

**78-60 MEMORANDUM OPINION FOR THE COUNSEL,
OFFICE OF PROFESSIONAL RESPONSIBILITY**

**Federal Bureau of Investigation—Constitutional
Law—Fourth Amendment—Privacy Act (5 U.S.C.
§ 5522)—Acquisition of Private Papers**

This responds to your request for our opinion on the legality of the way in which the Federal Bureau of Investigation (FBI) obtained personal papers on the late John Forichette of Hastings, Minnesota, from his cousin, Mrs. Marcella Faltersek, after his death in an automobile accident. Mr. Forichette had openly been a member of the Communist Party of Minnesota, and the papers in question concerned that organization. The Minnesota Civil Liberties Union (MCLU) has complained to Representative Bruce Vento that the FBI's action was unlawful because Mrs. Faltersek lacked authority to dispose of the papers and because it infringed on the First Amendment rights of persons named in them. Representative Edwards, chairman of the House Subcommittee on Civil and Constitutional Rights, forwarded the MCLU's letter to the Office of Professional Responsibility together with a response from the Director of the FBI. He has requested your views on the legality and propriety of the FBI's actions.

This matter raises the following legal issues: First, did the Fourth Amendment permit the FBI to obtain the papers from Mrs. Faltersek? Second, did the Privacy Act, 5 U.S.C. § 552a, or the Attorney General's guidelines implementing that Act, permit the FBI to obtain and copy the papers? After careful consideration of these issues, we have concluded that the FBI's action was authorized by law.

We understand the facts to be as follows: Mr. Forichette was killed in an automobile accident in Hastings, Minnesota, on June 14, 1978. Since Mr. Forichette lived alone, Officer Ritter of the Hastings police entered his house on June 15 to search for the names of next of kin. In the course of the search, he found papers relating to the Communist Party and notified Special Agent Nelson of the FBI. The officer also found the name of Mrs. Faltersek, a cousin of Mr. Forichette, and informed her of his death.

When Mrs. Faltersek arrived at the house on June 15, she told Officer Ritter that she had been designated by Mr. Forichette's closest relatives, an elderly couple, to handle funeral arrangements and take charge of the personal property. She then went through the house and found pamphlets, address books, and other papers connected with Mr. Forichette's Communist Party activities. When she told Officer Ritter that she intended to destroy the material, he suggested that the FBI might be interested and asked if she would be willing to talk to them. Mrs. Faltersek agreed, and Ritter called the FBI to arrange a meeting.

Accordingly, on June 19, 1978, two FBI agents and officers of the Hastings Police Department met with Mrs. Faltersek and her husband outside Mr. Forichette's house. Mrs. Faltersek was told that the FBI was conducting an investigation of the Communist Party and might have an interest in the material maintained within the house. She stated that the FBI was free to take whatever Communist material was maintained in Forichette's residence because she intended to discard it.

Mrs. Faltersek, using a key to the house, admitted the FBI agents, a police officer, and her husband. After entering the house, one of the FBI agents presented a written release to Mrs. Faltersek, which she signed. This release authorized special agents of the FBI to examine all personal effects of John Forichette and to take with them any items they desired. Mrs. Faltersek's signature was witnessed by a police officer and the two FBI agents.

All of the persons present, including Mr. and Mrs. Faltersek, spent approximately 30 to 45 minutes collecting and examining Mr. Forichette's papers. The FBI agents departed with one suitcase and one cardboard box full of miscellaneous documents relating to the Communist Party.

Mr. Forichette died intestate. Mrs. Faltersek was appointed administrator of his estate on September 11, 1978, by the local probate court. The FBI has stated that it will return the original papers to the estate on her written request.

The Communist Party of the United States is the subject of a foreign counterintelligence investigation authorized and conducted under guidelines promulgated by the Attorney General.

In substance, the FBI has borrowed the personal papers of a deceased person from his estate for inspection and copying. The individual who loaned the papers is now the administratrix of the estate; at the time of the loan she was merely the agent of the deceased's next of kin. The first question is whether this transaction is a reasonable seizure under the Fourth Amendment.

Assuming for the moment that the FBI has "seized" the papers,¹ the general issue is whether that seizure is authorized by Mrs. Faltersek's consent. As a

¹The Eighth Circuit has defined a "seizure" as an involuntary dispossession and retention of property under color of authority. See, *United States v. Lacey*, 530 F. (2d) 821, 823 (8th Cir. 1977); *Caldwell v. United States*, 338 F. (2d) 385, 388 (8th Cir. 1964); *United States v. Nicholas*, 448 F. (2d) 622, 624 (8th Cir. 1971); *Wilhelm v. Turner*, 431 F. (2d) 177, 179-80 (8th Cir. 1970). Since the FBI has obtained the papers with the consent of Mrs. Faltersek and will return them at her request, we doubt whether the transaction can even be characterized as a "seizure" under the Fourth Amendment.

rule, consent to search premises or seize property may be voluntarily given by one "generally having . . . access or control for most purposes, so that it is reasonable to recognize that [he] has the right to permit the inspection in his own right. . . ." *United States v. Matlock*, 417 U.S. 164, 171, n. 7 (1974); *see, Coolidge v. New Hampshire*, 405 U.S. 443, 488-89 (1971); *Frazier v. Cupp*, 394 U.S. 731, 740 (1969). As owner of the papers,² there is no question that Mr. Forichette could have voluntarily disclosed them to the FBI. Mrs. Faltersek did so.³ The specific question is thus whether she had sufficient authority under the Minnesota law of decedent's estates to act as Mr. Forichette could have.

In Minnesota, the property of an intestate devolves to his heirs at death, subject to administration.⁴ The administrator is entitled to possession of all personal property and takes title in trust for the benefit of the estate.⁵ The administrator has broad power to dispose of the estate's property, including the power to abandon property he believes to be of no value.⁶ In the exercise of his powers, the administrator is a fiduciary for the estate, and any heirs or creditors, may sue for breach of fiduciary duty.⁷ The administrator's powers are to be exercised "for the best interests of successors to the estate."⁸

One cannot act as administrator without a court appointment.⁹ However, actions taken before an administrator is appointed are not necessarily invalid, for the Minnesota statute provides:

The duties and powers of a personal representative commence upon his appointment. The powers of a personal representative relate back in time to give acts by the person appointed which are beneficial to the estate occurring prior to the appointment the same effect as those occurring thereafter. . . . A personal representative may ratify and accept acts by others which would have been proper for a personal representative.¹⁰

The purpose of this provision is to give the administrator authority *nunc pro tunc* from the time of death.¹¹ The administrator succeeds to the decedent's standing to assert any legal rights which survive death.¹²

²None of the persons interested in this matter has claimed that Mr. Forichette did not own the papers in question. We note that whether Mr. Forichette was the owner of the papers or merely held them for others, the Fourth Amendment gave the Communist Party and any third persons named in the papers no protected expectation that he would not voluntarily turn them over to the FBI. *See, United States v. Miller*, 425 U.S. 435, 440-43 (1976).

³No person connected with this case has claimed that Mrs. Faltersek's consent was not free and voluntary.

⁴Minn. Stat. § 524.3-101.

⁵Minn. Stat. § 524.3-709.

⁶Minn. Stat. § 524.3-715(ii).

⁷Minn. Stat. §§ 524.3-703, 524.3-712; *see* Minn. Stat. § 524.1-201(20).

⁸Minn. Stat. § 524.3-703(a).

⁹Minn. Stat. § 524.3-103.

¹⁰Minn. Stat. § 524.3-701.

¹¹*See* Uniform Probate Code § 3-701, comment. The Minnesota statute is identical to the Uniform Act.

¹²Minn. Stat. § 524.3-70(b).

Thus, Mrs. Faltersek essentially had the same relation to the estate's property as Mr. Forichette had when alive, including the power to transfer or abandon it. She was permitted to exercise her power in any way not harmful to the estate, and she was amenable only to its creditors or the heirs for any financial loss her handling of the property incurred. In particular, she could relinquish possession or control of property which she believed to be of no value, subject to the heirs' claim for any loss caused by her misjudgment. That power was deemed by State law to have existed from the time of Mr. Forichette's death.¹³ As the person legally authorized to possess and dispose of the estate's property, Mrs. Faltersek had full authority to abandon the Communist Party records. This necessarily included the lesser authority to consent to their permanent, or in this case temporary, removal by the FBI. We therefore conclude that the Fourth Amendment did not prohibit the FBI from accepting the records from Mrs. Faltersek.

The next question is whether the Privacy Act, 5 U.S.C. § 552a, prohibited the FBI from obtaining, analyzing, and retaining copies of the records. As a preliminary matter, we note that only an "individual" has rights and remedies under the Privacy Act; associations have none apart from the separate rights of their members.¹⁴ Further, the Act applies only to collection, retention, and dissemination of information about an individual that is retrievable by name or an equivalent personal identifier.¹⁵ Thus, the Act applies only to the FBI's collection, retention, and use of information concerning individual Communist Party members.

The relevant portion of the Privacy Act is 5 U.S.C. § 552a(e)(7), which provides:

Each agency that maintains a system of records shall—

* * * * *

(7) maintain no record describing how any individual exercises his rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity. [Emphasis added.]¹⁶

The underlined language was added to the statute in a floor amendment sponsored by Representative Ichord. He stated that the purpose of the amendment was to permit the FBI to investigate illegal activity undertaken by

¹³We are aware that only authority for acts "beneficial" to the estate relates back before the administrator's appointment. Minn. Stat. § 524.3-701. While we cannot authoritatively construe this question of State law, we believe that it means only that the administrator would be strictly liable for any loss to the estate from these dealings, rather than liable as a fiduciary under the "prudent man" rule. Cf., Minn. Stat. § 524.3-703(a).

¹⁴See 5 U.S.C. §§ 552a(2), (4), (c)(3), (d), (e)(1)-(3), (5)-(8), (f), (g); *Am. Federation of Government Employees, Local 2047 v. Defense General Supply Center*, 423 F. Supp. 481 (E.D. Va. 1976).

¹⁵5 U.S.C. § 552a(a)(4)-(5).

¹⁶The FBI Central Records System (Justice/FBI 002) has been exempted from the provisions of 5 U.S.C. § 552a(e)(1). See 5 U.S.C. 552a(k)(2); 43 F.R. 44694 (Sept. 28, 1978).

the Communist Party and similar organizations under the guise of political activity protected by the First Amendment. He further stated that the amendment was not intended "to hurt in any way the exercise of the first amendment rights."¹⁷ Thus, 5 U.S.C. § 552a(e)(7) permits the FBI to maintain a record of an individual's activities relating to the First Amendment when, but only when, those activities are involved in conduct which is the subject of an otherwise authorized law enforcement investigation by the FBI.

In our view, the FBI has complied with subsection (e)(7) in this case. Investigation of the Communist Party has been specifically authorized by the Attorney General as a foreign counterintelligence investigation under 28 U.S.C. § 533(3), Executive Order No. 12036, §§ 1-1401, 2-208(j), 4-202, and the Attorney General's procedures for the conduct of such investigations.¹⁸ To date, the FBI has not opened or initiated any new individual files on the basis of the Forichette papers. The material is being evaluated, and individual investigations will be undertaken only if authorized under the Attorney General's procedures or if other possible violations of law are revealed. These investigations would be duly authorized, and the maintenance of records on the association of individuals concerned with the Communist Party would be permitted if pertinent to the investigation.¹⁹

To summarize, the FBI is conducting its investigation of the Communist Party as a foreign counterintelligence investigation under appropriate authority. In the course of this investigation, Mrs. Faltersek voluntarily provided the FBI with temporary use of papers relating to the Communist Party which were lawfully in her possession and which, under the law of Minnesota, she had the authority to abandon entirely. The Fourth Amendment permits the FBI to acquire the papers in this manner. Since the papers concern associational activity protected by the First Amendment, the Privacy Act permits the FBI to maintain retrievable records of individuals mentioned in them only when pertinent to and within the scope of the authorized investigation of the Communist Party. Insofar as we are aware, the FBI intends to proceed accordingly.

MARY C. LAWTON
Deputy Assistant Attorney General
Office of Legal Counsel

¹⁷120 Cong. Rec. 36957 (1974); *see also* 120 Cong. Rec. 36644 (Representative Moorhead), 36650 (Representative Ichord).

¹⁸Representative Ichord stated that he was using the term "law enforcement" in its broadest sense, to include legitimate "national or internal security investigations" authorized by statute or Executive order. 120 Cong. Rec. 36651 (1974).

¹⁹The Privacy Act notice for the FBI Central Records System (Justice/FBI 002) states: "It should be noted that the FBI does not index all individuals that furnish information or names developed in an investigation. Only that information that is considered pertinent and relevant and essential for future retrieval, is indexed." 43 F.R. 44693 (Sept. 28, 1978).

November 24, 1978

**78-61 MEMORANDUM FOR THE GENERAL COUNSEL,
FEDERAL MEDIATION AND CONCILIATION
SERVICE**

**Department of Labor—Boards of Inquiry—Payments
to Federal Employees From Non-Government Sources
(18 U.S.C. § 209)—Proposed Supplementation of
Compensation**

This responds to your request for our opinion whether a proposal to supplement the salary paid to arbitrators who are members of Boards of Inquiry appointed under 29 U.S.C. § 183 would be permissible under the Federal conflict-of-interest laws. You inquire further whether a particular system of supplementation involving unequal contributions by the various parties to a dispute would raise additional legal problems. We have concluded that a supplementation arrangement would not result in violation of the applicable conflict provision, 18 U.S.C. § 209. We believe, however, that your decision regarding the handling of unequal contributions may be influenced by the requirement that distribution of additional funds be accomplished by the parties themselves or some entity other than the Federal Mediation and Conciliation Service (FMCS). We also recommend that you consider revising pertinent FMCS regulations before any such supplementation proposal is implemented.

Pursuant to 29 U.S.C. § 183, Boards of Inquiry are appointed by the FMCS to conciliate certain disputes in the health care industry. Members of these boards are selected from a roster of private arbitrators maintained by the FMCS and the boards are required by law to issue their reports within 15 days of their establishment. In unusual cases an individual arbitrator may serve on more than one board in a given year. You indicate that in many instances service for a full 15 days in connection with a single inquiry is not required. However, in no event has an arbitrator served on as many as eight Boards of Inquiry in a single year.

Compensation of members of Boards of Inquiry is set by statute at the GS-18 rate. The proposal in question is that this compensation, which amounts to \$183 per day, be supplemented by voluntary contributions of the parties to the

dispute to approximate more closely the prevailing rate for arbitral services—\$200 to \$400 per day.

Section 209(a) prohibits the receipt of salary or contribution to or supplementation of salary as compensation for services rendered as an officer or employee of the executive branch of the United States or of any independent agency. However, 18 U.S.C. § 209(c) specifically exempts “special government employees” from the prohibition. Section 202(a) of title 18 defines “special government employees” as those who are appointed to perform temporary duties either on a full-time or intermittent basis, for a period not to exceed 130 days during any period of 365 consecutive days. The period of 130 days is, moreover, to be ascertained by reference to the anticipated period of employment, not the duration of actual service. So long as the existing practice is continued, whereby Board members are appointed for terms of not more than 15 days and, whenever reappointed, would serve in total no more than 130 days in any period of 365 consecutive days, they would qualify as special Government employees, and supplementation of their compensation would not be prohibited by § 209.

Two additional questions are raised, however. First, we are uncertain whether you plan to provide for distribution of the supplemental funds through the FMCS itself, or directly through the parties. Absent statutory authorization to accept gifts, the Service could not itself participate in such an arrangement. We are not aware of any such authority. This limitation may well bear on the procedures to be adopted where only one party agrees to provide supplemental funds or where the parties agree to pay varying amounts. Although you might devise a pooling arrangement, the creation of such a mechanism may prove more difficult in the circumstances of this case. Apart from this consideration, we are aware of no other legal impediment to an arrangement involving unequal contributions by the parties.

Finally, consideration should be given to the more explicit requirements imposed by the FMCS's Standards of Conduct set out in 29 CFR Part 1400. Section 1400.735-30 applies certain of those rules to special Government employees. One of the applicable rules, § 1400.735-11, provides that except as otherwise specifically permitted “an employee shall not . . . accept . . . any gift, . . . or any other thing of monetary value, from a person who . . . (2) [c]onducts operations or activities that are affected by Federal Mediation and Conciliation Service functions.” The acceptance of a compensation supplement is not in the nature of a gift, and may well fall within the intended coverage of § 1400.735-12, which governs employment and is specifically rendered inapplicable to special Government employees. We are, however, uncertain whether you have adopted such an interpretation of this provision rather than a more literal reading that might bar acceptance of any such consideration. You may therefore wish to consider whether the list of

exceptions found in subsection (b) of § 1400.735-11 should be expanded specifically to include approval of the proposed compensation supplements.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

November 29, 1978

**78-62 MEMORANDUM OPINION FOR THE
DIRECTOR, PRESIDENT'S COMMISSION ON
WHITE HOUSE FELLOWSHIPS**

**Supplementation of Salary of Government Employees
(18 U.S.C. § 209)—Propriety of Employer Providing
Certain Benefits to Employee Serving as a White
House Fellow**

This responds to questions raised by your Office and the General Counsel of an Executive department regarding certain benefits an employer proposes to make available to one of its employees in connection with service as a White House Fellow. The suggested arrangements are embodied in the employer's guidelines on leave of absence contracts for its employees on temporary Government assignments. We are unable to accept as legally permissible a number of its features.

Apparently, the most important aspects of the proposed arrangement from the employee's point of view are those providing for the employer to reimburse her for the cost of temporary living quarters while in Washington and for travel to her home during the year. We understand that her husband will continue to work in New Jersey and live in their home there during the year. The employee points out that her husband's desire to keep his present job and his resulting inability to move to Washington will occasion the trips home, and likewise prevent her from renting the house in New Jersey thereby avoiding lodging expenses for the family in two locations. While we sympathize with the employee's situation, we do not believe that these special arrangements are permissible under 13 U.S.C. § 209.

Whatever the reasons, the decision of the employee to reside in two different locations is a personal one. As a legal matter, § 209, in our opinion, prohibits a private employer from providing at its expense a Federal employee with travel for personal reasons where, as here, that travel is furnished on account of the employee's Federal assignment. Whether the travel is for vacation, family, or other personal reasons is irrelevant for purpose of the statute.

Similarly, we do not believe that the employee may be reimbursed for temporary living quarters in Washington. The payment of a Government

employee's living expenses due to his Government service is a classic example of a supplementation of Government salary prohibited by § 209.

It has been suggested that the employer's rental of an apartment in Washington is merely a payment in lieu of the cost of moving household belongings to Washington. Because payment of moving expenses has previously been authorized by us, the argument proceeds that the payment of living expenses in Washington in lieu of moving costs should also be permitted.

We recognize that our 1976 letter to your predecessor stated that a company may pay a participant's moving expenses to the location of the fellowship assignment and back at the conclusion of the year. Upon reexamination, we no longer believe that the policy of paying all moving expenses conforms to the intent of § 209. However, we see no legal objection to the payment of the actual expenses of returning to the employer's place of business at the conclusion of the fellowship year because the payment of relocation expenses is a rather common practice in the private sector.

However, payment of expenses of moving to Washington to work for the Government presents a different question. As a rule, the Government cannot pay moving costs; newly hired Federal employees must ordinarily bear those expenses themselves. Payment of these expenses by a private firm therefore would bestow a substantial benefit on the individual. When this benefit accrues solely because of Federal service, § 209 prohibits the arrangement.

We recognize that White House Fellows enter Federal service for only a brief period with the expectation of returning to their previous employers. By § 209(c), Congress created an exception from the prohibitions in § 209(a) for special Government employees, who are persons employed or retained for not to exceed 130 out of any ensuing period of 365 days. In view of Congress' express recognition of the unique status of certain short-term employees, it is not legally possible to fashion additional exceptions administratively for other short-term employees who do not fall within that exception.

Nor do we believe that a special construction of § 209(a) is warranted in order to further the purposes of the White House Fellows program. If that program had any special statutory authorization indicating that certain outside financial assistance is permissible, then perhaps modifications in the application of § 209(a) would be warranted. But the program, which is authorized only by Executive order, warrants no implied exception to an act of Congress.

We also recognize that current participants in the White House Fellows program may have relied upon past practice in accepting moving expense reimbursement. But we would suggest that next year's participants be advised in advance of the legal restrictions identified herein.

In the interim, we are unable to extend the reasoning of the 1976 letter to other reimbursements, such as those for apartment rental in Washington. We should point out that the letter did not suggest that every participant in the fellowship program is entitled to some reimbursement from his previous employer, or that the payment can be for a variety of purposes, such as moving expenses, rent, or for some other items. Regardless of the controversy over the legality of paying moving expenses under § 209(a), the payment of a Federal

employee's living expenses while in Washington is, as pointed out above, a classic example of salary supplementation and therefore § 209(a) applies.

It has also been suggested that payment of expenses for temporary quarters in Washington is no different in principle from a firm renting an employee's permanent residence which he vacates during his period of absence as a White House Fellow, which we concluded in the 1976 letter is lawful. We must disagree. When the company arranges for the rent of the permanent residence, or rents the residence itself, the employee should be left in no better position than he would be in if he rented the residence directly to an individual tenant. For example, the employee should bear any rental or management fees entailed in the firm's renting the residence to an individual tenant; and if the arrangement provides for the firm to rent the residence and leave it unoccupied, the fair market rental should be reduced by a reasonable estimate of maintenance and other costs that foreseeably will not be incurred.

Implicit in the conclusion stated in our 1976 letter that it is permissible for a company to rent the vacated permanent residence of a White House Fellow was the understanding that the arrangement must be essentially the same as though the residence were rented on the open market and that the employee will therefore not have the use of the residence during the rental period.¹ In this case, however, the family *will* have the use of the permanent residence. The employer could not, therefore, properly pay the employee the rental value of the home; this would confer a windfall that would not otherwise result. Thus, the reimbursement of temporary lodging costs in Washington cannot be justified by reference to situations in which the private employer may rent the White House Fellow's permanent residence.

Several other aspects of the employer's guidelines are also troublesome. We may question, for example, the continuation of concession telephone service provided by the company for a person in Government service. Section 209(b) permits a Government employee to continue to participate in a "bona fide pension, retirement, group life, health or accident insurance, profit-sharing, stock bonus, or other employee welfare or benefit plan maintained by a former employer." It may be argued that concession telephone service is a "benefit plan" maintained by the employer. However, the purpose of § 209(b), suggested by the enumeration of benefit plans in the subsection itself, is to permit persons entering Federal service to continue established security arrangements that are often essential to long-range financial planning for the family. See R. Perkins, *The New Federal Conflict-of-Interest Law*, 76 Harv. L. Rev. 1113, 1139-42 (1963). Concession telephone service is, we believe, far removed from this purpose.

We also note that the suggestion in the guidelines that a person returning to the employer after Government service would be entitled to vacation days in an amount equal to the difference between what he would have accrued and what

¹Also implicit was the understanding that the employee was prepared to rent the house to a tenant who would reside there, so that the employer would not be paying the employee for a residence the employee intended to leave vacant. In the latter situation, the employer's payment of rent may disguise a supplementation of Government salary.

he actually used (or was paid for) while in Government service is inconsistent with the advice of our 1976 letter. We continue to believe that the accrual of vacation time from a private employer under these circumstances constitutes a supplementation of salary prohibited by § 209. For similar reasons, we do not believe that the employer may pay for sick leave due to any absence on account of service over the amount accrued from the Government, as is contemplated in the guidelines. We do not, however, object to the provision for termination of the leave of absence and reinstatement on the employer's payroll in the event of a long-term absence.

In our view, a problem of salary supplementation also arises in those portions of the guidelines providing that coverage under the basic group life insurance plan and death and pension benefit plans will be calculated on the higher of the employee's Government or his private salary. Section 209(b) permits "continued participation" in a "bona fide" benefit plan maintained by a former employer. The concept of "continued participation" would appear to require that participation is to be based on the employee's private salary under all circumstances. The salary on which these figures are based must in turn be calculated without reference to Government service.

Several other features of the guidelines are unclear. It is provided that the employer will make a lump sum payment equal to the contribution that would have been made to the employer's savings plan had the employee remained on its payroll. To whom is the lump sum to be paid? If the payment is to be made directly to the employee under circumstances in which he would not otherwise be entitled to have access to the funds, this would not appear to be "continued" participation in the savings plan. Similar questions are raised by the provision of the guidelines for payment of the cash equivalent of the Employees Stock Ownership Plan participation the individual would have earned at his previous year's salary. In both these provisions and in the provision dealing with net credited-service, we also have some doubt that an employee actually "continues" to participate in the benefit plans if he does not receive credit for the period of Federal employment until he returns to the company.

A final ambiguity concerns the meaning of the term "educational fees" in the guidelines. Some further justification of miscellaneous reentry expenses mentioned also seems necessary.²

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

²Public Law 96-174, 93 Stat. 1288 (1979), amends 18 U.S.C. § 209 by providing that it does not prohibit the payment of actual relocation expenses of participants in an executive exchange or fellowship program. See H. Rept. No. 96-674 (1979).

December 6, 1978

**78-63 MEMORANDUM OPINION FOR THE
SOLICITOR OF LABOR**

**Comprehensive Employment and Training Act
(42 U.S.C. §§ 6701-6710)—Wider Opportunities for
Women (WOW)—Program Funding in the
Metropolitan Washington Area**

This responds to your request for our opinion regarding the legality of funding the Wider Opportunities for Women (WOW) program in the metropolitan Washington area under Title III of the Comprehensive Employment and Training Act Amendments of 1978 (CETA), Pub. L. No. 95-524, 92 Stat. 1909. Your request also mentions several other programs directed toward women or members of minority groups and raises the general issue of the propriety of funding affirmative action programs such as those under CETA. Specifically, you ask that we address two questions: (1) whether § 301(a) of CETA, 29 U.S.C. § 871(a), authorizes the Secretary of Labor to fund programs designed to assist eligible, disadvantaged women and minorities in the labor market; and (2) whether funding of the WOW program providing training for women in skilled crafts in which they have been historically underrepresented is an appropriate exercise of the Secretary's authority under § 301(a).

We have considered these questions in light of the recent decision in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). Certain general principles emerge from that decision. We know that neither the Constitution nor Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*, requires "color blindness" in federally funded programs. That is, race and ethnicity (and presumably sex) may be taken into consideration for some purposes. 438 U.S. at 284-286. Certain race-conscious programs may come into conflict with the Constitution and title VI even if they are intended to be remedial. Analysis of the legality of race or gender-conscious programs must, therefore, proceed on a case-by-case basis after a careful examination of relevant facts. Accordingly, we have not attempted to furnish advice regarding the legality of funding all the types of programs that might conceivably be directed toward women or members of minority groups. Instead, we have

focused on the legality of funding the specific training program in the skilled crafts now proposed as part of the WOW program.

We conclude that in light of the statutory amendments adopted as part of the 1978 CETA reauthorization legislation, Pub. L. No. 95-524, it is now clear that Congress has authorized the Secretary of Labor, under title III, to fund programs designed to assist women in overcoming particular disadvantages found to impede their entry into specific or general labor markets or occupations. By authorizing funding of programs designed to assist members of special target groups, Congress limited the participation in such programs to members of such disadvantaged groups, notwithstanding the language of the title VI analog included as § 132(a) of the Act, 29 U.S.C. § 834. So long as they are supported by adequate findings, we believe that programs similar to WOW directed toward disadvantaged groups and carefully designed to remedy the effects on past or ongoing discrimination will be sustained against legal challenge. In light of the Court's reasoning in *Bakke*, however, it is evident that programs drawn along racially or sexually exclusive lines are particularly prone to raise constitutional questions. We therefore advise, in light of the uncertainty prevailing in this area of the law and the risk of litigation presented by adoption of a sexually exclusive program, that you propose revising the administration of the WOW program. Recruitment efforts could continue to be directed toward women, and women would be presumed to meet applicable eligibility requirements; however, where male applicants can demonstrate comparable disadvantages, they should also be considered eligible for participation.

I.

The proposed project, the "Multi-Craft Program for Women," would provide counseling and training to 75 unemployed women residents of the District of Columbia in the field of electronics, as skilled auto mechanics, or as electrician or carpenter apprentices. Eligibility for participation in the program is limited to women.¹ While most trainees are also members of minority groups, the program is not racially exclusive in character. Training, both in the classroom and through field placement, would last from 7 to 14 months and would be provided by both industry trainers and program staff specialists.² Personal, professional, and group counseling would focus on possible problems at home and on the job in an attempt to prevent such problems from adversely affecting job performance.

We understand that for entry-level positions as auto mechanics and carpenter apprentices the industry does not require formal training as a prerequisite. With regard to entry-level jobs in electronics, however, employers prefer a technical school or high school education and they require 14 months of preparatory

¹ Applicants are required to achieve an acceptable score on a mechanical aptitude test and to demonstrate good mathematical computation skills. They must also be highly motivated and demonstrate some measure of self-confidence.

² The curriculum would include basic mechanics, basic electricity, beginning electronics, mathematics, communications, and work preparation.

training. We also understand that a portion of the basic program curriculum is comparable to high school instruction in such fields as mechanics and mathematics, which women may have been discouraged from pursuing, and it includes practical training in identification of tools similar to that traditionally provided to men in their home environment or in high school shop classes.

II.

Funding of the WOW counseling and training program is proposed under Title III of CETA. Although the original version of the Act did not include a specific reference to women as one of the groups to be assisted,³ the Secretary's authority to direct funds toward this particular target group was outlined by the 1978 CETA reauthorization which amended § 301(a) to read as follows:

- (a) The Secretary shall use funds available under this title to provide services authorized under all titles of this Act and for employment and training programs that—
 - (1) meet the employment-related needs of persons who face particular disadvantages in specific and general labor markets or occupations including offenders, persons of limited English language proficiency, handicapped individuals, *women*, single parents, displaced homemakers, youth, older workers, individuals who lack educational credentials, public assistance recipients, and other persons whom the Secretary determines require special assistance. [Emphasis added.]

The more difficult question is whether in order more effectively to aid women as a target group, the Secretary may fund programs that are sexually exclusive in character. Neither the language nor the legislative history of CETA gives a clear indication how Congress intended that programs of this sort be funded, in contrast, for example, to those that are for practical reasons limited to the handicapped or to persons with limited English language proficiency. The limited congressional discussion in connection with the floor amendment that led to the inclusion of the reference to women in the list of disadvantaged groups now found in § 301(a) focused primarily on the low pay and high unemployment rate of women in the labor force and the need to provide women with basic resources to overcome these disadvantages.⁴ In contrast to other legislation that expressly authorized Agencies to take affirmative action

³The earlier version of this provision provided in pertinent part:

The Secretary shall use funds available under this title to provide additional manpower services as authorized under Titles I and II to segments of the population that are in particular need of such services, including youth, offenders, persons of limited English-speaking ability, older workers, and other persons which the Secretary determines have particular disadvantages in the labor market. [Act of December 28, 1973, 87 Stat. 857, 891.]

⁴124 Cong. Rec. H. 10474 (Sept. 22, 1978) (Representative McGuire). *See also, id.*, H. 12444 (Oct. 11, 1978) (Conference Report) (stating without elaboration that women are to be included in the list of those facing disadvantages in the labor market).

favoring members of certain disadvantaged racial or ethnic groups to the exclusion of other persons,⁵ there is no explicit statement that sexually exclusive programs were thought necessary here.⁶

Nevertheless, the apparent purpose of § 301(a) is to provide special assistance to particular groups. In accord with that purpose, the Secretary may fund programs designed for assistance to one or more of these special target groups, and limit the admittance to those for whom the programs were designed. Congress left it to the discretion of the Secretary to determine how best to provide services to the special target groups. The Secretary's exercise of this discretion in circumstances such as these will not ordinarily be disturbed as long as it is consistent with the governing statute and does not violate constitutional requirements. *See, e.g., FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1974); *FCC v. Schriber*, 381 U.S. 279, 289-294 (1965).

III.

The Secretary's authority is limited, however, by § 132(a) of the Act, 29 U.S.C. § 834. It is a provision modeled on Title VI of the 1964 Civil Rights Act⁷ but expanded to bar additional forms of discrimination:

No person in the United States shall on the ground of race, color, religion, sex, national origin, age, handicap, or political affiliation or belief be excluded from participation in, be denied the benefits of, be subjected to discrimination under, or be denied employment in the administration of or in connection with any program or activity funded in whole or in part with funds made available under this Act.

The intent of Congress in including this provision as part of CETA must be discerned not simply from the words of the provision but also from its relation to § 301. In title III Congress undertook to aid specified target groups, including women, persons with limited English language proficiency (a characteristic likely to correlate with national origin), older workers, and handicapped persons. In light of that intent, we do not think that Congress intended § 132(a) to serve as a statutory directive mandating at the same time the provision of such specially designed remedial opportunities on a uniform basis to all comers, male and female, persons who for whatever reason wish to enhance their proficiency in English grammar and related skills, the young and

⁵Compare the minority set-aside provision of § 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. § 6705(f)(2) and its legislative history as discussed, *e.g.*, in *Fullilove v. Kreps*, 584 F. (2d) 600 (2d Cir. 1978).

⁶*See* H. Rept. No. 1124, 95th Cong., 2d sess. 15 (1978); S. Rept. No. 891, 95th Cong., 2d sess. 3, 7 (1978); 124 Cong. Rec. S. 13960 (Aug. 22, 1978) (1978 version); H. Rept. No. 659, 93d Cong., 1st sess. 14, 24 (1973); H. Rept. No. 737, 93d Cong., 1st sess. 62 (1973); 119 Cong. Rec. 25702, 38409, 38417, 38419, 38422 (1973) (1973 version).

⁷The original provision, § 712 of the 1973 Comprehensive Employment and Training Act, 87 Stat. 857, read as follows:

No person in the United States shall on the ground of race, color, national origin, or sex be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity funded in whole or in part with funds available under this Act.

the old, persons whether or not handicapped. Because § 132(a) is part of a statutory scheme which clearly contemplates that benefits will be directed to certain target groups, it may well be appropriate to give it different application when applied to remedial programs than would be the case where, as in *Bakke*, the Court was asked to interpret the significance of similar language standing alone. Insofar as the Court's interpretation of title VI turned in the end on constitutional analysis,⁸ it is nevertheless clearly pertinent here. Even in the absence of a statutory bar to the proposed award of funds, the constitutionality of such Federal action remains to be considered.

IV.

It now seems relatively certain that the Supreme Court has adopted an intermediate Equal-Protection analysis with regard to gender-based classifications, inquiring whether the classification serves important governmental objectives and is substantially related to the achievement of those objectives. See, *Califano v. Webster*, 430 U.S. 313, 316-17 (1977); *Craig v. Boren*, 429 U.S. 190, 197 (1976). See also, *Regents of the University of California v. Bakke*, 438 U.S. 265, 302, 303 (Powell, J.). While the application of this standard has not yet been fully explored in the context of affirmative action programs, certain basic points are clear.

It is first evident that achievement of a work force composed of a specified percentage of women merely because of their sex is not an acceptable governmental goal. *Bakke*, at 307 (Powell, J.). Neither will such justifications based on administrative convenience suffice to sustain a gender-based classification. *Califano v. Goldfarb*, 430 U.S. 199, 209-210 (1977). On the other hand, the governmental interest in "ameliorating, or eliminating where feasible, the disabling effects of identified discrimination" is "legitimate" and "substantial." *Bakke*, *ibid.* (Powell, J.).⁹

⁸The majority of the Court in *Bakke* adopted the view that, in the context of a remedial program, title VI prohibits only those racial classifications as are barred by the constitutional guarantee of equal protection. 438 U.S. 265, 286, 287 (Powell, J.); 438 U.S. 265, 327, 328 (Brennan, White, Marshall, and Blackmun, JJ.)

⁹It is, however, uncertain under the Court's earlier decisions just how specific such a finding of discrimination must be. A showing of lower prevailing wage rates justified the adjustment in number of low wage years excluded in calculating Social Security benefits that was upheld in *Califano v. Webster*. There the Court expressly stated that "[r]eduction of the disparity in economic conditions between men and women caused by the long history of discrimination against women has been recognized as such an important governmental objective." *Califano v. Webster*, 430 U.S. 313, 317 (1977). Evidence of general economic disparity reflected in wage and labor market statistics, a disparity that would in some measure be remedied by provision of preferential property tax exemptions, sufficed in *Kahn v. Shevin*, 416 U.S. 351 (1974). See also, *Lewis v. Cowen*, 443 F. Supp. 544 (E.D. Pa. 1977) (three-judge court) (provision of Railroad Retirement Act authorizing retirement with a full pension by women at age 60 but only reduced benefits for men between the ages of 60 and 65 upheld, *inter alia*, as reducing economic disparity resulting from the payment of lower wages to women). A gender-based classification was also sustained in *Schlesinger v. Ballard*, 419 U.S. 498 (1975), where the more beneficial treatment of women had been designed to equalize the opportunities for promotion available to male and female naval officers.

The second requirement, that the gender-based classification be “substantially related” to the achievement of legitimate Government objectives, is somewhat less well defined. It is clear that the justification for the classification must in fact reflect the real governmental objective; for example, reliance on an overbroad assumption about dependency will not be regarded as an effort to remedy even demonstrable need. *Califano v. Goldfarb*, *supra*; *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).¹⁰ Careful articulation of the intended objective is particularly important, *see, Califano v. Webster*, *supra*, so that the existence of such a direct nexus between injury and remedy will be apparent. A sound statistical or empirical base in support of the asserted assumptions is also important. *See, Craig v. Boren*, *supra*. Thus, where a gender-based classification is chosen as a means for achieving even those governmental objectives that are recognized to be legitimate, and particularly where such a classification is used to exclude certain persons from any possibility of receiving benefits or participating in Government programs because of their sex, care must be taken to provide a clear and demonstrable justification.¹¹

V

You have characterized findings by the Secretary of Labor regarding the underrepresentation of women in the skilled crafts and construction industry as evidencing “the disabling effects of discrimination on women’s participation” in these segments of the labor market.¹² Your concern is to provide the

¹⁰The courts have similarly, but without direct reference to the “substantial relationship” test, held that judicially imposed remedies designed to aid the victims of past discrimination must be precisely tailored so as not to exceed the scope of the underlying injury. *See, e.g., Chance v. Board of Examiners*, 534 F. (2d) 993, 999 (2d Cir. 1976), cert. denied, 431 U.S. 965 (1977) (rejecting preferential retention of female or minority employees during layoffs to the detriment of senior nonminority personnel where such victims of past discrimination have been made whole by their appointment to an appropriate job with an appropriate fictional hiring date).

¹¹For example, a gender-based classification was struck down in *Meloon v. Helgemoe*, 564 F. (2d) 602 (1st Cir. 1977). In that case, the court relied rather heavily on New Hampshire’s failure to provide a sufficient justification for adoption of such a classification, striking down a criminal statute which prohibited males from engaging in sexual intercourse with females under 15 but not like conduct by females with males under 15.

¹²You indicate that recently amended Labor Department regulations, 29 CFR Part 30, provide that written affirmative action plans for apprenticeship programs registered with the Department or with State agencies cover women, and include the establishment of goals and timetables. *See* 43 F. R. 20760 (May 12, 1978). At the time these regulations were promulgated the Department concluded that “[i]f women are ever to be fairly represented in the skilled crafts, their entry into apprenticeship programs must be greatly accelerated.” *Id.*, at 20762. Although women constituted 40.5 percent of the national labor force in 1976, *id.*, at 20764, the Department found that

[w]omen have had only limited participation in apprenticeship programs, which is how many skilled craftworkers enter their jobs [T]he proportion of women carpenters, electricians, painters, plumbers, machinists, mechanics, stationary engineers, and a few other skilled trades ranged from less than 1 percent to about 3 percent of the total. Although the number of women apprentices increased by 74 percent in one year (1974-75) they still represented only 1.2 percent of the total number of apprentices registered. [Emphasis added.] [43 Fed. Reg. 20761]

The Department further found that while women were available and interested in entering the skilled trades “the longstanding reputation of the trade for excluding women discourages many women from applying for these jobs.” *Id.*, at 20763.

assistance necessary to eliminate these continuing effects of discrimination. To that end the WOW program is designed to provide participants with remedial instruction in mechanics, mathematics, and handling of tools, subjects which, during high school, women may have been prevented or discouraged from pursuing. The program seeks to provide an opportunity to review and reaffirm basic skills and knowledge in a supportive atmosphere, thereby bolstering self-confidence and commitment to a career in the skilled crafts or construction industry. At the same time it also seeks to allay uncertainty and eradicate self-fulfilling doubts regarding prospects for success in jobs which women have in the past been discouraged from seeking. We believe that these are the types of substantial and legitimate governmental objectives that would satisfy the Supreme Court's gender-based equal protection analysis.

Of greater concern is that the program satisfy the second part of the Court's requirement, *i.e.*, that there be demonstrated a substantial relationship between the choice of a gender-based classification and the achievement of the governmental objectives. While the Department, as previously noted, has already made certain findings concerning the underrepresentation of women in the construction trades, care should be taken as fully as possible to identify discrimination in the particular fields for which training is proposed. Also, women generally suffer from discrete educational deficiencies in the fields of basic mathematics, mechanics, and the manual arts. To support this generalization, an effort should be made to develop a factual record and to make findings with regard both to the existence of discrimination that has deterred women from seeking employment in the fields of construction, auto repair, and electronics, and with regard to practices of educational institutions that resulted in identifiable educational deficiencies specific to women. To the extent possible, these findings should be made both with reference to the Nation as a whole and with reference to the metropolitan Washington area.¹³

The electronics training segment of the WOW program requires special consideration because this training is somewhat different from the remedial education and support services in the other training tracks. Although such services are also provided during the first 2 months of the 14-month electronics course, the bulk of the training provided as part of the electronics segment satisfies the requirement of an additional period of formal vocational education

¹³Section 301 authorizes funding of programs designed to remedy disadvantages found in general as well as in specific labor markets. Congress appears to have envisioned the use of title III funds to underwrite pilot programs capable of subsequent nationwide application. It may also be argued that in light of the mobility of the population, where denial of employment or educational opportunities is alleged, the discrimination is not limited to that practiced in the immediate local area. *Cf., Gaston County v. United States*, 395 U.S. 285 (1969). The case in support of the WOW program and others like it may nevertheless be significantly strengthened by reference to evidence of discrimination on the local level.

While Agencies of the D.C. government or personnel affiliated with the WOW program may provide necessary data or other evidence of local discrimination, findings of fact prepared by the Department of Labor would more surely constitute the sort of administrative findings envisioned by Mr. Justice Powell in *Bakke* as a critical factor in sustaining an affirmative action program which purports to remedy past discrimination. *See* 438 U.S. at 307-310.

that is regarded by employers in this field as a prerequisite before an applicant is considered eligible for employment.

In a number of cases the use of judicially imposed quotas or racially exclusive apprenticeship programs has been upheld by the courts.¹⁴ Those programs were designed to correct inequities in the actual operation of existing training programs by providing instruction tailored to minority needs or were intended to create a parallel educational opportunity where entry into the existing training structure has been effectively closed to members of minority groups. The additional formal training which the WOW electronics program represents is justified in terms of a discriminatory denial of pertinent post-secondary level opportunities for necessary vocational education. The findings of the Department of Labor demonstrate the exclusion of women from apprenticeships in the skilled crafts generally and suggest that women have been discriminated against in training programs such as this one. However, the electronics program does more than provide necessary supplemental training designed to make up for denial of pertinent high school level educational opportunities and goes beyond facilitating the entry into the job market of eligible persons with requisite qualifications. Therefore, specific findings—which link the need for provision of advanced training either directly to discriminatory practices in existing training programs or more indirectly to limited participation training opportunities that have resulted from practices and perceptions of practices in the job market—are important to support this particular segment of the WOW program.

VI.

The development of a detailed administrative record will aid significantly to sustain the legality of the WOW program in the event it is judicially challenged. We believe, however, that because the racially exclusive nature of the Davis admissions program proved to be perhaps the most significant factor in the *Bakke* decision, you should carefully consider whether a continuation of the program's sexually exclusive approach is advisable.¹⁵

¹⁴*See, e.g., Southern Illinois Builders Ass'n v. Ogilvie*, 471 F. (2d) 680 (7th Cir. 1972); *United States v. Ironworkers Local 86*, 443 F. (2d) 544 (9th Cir. 1971), cert. denied, 404 U.S. 984 (1971); *Buckner v. Goodyear Tire & Rubber Co.*, 339 F. Supp. 1108 (N.D. Ala. 1972), *aff'd*, 476 F. (2d) 1287 (5th Cir. 1973). *But see, Weber v. Kaiser Aluminum & Chemical Corp.*, 563 F. (2d) 216 (5th Cir. 1977), 443 U.S. 193 (1979).

¹⁵Particular care should be taken to justify the choice of a racially or sexually exclusive approach undertaken by an Agency in the absence of an explicit congressional determination and directive that this sort of a remedial affirmative action program is necessary in light of the inadequacy of other alternative approaches. The utilization of a program designed along exclusive lines is justified where undertaken pursuant to express congressional authorization. The adoption of a sexually exclusive program such as WOW which is undertaken pursuant to CETA presents what appears to be a middle case. While it may be inferred from the underlying congressional authorization that such a program would be consistent with the statutory scheme, an explicit congressional directive that programs drawn along these lines be employed is lacking. We therefore believe that the Department should consider and specify the reasons why it believes that the adoption of a sexually exclusive approach to the administration of the WOW program is warranted.

Certain cases suggest that the use of an adequately justified gender-based classification providing a remedial preference solely for women will be upheld. See, *Califano v. Webster*, *supra*; *Kahn v. Shevin*, *supra*; *Schlesinger v. Ballard*, *supra*. It is not clear, however, what effect the *Bakke* decision has had in this area. The four justices in the Brennan group applied the standard applicable to classifications based on sex and upheld the program.

Moreover, we believe that this program can be distinguished from the one struck down by the Court in *Bakke*. First, the authorization to fund a sexually exclusive program can be inferred from a statute that explicitly directs the Secretary to use Federal funds to provide services, employment, and training programs for women. Second, if appropriate findings, as outlined above, are made, they will establish a factual predicate of past discrimination closely related to the aims of the remedial program. Third, the nature of the exclusion here is significantly different from that present in the program held to be unlawful in *Bakke*. It is harder to identify the practical harm to the men who are excluded from this program since the program has been newly established in order to expand the pool of qualified job applicants by providing training to a class that has suffered discrimination in the past. Men can continue to enter the trade through the same apprenticeship programs that they have used in the past.

Nevertheless, the law in this area is far from clear and risks exist in funding a sexually exclusive program. Critical to Mr. Justice Powell's pivotal opinion is the view that for a racially exclusive classification to be sustained, some significant justification for a departure from the norm of equal access for all and distribution of benefits according to individual merit or need must be provided. Such a justification may also be required where a sexually exclusive classification is employed, albeit that it may be subjected to a less stringent standard than that applicable under *Bakke*, where racial classifications are utilized. In either event, where the aims of a program can be effectively accomplished without the adoption of an exclusive classification the exclusivity might be seen as insufficiently justified.

To our knowledge, no attempt has been made formally to justify the decision to administer the WOW program along sexually exclusive lines. One possible argument in favor of this approach is that it serves more efficiently to funnel benefits to those presumed by the statute to need them most. In most circumstances, however, administrative convenience alone has not proved to be an adequate governmental interest to sustain gender-based classifications.¹⁶

Alternatively, while it is doubtful that a sexually exclusive training program could properly be maintained, in this case, since counseling is an integral and inseparable aspect of the WOW training process, the exclusion of men from the counseling or training sessions appreciably increases the program's efficacy in breaking down participants' self-doubts and stereotyped visions of themselves. It might, moreover, be shown that because of past discrimination and their limited access to training in the industrial and manual arts and related subjects,

¹⁶See, e.g., *Califano v. Goldfarb*, *supra*, at 217.

women suffer from particularly severe and distinctive deficiencies in skill and knowledge relating to mechanics and tools so as to justify channeling available funds to their sole benefit. Broad assumptions or assertions based upon outmoded stereotypes alone, may not, in any event, serve as adequate justification for adoption of gender-based classifications, and selection criteria could better be structured to include women rather than outright prohibiting men from participation in the program.¹⁷

We recommend that based on the sort of findings described above, a rebuttable presumption be adopted that women who meet the program's eligibility requirements, more than others, have suffered from discrimination and its lingering effects. However, the applications of males who might also have been victims of similar discrimination in the job market or who, in their educational careers, have likewise been discouraged from developing basic mechanical and manual skills, should likewise be considered.

The program still could continue to focus primarily on women. For instance, we see no reason why the program's name needs to be changed. Nor do we see any legal reason why those who administer the program cannot openly take steps designed to attract female applicants. Our advice is that, in light of *Bakke*, you should carefully consider reasonable alternatives that are not sexually exclusive and which would effectively accomplish the goals of the program. The objectives of the WOW program, as we understand them, are certainly important governmental interests. We do not here discourage in any way the achievement of those objectives.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

¹⁷*Id.*

December 6, 1978

78-64 MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION

National Aeronautics and Space Agency—Disposition of Items Carried by Astronauts on Space Flights

This responds to the inquiry of the National Aeronautics and Space Agency (NASA) General Counsel, which you forwarded to us, concerning the disposition of postal covers that several astronauts, acting with or without authorization, took on space flights and now held by NASA or the National Archives as custodian.¹ We conclude:

- (1) With respect to postal covers the Apollo 15 astronauts took to the moon, a claim to the covers by NASA exists only with respect to those given by a third party to Astronaut Worden and taken by him to the moon for a commercial purpose.
- (2) Should an astronaut sell a souvenir item authorized by NASA to be transported into space as a personal memento, an action by NASA in quasi-contract would lie for recovery of the astronaut's profits from the sale.

I. Summary

The postal covers taken to the moon in July 1971 by the Apollo 15 astronauts and now in NASA's custody can be considered from the standpoint of three separate categories: Covers the astronauts purchased and took to the moon as mementos; covers they purchased or that were given to them by third parties, but not for commercial purposes, and subsequently transported with authorization; and covers given to Astronaut Worden that were intended for commercial exploitation. With respect to the Worden covers, his acceptance of the covers and failure to disclose to NASA their source and intended use resulted in a breach of fiduciary obligation to NASA that would, in the eyes of a court, render Worden a trustee on behalf of NASA.

¹References in this memorandum to covers "in NASA's custody" pertain to covers in the actual possession of NASA or the National Archives.

We further conclude that any sale of covers or other souvenirs by the astronauts would constitute a form of unjust enrichment on the basis of which a claim in quasi-contract for the proceeds of the sale could lie. The prospect of such an action, which could not be used to retain the Worden covers themselves, might even in his case be the preferable means of discouraging commercial use of the covers because of uncertainties in applying a theory of fiduciary obligation to the facts presented.

II. The Facts

NASA, through Donald Slayton, then its assistant director for flight crew operations, published regulations on August 18, 1965, permitting astronauts on space flights to take with them into space up to 8 ounces each of personal mementos, subject to Slayton's approval and the approval of the mission director for each flight. No declaration as to the source or intended use of any memento was required under this procedure. Among the items routinely approved and carried on subsequent space flights were a variety of postal covers—decoratively printed envelopes bearing stamps and special cancellations—that are popular philatelic souvenirs. For example, 279 such covers were carried, with approval, on Apollo flights 11, 13, and 14.

After the flight of Apollo 15, because of events detailed below, NASA asked its astronauts to turn over to it postal covers and other souvenir property pending an appraisal of the legal issues discussed in this memorandum. Although the discussion that follows applies to all such souvenirs, NASA has investigated only the facts surrounding the acquisition, transport, and disposition of the Apollo 15 souvenirs. Consequently, this memorandum will focus on those facts as garnered from memoranda describing the investigations into Apollo 15 by NASA, the U.S. Postal Service, and the Senate Committee on Aeronautical and Space Sciences.

On Apollo 15, astronauts David Scott, James Irwin, and Alfred Worden carried with them a total of 642 covers: 398 covers carried by Scott without prior authorization; 144 covers carried, with authorization, by Worden that were given to him by F. Herrick Herrick, a stamp collector and former film director; and 100 covers carried, with authorization, by the three astronauts to be used as gifts or mementos.

A. *The Unauthorized Covers.* The astronauts agreed to carry 400 specially cacheted covers at the suggestion of Horst Walter Eiermann, a German businessman, who, in turn, was acting on behalf of a German stamp dealer, Hermann Sieger.² The parties agreed that the astronauts would sell 100 covers to Eiermann for approximately \$200 each and keep the remaining covers for their own use. The covers were designed by Scott, ordered from a commercial printing company, and paid for by the astronauts.³ Before ordering the

²The astronauts agreed originally to carry covers to be supplied to them by Sieger, through Eiermann. Instead, the astronauts prepared the covers themselves.

³In addition to the covers to be taken to the moon, the astronauts ordered between 800 and 1,000 cacheted envelopes to be autographed on earth and distributed as flight souvenirs.

envelopes, Scott submitted his cachet design to Harold Collins, chief of the Kennedy Space Center Mission Support Office.

During the early morning of July 26, 1971, the Apollo 15 launch date, Collins, through a previous arrangement with Forrest Rhodes, chief of the Kennedy Space Center mail and distribution section, carried several hundred envelopes to the center's post office. Ten-cent stamps, purchased by the astronauts, were affixed to each cover, and the covers were canceled. Collins then delivered the covers to astronaut quarters.

James Smotherman, who was in charge of Apollo 15 flight support and responsible, among other things, for packaging the astronauts' personal items, instructed two assistants to vacuum-pack the envelopes for transportation. He neglected to list the covers on Scott's "personal property preference list" because he confused the covers in question with another set of covers that had been listed and approved for transport earlier. Scott had not attempted to secure approval for the Eiermann covers; however, neither he nor either of the other astronauts instructed anyone not to list the covers, and Scott apparently made no attempt to conceal from NASA personnel the fact of the covers' existence. After packaging, the covers were given to Scott, who carried them aboard Apollo 15 in a pocket of his spacesuit.

Following the recovery of Apollo 15 and while aboard the recovery ship, U.S.S. *Okinawa*, the Apollo crew, with assistance from *Okinawa* crew members, affixed to the envelopes twin 8-cent "Space Achievement" postage stamps that the astronauts had paid for, and had the envelopes date-stamped in the ship's post office. During their flight home from Hawaii, the astronauts signed 100 covers, on the back of each of which appeared a notarized, typewritten certification that the covers had been landed on the moon. Later Scott mailed the 100 covers to Eiermann in Stuttgart, Germany.

Eiermann subsequently delivered the covers to Sieger, who retained 1, sold the remaining 99, and transferred DM 30,500 (roughly \$10,000) to each of three bank accounts he had opened for the astronauts. The 99 covers sold for a total of approximately \$150,000.

The astronauts, after receiving bankbooks for their German accounts, called Eiermann to inform him that they had decided to accept no money for the covers, and transmitted powers of attorney to enable him to close the accounts. They accepted his alternative offer of stamp collections for their children, but several months later, they also declined this offer.

Upon learning of the existence of the unauthorized covers, NASA, on June 30, 1972, impounded the 298 covers remaining in the astronauts' possession. (Despite the astronauts' plan to carry 400, 298 appears to be the number of covers actually carried.) The covers now in the National Archives' custody represent only the unauthorized covers the astronauts intended to keep for their own use.

Because of their actions, each astronaut was reprimanded; two were assigned to new positions, and one retired.

B. *The Worden Covers.* Worden carried with him, with authorization, 144 covers supplied by Herrick, who had had the covers designed and printed

through a New York advertising executive. Herrick paid for the envelopes, stamps, and printing, and for printed cards that were placed in the envelopes. Worden did not tell NASA, prior to flight of Apollo 15, of the source of the covers.

Both Herrick and Worden denied any agreement between them to compensate Worden for carrying the covers, and Worden has apparently received no money from the sale of any of them. However, Herrick did counsel Worden, prior to the flight, that taking such souvenirs to the moon would be a wise investment because of their value to stamp collectors.

The astronauts, following their recovery by the *Okinawa*, signed, stamped, and canceled the 144 covers. Of the 144, 16 were reported damaged or destroyed; Worden gave 28 to friends and sent 100 to Herrick, 70 of which were given, in turn, to a New York stamp dealer, who sold 10 covers, and, at Herrick's request turned 60 covers over to Worden. These 60 covers are now in the National Archives' custody.

C. *Other Authorized Covers*. Besides the 144 covers taken by Worden, Irwin and Scott carried an additional 100 authorized covers to be used for noncommercial purposes. Irwin carried 88 covers as a favor to a fellow astronaut, whose wife is a stamp collector. All 88 covers are reportedly in her possession. Irwin also carried eight covers bearing a shamrock insignia; two were given as gifts to Kennedy Space Center employees, and six were retained by Irwin, plus a single cover bearing a "First Man on the Moon" stamp and a "Bliss Centennial" 3-cent stamp. Scott carried, with authorization, a 1928 cover bearing Orville Wright's signature and two covers furnished by the U.S. Postal Service, one of which Scott canceled on the moon and one of which remained in the command module. The canceled envelope has been placed on public display by the Postal Service.

III. Discussion

We have identified two questions on which NASA seeks the advice of this Office:

- (1) Whether NASA has any claim to postal covers and other souvenirs that astronauts took into space and that are now in NASA's custody;
- (2) The remedies, if any, available to NASA to prevent astronauts or former astronauts from profiting from the commercial exploitation of such souvenirs.

With respect to the first question as it applies to the Apollo 15 covers that NASA now holds, any claim by NASA to the covers themselves must rest on a property interest antedating the flight of Apollo 15, or on some equitable principle, the breach of which would make the astronauts constructive trustees for this specific property. Because none of the covers were purchased by public funds or prepared at public expense, NASA has no legal, as opposed to equitable, claim. Any claim must rest on a theory of constructive trusteeship.

At the time of the Apollo 15 flight, it was still routine NASA practice to

permit astronauts to take postal covers into space as personal mementos. There thus appears to be no breach of any equitable or other principle that would sustain a claim to any of the 100 covers taken into space, with authorization, by Scott and Irwin for noncommercial purposes. That 88 were given to Irwin by Astronaut Gordon and his wife does not alter this conclusion because no commercial use for the covers appears to have been intended. Nor did Irwin profit from his custody of the covers.

With respect to the 398 covers taken into space by Scott without authorization; three of the astronauts' actions may be deemed violations of some obligation to NASA: Scott's failure to secure authorization; the astronauts' failure to disclose the intended commercial use of 100 of the covers; and the astronaut's facilitation of the commercial exploitation of 100 of the covers. The second and third possible breaches of duty, however, would not sustain a claim to any of the 298 covers now held by NASA if it is assumed, as the evidence seems to indicate, that the astronauts intended to keep them as personal mementos. NASA might well have a colorable claim to the one cover retained by Sieger, who participated in any violation of duty that the astronauts committed. It appears, however, that the 99 other covers have passed to *bona fide* purchasers and are beyond NASA's reach.

As for the 298 unauthorized covers now in NASA's possession, the failure by Scott to secure authorization for the covers that were not intended for commercial use would not be a breach of any equitable principle on which a claim to the covers could be based. The violation of regulations appears inadvertent—Scott made no effort to conceal his possession of the covers. Further, Slayton has testified that he would have authorized transportation of the covers had a request been made. *Hearing on Commercialization of Items Carried by Astronauts Before the Senate Comm. on Aeronautical and Space Sciences*, 92d Cong., 2d sess. 59-60 (August 3, 1972) (statement of Donald Slayton to the committee in executive session; unpublished transcript). Although the weight of the covers, 30 ounces, exceeded the 8-ounce limit established in the 1965 regulations, that limit was based on the lesser capabilities of the Gemini spacecraft then in use; current proposed NASA regulations would permit each astronaut up to 1.5 pounds of souvenirs per flight. 43 F. R. 25693, 25694 (1978).

A colorable claim does exist, however, with respect to the 60 covers remaining from the 144 given by Herrick to Worden. Although Worden did not initiate his dealing with Herrick and did not profit from the sale of any covers, his mere acceptance of the covers, the commercial purpose of which is amply demonstrated by the evidence, may itself be deemed a breach of Worden's fiduciary obligation of complete loyalty to the interest of NASA, his principal, while employed as its agent.

It is fundamental that an agent owes his principal the loyalty of a fiduciary as to all matters within the scope of his employment. Restatement of Agency § 13 (1933). The duty of loyalty that the astronauts owed to NASA was codified in "Standards of Conduct for NASA Employees," 14 CFR § 1207.735-1 *et seq.* (1977), that were promulgated in October 1967, and governed the conduct of

the Apollo 15 astronauts. In relevant part, those regulations prohibited any commercial exploitation by a NASA employee of his position, 14 CFR §§ 1207.735-100(e)(1), (2), and (6); 1207.735-201(a) and (b)(2); 1207.735-605(a), (d); and, in particular, any outside employment that would involve the violation of Federal regulations, a conflict of interest, the use of NASA's name in connection with a privately sold product, or the use of Federal facilities, or any action that would otherwise reasonably cause unfavorable criticism of NASA or impair public confidence in the Agency, 14 CFR § 1207.735-303(a)-(d), (f)-(h). In merely accepting covers from Herrick, in the light of Herrick's commercial purposes, Worden arguably violated each of the foregoing regulations; insofar as the regulations reasonably define an astronaut's obligation of complete loyalty to his employer, those violations evidence a breach of fiduciary duty that would result in the imposition of a constructive trust over the covers themselves for NASA's benefit.

In a claim for the imposition of a constructive trust, no actual damage need be shown:

It is immaterial that the profit was not made at the expense of the beneficiary or principal; it is immaterial that if the fiduciary had not made the profit it would have been made and could have been retained by someone else. The constructive trust which is imposed is based upon the broad principle that a fiduciary must act with an eye single to the interest of his beneficiaries. If he were permitted to keep a profit made by him in connection with the performance of his duties as fiduciary, he would be tempted to consider his own interest and not merely that of the beneficiary. He will not be permitted to put himself in a position where there is a conflict between his self-interest and the interest of the beneficiaries.

5 Scott, *Law of Trusts* § 502, at 3555 (3d ed., 1967). See also, *United States v. Carter*, 217 U.S. 286 (1910); *Byer v. International Paper Co.*, 314 F. (2d) 831 (10th Cir. 1963); *United States v. Bowen*, 290 F. (2d) 40 (5th Cir. 1961). The "single-minded devotion" theory of fiduciary obligation has been cited with approval by courts in suits to recoup profits for the Government that were reaped by Government employees, who, during the course of their employment, had engaged in compromising outside activities. *United States v. Carter*, 217 U.S. 286 (1910); *United States v. Podell*, 572 F. (2d) 31 (2d Cir. 1978); *United States v. Drumm*, 329 F. (2d) 109 (1st Cir. 1964); *United States v. Bowen*, 290 F. (2d) 40 (5th Cir. 1961).

In Worden's case it may be that the doctrine of constructive trusteeship does not apply because (1) the taking of the covers was not within the scope of his employment, and (2) the benefit conferred on him by Herrick could not lawfully have been realized by NASA in the absence of Worden's acts. Scant case law attempts to analyze these problems directly. Professor Scott discusses a leading decision by the British House of Lords, holding that the Crown could recover bribes received by a British army sergeant in Cairo, who enabled a lorry to pass civilian police without inspection by escorting it through the city

while in uniform. Notwithstanding the objections noted above to the imposition of a constructive trust and the Crown's inability to show any loss in this case, the Lords held that the Crown was entitled to any profit that the sergeant reaped by the use of his uniform and pretended authority. *Reading v. Attorney General*, [1951] A.C. 507, *aff'g Reading v. The King*, [1949] 2 K.B. 232, *aff'g* [1948] 2 K.B. 268 (discussed in 5 Scott, *Law of Trusts*, § 502 at 3556 (3d ed. 1967)).

Similarly, the second circuit recently held that the Government's complaint against a former Congressman, alleging his receipt of unlawful legal fees and campaign contributions, was sufficient to state a claim for the imposition of a constructive trust on the money he received. *United States v. Podell*, 572 F. (2d) 31 (2d Cir. 1978); *see also*, *Fuchs v. Bidwell*, 31 Ill. App. (3d) 567, 334 N.E. 2d 117 (1975), *rev'd on other grounds*, 65 Ill. (2d) 503, 359 N.E. (2d) 158 (1976). The results in both cases are sensible because, despite what would have been the respective Governments' inability to obtain the profits in question themselves, the balance of equities between the innocent principals and their wrongdoing agents unquestionably favored the principals.

Two further uncertainties arise in extending traditional fiduciary principles to the unusual facts of the Worden case; we conclude, however, although no precedent squarely resolves these uncertainties, that, because of the policy inherent in the concept of fiduciary obligations neither problem would preclude a successful suit in equity.

First, it might be argued that Worden's disloyal intent notwithstanding, his intent, at the moment he accepted Herrick's covers, had not yet materialized into a disloyal act compromising the performance of Worden's official duties. Those breaches that courts penalize by the imposition of constructive trusts involve acts manifestly in conflict with a trust beneficiary's interests, or where the profits unlawfully received represent an apparent incentive for trustees to perform their duties without full attention to their principals' interests, *e.g.*, acts adverse to the principals' financial interest, *Byers v. International Paper Co.*, 314 F. (2d) 831 (10th Cir. 1963); acts that deprive the principal of a business opportunity, *Community Counselling Service, Inc. v. Reilly*, 317 F. (2d) 239 (4th Cir. 1963); *County of Lake v. X-PO Security Police Service, Inc.*, 27 Ill. App. (3d) 750, 327 N.E. (2d) 96 (1975); unauthorized exploitation of information obtained through the purported trustee's employment, *Hunter v. Shell Oil Co.*, 198 F. (2d) 485 (5th Cir. 1952); or acts that create the appearance of a conflict of interest or the possibility that the activity involved will compromise the employee's judgment in the exercise of his duties, *United States v. Carter*, 217 U.S. 286 (1910); *United States v. Podell*, 572 F. (2d) 31 (2d Cir. 1978); *United States v. Drumm*, 329 F. (2d) 109 (1st Cir. 1964). However, Worden's act need not have conflicted with his tasks in getting to the moon and back in order to have constituted a violation of his duty of undivided loyalty to NASA. His acceptance of the covers from a commercially interested party, which, once disclosed, foreseeably compromised his employer's good name and reputation, sufficiently conflicted with the interests of NASA so as to justify the imposition of a constructive trust in this case.

A second question is whether Worden had title to the Herrick covers at the time they were given to him. For a trust to be imposed with respect to any property, the disposition of property must constitute profit to the trustee in violation of his fiduciary duties. Worden or Herrick could conceivably argue that, assuming a plan to permit Herrick to sell the covers, the covers, at the time of their transfer to Worden, were only a loan to Worden and that their transfer alone represented no gain to the astronaut. The facts, however, belie any loan characterization. Worden was able, apparently without dispute, to dispose of 28 of the covers, of his own accord, as postflight gifts. Further, at Worden's request, Herrick secured the return to Worden of 60 unsold covers from the stamp dealer Siegel. These acts are consistent only with Worden's ownership of the covers at the time Herrick delivered them to him.

An alternative approach that would apply as well to covers in the hands of other astronauts would be legal action to recover, instead of the souvenirs, any profits the astronauts might realize from their sale. In the event of a sale, the relevant case law suggests several theories on which a claim of "unjust enrichment" may be based. Under any theory, a claim of unjust enrichment asserts that profits accrued to the defendant through some wrongful act, and the defendant should, therefore, be compelled to disgorge his profits. 5 Scott, *Law of Trusts* § 462.2 (3d ed. 1967); Second Restatement of Agency § 404A (1958). Case law and secondary authority suggest three theories under which the enrichment of the astronauts can be deemed wrongful; the policy considerations underlying the three theories clearly converge:

A. *Unjust Enrichment Through Violations of Quasi-Contractual Duties.* Regardless of whether those of NASA's regulations cited above accurately define the astronauts' fiduciary obligations, they do represent duly promulgated regulations that would be violated by the astronauts' commercial exploitation of their souvenirs. Official duties imposed by statute or regulation are quasi-contractual in nature. *Cf.*, *Steamship Co. v. Joliffe*, 69 U.S. (2 Wall.) 450 (1864); *NLRB v. Killoran*, 122 F. (2d) 609 (8th Cir. 1941), cert. denied, 314 U.S. 696 (1941); *In re Shawsheen Dairy*, 47 F. Supp. 494 (D. Mass. 1942) [per Wyzanski, D.J.]. Where a defendant profits from his violation of a quasi-contractual obligation, he is liable to the party to whom he owed his duty for the profits realized.

B. *Unjust Enrichment Through Use of the Principal's Assets.* Whatever value inheres in souvenirs that were taken to the moon clearly could not have been realized without the use of NASA's facilities and equipment. Section 404 of the Second Restatement of Agency (1958) states that where the use of a principal's assets is predominantly responsible for producing a profit for the principal's agent, the agent is liable, at the principal's election, for all profits thus realized.

C. *Unjust Enrichment at NASA's Expense.* Under the basic principle of restitution, one who is unjustly enriched at the expense of another is required to compensate the other for his loss. Restatement of Restitution § 1 (1937). However, where the profiteering violates some independent equitable principle, for example, the obligations of a fiduciary, the measure of restitution will

be the entire profit realized by the defendant and not the value of the plaintiff's loss. Restatement of Restitution, §§ 138, 197 (1937); *cf.*, *Heddendorf v. Goldfine*, 167 F. Supp. 915 (D. Mass. 1958). This theory is essentially the same as the theory advanced above for the recovery of Worden's covers, but views the proceeds of a sale rather than the covers as trust property in the hands of the astronauts. The application of the theory to recover the profits from any sale is more straightforward, under these facts, than the attempt to retain the covers themselves. First, assuming that a breach of duty through such a sale can be shown, there is no question after a sale as to whether the astronaut in question has profited from his breach. Second, where an astronaut sells his souvenirs—creating the possibility that NASA's name and reputation may be exploited by private parties for personal gain—a plainer case of a potential conflict of interests appears than in the case of the initial acceptance of covers from a private party. This theory, however, can be used to restrain sales by astronauts only as long as they are employed by NASA; the termination of employment ends their duty of loyalty to NASA's interests, and fiduciary obligations no longer apply.

LEON ULMAN

Deputy Assistant Attorney General
Office of Legal Counsel

December 15, 1978

**78-65 MEMORANDUM FOR THE ATTORNEY
GENERAL**

**National Security Mail Covers—Constitutional
Challenge—Federal Bureau of Investigation
(39 CFR 233.2(d)(2)(ii))**

You have asked us to review the effect of District Judge Whipple's opinion on remand in *Paton v. LaPrade*, 469 F. Supp. 773 (D. N.J. 1978) on the current use of mail covers in cases being investigated by the Federal Bureau of Investigation (FBI) under the Foreign Intelligence and Foreign Counter-Intelligence guidelines. We believe that the opinion, standing alone, requires no change in present practice. A Supreme Court decision to the same effect would, of course, require the termination of any national security mail covers authorized under existing Postal Service regulations.

The plaintiff, Lori Paton, sued the FBI in 1973 seeking, *inter alia*, damages for injuries caused by the interception of a letter she had written to the Socialist Workers Party (SWP). Her letter was intercepted under an FBI-authorized mail cover. She further sought a declaration that the postal regulation under which the SWP mail cover was conducted, 39 CFR § 233.2(d)(2)(ii) (1977), was unconstitutional.¹

The complaint was originally dismissed. *Paton v. LaPrade*, 382 F. Supp. 1118 (D. N.J. 1974). On appeal the Third Circuit held that the complaint stated an actionable claim for damages and Paton had standing to challenge the constitutionality of the mail cover regulation, 524 F. (2d) 862 (3d Cir. 1975). On remand Judge Whipple declared the regulation unconstitutional on its face. He reached his conclusion as follows: First, the SWP mail cover, as authorized by the challenged regulation, infringed on political associational freedoms

¹The regulation reads:

“(2) The Chief Postal Inspector, or his designee, may order mail covers under the following circumstances:

* * *

(ii) When written request is received from any law enforcement agency wherein the requesting authority stipulates and specifies the reasonable grounds that exist which demonstrate the mail cover is necessary to (A) protect the national security”

protected by the First Amendment. *Buckley v. Valeo*, 424 U.S. 1 (1976); *NAACP v. Alabama*, 357 U.S. 449 (1958). Second, because the regulation had that effect, it had to pass muster under “strict” constitutional scrutiny; that is, the regulation had to be justified by a compelling Government interest that was, in fact, served by its operation. *Buckley v. Valeo, supra*, 424 U.S. at 64. Finally, Judge Whipple concluded that the Government had demonstrated no compelling interest because of the vagueness of the term “national security” and the consequent “overbreadth” of the regulation.

For purposes of this memorandum we assume that Judge Whipple might have properly concluded that the challenged regulation as applied in Ms. Paton’s case was not justified by any compelling Government interest, and therefore unconstitutional. We believe that Judge Whipple’s analysis of the regulation was incorrect because of his failure to consider the constitutionality of the regulation as applied.

Judge Whipple found the challenged postal regulation overbroad because it was “susceptible to impermissible applications” (*see* 524 F. (2d) at 779) and not “susceptible to a narrowing construction,” (524 F. (2d) at 782) which could withstand strict scrutiny. If the term “national security” were confined to cases in which there was some foreign power involvement, we believe the regulation would be justified by a compelling Government interest. This conclusion is compatible with the distinction drawn by the Supreme Court in *United States v. United States District Court*, 407 U.S. 297, 322 and n. 20 (1972), between domestic security cases and cases involving foreign powers or their agents. The Court held that a warrant was required in a domestic security case not involving a foreign power. Because the Third Circuit recognized the Government’s compelling interest in the conduct of foreign affairs and held that the President has power to conduct warrantless electronic surveillance to gather foreign intelligence information, *United States v. Butenko*, 494 F. (2d) 593 (3d Cir. 1974), we think it doubtful that the Third Circuit would uphold Judge Whipple’s decision as written.

Even assuming the SWP mail cover in this case was unconstitutional, Judge Whipple’s analysis of the regulation on its face adjudicated questions not requisite to the protection of any party’s rights. Had he first addressed the constitutionality of the regulation as applied, he could have afforded the plaintiff complete relief without deciding issues not presented by the facts. The Supreme Court’s hesitancy in resorting to overbreadth analysis counsels such an approach: “[W]hen considering a facial challenge it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a [government] regulatory program,” *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975). The Court has refrained, for example, from relying on the asserted overbreadth of breach-of-the-peace statutes to overturn petitioners’ criminal convictions in cases in which such convictions were themselves unconstitutional under the First Amendment or unsupported by any evidence. *See, Broadrick v. Oklahoma*, 413 U.S. 601, 613-14 (1978), and cases cited therein. The Supreme Court, moreover, has resisted application of overbreadth analysis in cases involving “statutes regulating conduct in the

shadow of the First Amendment, but doing so in a neutral, noncensorial manner.” *Broadrick v. Oklahoma, supra*, at 614. Like the statute upheld in *Broadrick*, the regulation challenged by Paton is “neutral” and “noncensorial,” although it clearly implicates First Amendment liberties. However, unlike the *Broadrick* statute, the postal regulation does not proscribe any conduct. Paton was free to engage in any “speech” she desired; the Government made a record of her “speech,” it did not prohibit it. Thus, her case presents a more compelling circumstance for the court to avoid overturning the challenged regulation for overbreadth.

Because we believe Judge Whipple’s broad conclusion is incorrect, we think it would be lawful to continue to approve and implement mail covers under the existing FBI Foreign Intelligence and Counter-Intelligence guidelines. This conclusion rests, of course, on the assumption that the District Court will not enjoin the FBI or the Postal Service.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

December 18, 1978

78-66 MEMORANDUM OPINION FOR THE GENERAL COUNSEL, CENTRAL INTELLIGENCE AGENCY

Central Intelligence Agency—Supremacy Clause (Constitution, Article VI, Clause 2)—Possible State-Federal Law Conflict Involving Classified Information—CIA's Proposed Administration of Polygraph Examinations of Its Contractors' Employees

This responds to a request by your Office for our views on State laws bearing on the Central Intelligence Agency's (CIA) administration of polygraph examinations of certain employees of those U.S. corporations which have classified contracts with the CIA.

I.

Any discussion of the question whether State law may restrict the performance of Federal functions must first address the issue whether those Federal functions are authorized. In our view, the CIA has the authority to conduct the polygraph examinations involved in order to protect the confidentiality of classified information.

Several provisions of law, both of general and particular applicability, support the CIA's authority in this situation. As a general matter, Executive Order No. 12065, 43 F. R. 28949 (June 23, 1978) requires Federal agencies to insure the security of classified information. The pertinent provisions of that order provide:

No person may be given access to classified information unless that person has been determined to be trustworthy and unless access is necessary for the performance of official duties. [Section 4-101¹]

¹Information Security Oversight Office Directive No. 1, approved September 29, 1978, issued pursuant to the provisions of Executive Order No. 12065, further states that:

A person is eligible for access to classified information only after showing of trustworthiness as determined by agency heads based upon appropriate investigations in accordance with applicable standards and criteria. [Section IV. B. 2]

Controls shall be established by each agency to ensure that classified information is used, processed, stored, reproduced, and transmitted only under conditions that will provide adequate protection and prevent access by unauthorized persons. [Section 4-103]

Agency heads listed in Section 1-201 may create special access programs to control access, distribution, and protection of particularly sensitive information classified pursuant to this Order or prior Orders. [Section 4-201]

The order also mandates that "classified information disseminated outside the Executive branch shall be given protection equivalent to that afforded within the Executive branch." § 4-105. This provision, in conjunction with the other cited above, would appear to require security precautions in instances where classified information is to be given to the employees of CIA contractors.

Several provisions of law focus on the CIA's responsibilities to protect the confidentiality of sensitive information. First, the Director of the CIA is made responsible by statute "for protecting intelligence sources and methods." Second, Executive Order No. 12036, 43 F. R. 3674 (Jan. 24, 1978), requires the CIA to "protect the security of its installations, activities, information and personnel by appropriate means, including such investigations of applicants, employees, contractors, and other persons with similar associations with the CIA as are necessary." § 1-811. This provision, as well as others in the order, *see* §§ 2-206(d), 2-208(e), explicitly allow the investigation of contractors handling sensitive information.

It seems evident that, on the basis of the foregoing authorities, the CIA is authorized and required to conduct investigation of its contractors' employees to insure the security of sensitive information. Based on the information supplied by your Agency, we believe that the use of polygraph examinations is also an authorized function. While no Federal law explicitly authorizes this approach, the lack of such a provision cannot be deemed controlling. *United States v. Macdaniel*, 7 Pet. 1, 13-14 (1833). Rather, in this case the following general rule should apply: when a statute imposes a duty, it authorizes by implication all reasonable and necessary means to effectuate the duty. *United States v. Jones*, 204 F. (2d) 745, 754 (7th Cir. 1953); *United States v. Kelly*, 55 F. (2d) 67 (2d Cir. 1932); 2A Sutherland, *Statutes and Statutory Construction*, § 55.04 (4th ed. 1973) at 384.² The use of polygraph tests, as we are informed, provided a means for determining whether employees may be entrusted with sensitive information. We are also informed that this technique elicits information that could not otherwise be obtained so that security is enhanced in a manner that could not otherwise be accomplished, making polygraph examinations an "extraordinarily useful device." Polygraph examinations thus may be seen as reasonable and necessary means to the effectuation of duties imposed

²The same general rule is set forth in Executive Order No. 12036, § 1-811, which authorizes "appropriate means" to protect security.

on the CIA under Federal law, and therefore the use of such examinations is authorized under Federal law.³

We believe, however, that a caveat is in order. Executive Order No. 12036, § 1-811, allows for "such investigations of . . . contractors . . . as are *necessary*." The requirement of necessity may be read as precluding the administration of polygraph tests on an undifferentiated basis to all employees of a contractor. However, an evaluation and determination of the need for the administration of such tests to a particular contractor's employees, or to certain classes of such employees, would appear to be more consonant with the provisions of the order. Since polygraph testing is apparently now being administered only to employees who either have access to or are being considered for access to SCI information, it appears that the need for such a procedure is being weighed and determined.

II.

Massachusetts has enacted the following statute:

Any employer who subjects any person employed by him, or any person applying for employment, including any person applying for employment as a police officer, to a lie detector test, or requests, directly or indirectly, any such employee or applicant to take a lie detector test, shall be punished by a fine of not more than two hundred dollars. This section shall not apply to lie detector tests administered by law enforcement agencies as may be otherwise permitted in criminal investigations. [Chapter 149 sec. 19B, Mass. Gen. Law]

One question raised by your office is whether the above statute may be legitimately applied to either the CIA or its Massachusetts contractors.

Your office believes that, by its own terms, the statute would not encompass the polygraph examinations the CIA wishes to conduct. The construction of the Massachusetts statute is a function to be performed by the appropriate State officials, although it is proper for you to urge on them your construction. We address here only the question of the validity of the statute, assuming that it does impinge on the performance of a Federal function. For the following reasons we believe that Massachusetts may not legally apply the statute to either the CIA or its contractors.

A.

We first discuss the application of the statute to CIA itself. It is a fundamental principle of Federal constitutional law that, by reason of the

³We understand that employees who are to be tested know that they are performing work for CIA, are informed of CIA's involvement in the testing, and consent to the testing. We do not believe that any problem arises from the prohibition on CIA's performance of internal security or law enforcement functions, *see* 50 U.S.C. § 403(d)(3), even as that prohibition was interpreted in *Weissman v. CIA*, 565 F. (2d) 692 (D.C. Cir. 1977). Nor are we aware of any other general prohibition on the use of polygraph testing by intelligence agencies.

Supremacy Clause, Article VI, cl. 2, the lawful activities of the Federal Government may not be regulated by any State. *Mayo v. United States*, 319 U.S. 441, 445 (1943).

Concededly, the situation here differs from the usual Supremacy Clause question. In the ordinary case, courts are called on to review State laws that conflict with a Federal statute or regulation. Although the Director's authorization of polygraph examinations does not so clearly proceed from statute or regulation, we do not believe that this is of any real consequence. It is not the abstract inconsistency between the express terms of State and Federal law which is the concern underlying the Supremacy Clause. *Cf.*, *Los Alamos School Board v. Wugalter*, 557 F. (2d) 709, 714 (10th Cir. 1977) (potential or peripheral conflicts between State and Federal law will not render the State law invalid). Rather, the evil that the clause addresses is the obstruction to the accomplishment and execution of Federal purposes and objectives. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). This may occur not only when State law conflicts with the express terms of Federal law, but also when State law impedes the performance of activities conducted under the authority of Federal law. *See, United States v. Public Service Commission*, 422 F. Supp. 676 (D. Md. 1976) (three-judge court) (upholding General Service Administration authority to conduct cross-examinations in utility rate proceedings beyond time limit imposed by State); *In Re New York State Sales Tax Records*, 382 F. Supp. 1205 (W.D. N.Y. 1974) (exercise of grand jury powers prevails over State nondisclosure law). *See also, United States v. City of Chester*, 144 F. (2d) 415, 420 (3d Cir. 1944). Since the administration of polygraph examinations is an activity authorized under Federal law, it may not be impeded by State law.

We recognize that, in certain circumstances, State law has been deemed to apply to, and control, the exercise of various Federal functions. This result obtains, however, only where the application of State law would not undermine Federal purposes or functions. *See, Mayo v. United States, supra*, at 446; *Federal National Mortgage Association v. Lefkowitz*, 390 F. Supp. 1364, 1368 (S.D. N.Y. 1975). *See also, City of Norfolk v. McFarland*, 145 F. Supp. 258, 260 (E.D. Va. 1956). We are informed by the CIA that the application of the statute to it would result in its inability to perform satisfactory security checks, and this in turn would substantially impair its procurement operations. On this basis, the rationale adopted in the decisions cited above does not justify the application of the Massachusetts statute.

The Supremacy Clause question often requires the assessment of congressional intent, *i.e.*, whether Congress, in promulgating the statutes under which the Executive branch implements a regulation, intended Federal action to override inconsistent State laws. In some cases an examination of the legislative history and the structure of a statute reveals that Congress did not intend to interfere with State regulation. Where, however, there is a clear conflict between the implementation and a State law, and there is no evidence that Congress contemplated the Federal interest to be subordinated, the State enactment must yield. We believe such conflict to exist in this instance, and

since we know of no congressional intent that the State's interest should prevail, the State law must yield.

B.

The remaining question is whether, even though the Massachusetts statute may not be validly applied to CIA itself, it may, nevertheless, be enforced against CIA's contractor. We reiterate here that we express no views on the interpretation of the statute insofar as CIA's contractor is concerned. Rather, we address only the question whether the statute may legitimately be applied to the contractor.

Whether State law may be applied to those under contract with the Federal Government is difficult to answer authoritatively. It is clear that the mere fact that a particular entity is performing work for the Federal Government does not entirely exempt it from State regulation. See, *Railway Mail Association v. Corsi*, 326 U.S. 88, 95-96 (1945) (applying State nondiscrimination law to postal union); *Stewart and Co. v. Sadrakula*, 309 U.S. 94 (1940) (holding a State safety requirement applicable to Federal contractor); *Public Housing Administration v. Bristol Township*, 146 F. Supp. 859 (E.D. Pa. 1956) (Federal contractor required to adhere to building code requirements). On the other hand, it also seems clear that performance of work for the Federal Government may at times exempt it from State or local regulation. See, *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187, 190 (1956); *Pacific Coast Dairy v. Department of Agriculture of California*, 318 U.S. 285 (1943); *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F. (2d) 159, 166 (3d Cir. 1971).

The courts approach the assessment of the validity of State statutes imposing burdens on Federal contractors in much the same way as they approach the statutes imposing burdens on the Federal Government itself. That is, the courts look to whether the State statutes would frustrate the operation of Federal functions. See, *Railway Mail Association v. Corsi*, *supra*, at 95-96; *Leslie Miller, Inc. v. Arkansas*, *supra*, at 190; *Stewart and Co. v. Sadrakula*, *supra*, at 103-04; *Associated General Contractors of Massachusetts, Inc. v. Altshuler*, 490 F. (2d) 9, 15 (1st Cir. 1973); *City of New York v. Diamond*, 379 F. Supp. 503, 520 (E.D. N.Y. 1974). Under this standard, it is our opinion that the application of the Massachusetts law to the contractor in this instance would frustrate Federal functions to the same extent as though the law were to apply to the CIA itself. According to the CIA, such an application would inevitably result in the contractor's refusal to allow his employees to take part in the polygraph examination program, which in turn would result in less than adequate security and ultimately would jeopardize CIA procurement. The decisions under the Supremacy Clause do not allow State law to cause this sort of disruption of Federal programs, even if the law is applied only to a contractor and not to the Federal Government itself.

II. Conclusion

For the foregoing reasons, we conclude that the Massachusetts law in question may not be legitimately applied to either CIA or its contractors so as to preclude authorized polygraph examinations. However, a word of caution is appropriate. The application of State law to Federal contractors is generally dependent on the facts and circumstances of a particular setting, *see, Mayo v. United States*, 319 U.S. at 447-48; *Los Alamos School Bd. v. Wugalter*, 557 F. (2d) at 712, 714, and is thus a question which necessarily entails a judgment predicated on a number of different factors. Moreover, as the considerable volume of case law in the State-Federal law conflict area demonstrates, disputes of this type often result in litigation and resolution pursuant to standards that are often difficult to apply with precision. It is, therefore, an area in which prelitigation predictions of success must necessarily be cautious.

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

December 18, 1978

78-67 MEMORANDUM OPINION FOR THE SPECIAL ASSISTANT TO THE ATTORNEY GENERAL

Immigration and Nationality Act (8 U.S.C. § 1182(d)(5))—Cuban Parole Program

This responds to your request that we address the following questions:

1. Can a parole visa be revoked once the parolee has entered the United States? If so, under what conditions?¹
2. Does the law allow any Cuban who holds dual U.S.-Cuban citizenship to immigrate to the United States with his or her entire family?

I. Parole Revocation

Parole of aliens into the United States is governed by § 212(d)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(d)(5). That provision reads as follows:

The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

Thus, when the Attorney General determines that the purposes of parole have been served, parole is revoked and the parolee faces exclusion proceedings as described in §§ 235 and 236 of the Act, 8 U.S.C. §§ 1225, 1226, as would any alien initially applying for admission into the United States. Section 212.5(b) of

¹An alien who is paroled into the United States does not receive a visa. A visa is a document issued by a consular officer to immigrants and nonimmigrants coming to the United States. Moreover, a parolee does not "enter" the United States in a legal sense. See 8 U.S.C. § 1182(d)(5).

Title 8 of the Code of Federal Regulations provides that parole shall be terminated and pre-parole status restored upon an alien's receiving written notice of the following: expiration of his parole period; that the purpose for which the parole was authorized has been accomplished; or when the District Director of the Immigration and Naturalization Service (INS) in charge of the area where the alien is located determines that neither emergency reasons nor public interest warrants his continued presence in the United States. In parole revocation proceedings, parolees are not entitled to the full panoply of procedural rights accorded aliens in deportation proceedings.² See, *Leng Ma v. Barber*, 357 U.S. 185 (1958); *Rogers v. Quan*, 357 U.S. 193 (1958); *Siu Fung Luk v. Rosenberg*, 409 F. (2d) 555 (9th Cir. 1969), cert. dismissed, 396 U.S. 801 (1969). Moreover, as stated above, the discretion to terminate parole resides in the Attorney General or his delegates and none of the statutory grounds for deportation under § 241 of the Act, 8 U.S.C. § 1251, need be alleged.

However, in one case, *United States v. Murff*, 260 F. (2d) 610 (2d Cir. 1958), the court held that the parole of certain refugees may be revoked only if they are accorded the same rights as those given aliens in deportation cases. The court after acknowledging that parolees may, in the normal case, have their parole summarily revoked, held that under the particular facts involved additional procedural protections were required before parole could be revoked. It noted that the circumstances under which the Hungarian refugees there involved were paroled into the United States made the case *sui generis*. In concluding that the refugees were "invited" to this country, the court stressed that the President had directed the Attorney General to exercise his § 212(d)(5) parole power to admit a certain number of Hungarian refugees in excess of the visas authorized under the Refugee Relief Act. *Id.*, at 613. It also stressed the fact that Congress had passed legislation endorsing the President's action.

The *Murff* case seems to stand alone; other courts have consistently distinguished *Murff*. See, *Ahrens v. Rojas*, 292 F. (2d) 406 (5th Cir. 1961) (case involving Cuban refugees); *Siu Fung Luk v. Rosenberg*, 409 F. (2d) 555 (9th Cir. 1969), cert. dismissed, 396 U.S. 801 (1969). But see the dictum of the Board of Immigration Appeals in *Matter of O*, Interim Decision 2614 (1977), suggesting that *Murff* might have some applicability to parole revocations of certain aliens paroled into the United States as part of the Vietnam evacuation. However, it would seem that even if the *Murff* rationale were invoked, a court would not necessarily require the full range of procedural protections required in deportation proceedings. See the comments of the Board of Immigration Appeals in *Matter of O*, *supra*.

Once parole is revoked, the alien becomes subject to an exclusion proceeding, in which he may seek asylum in the United States as a political refugee. Previously the law was unsettled. See, *Sannon v. United States*, 427 F. Supp. 1270 (S. D. Fla. 1977) (asylum claims must be heard in exclusion proceed-

²The procedural rights due aliens subject to deportation proceedings are set forth in § 242 of the Act, 8 U.S.C. § 1252.

ings), and *Pierre v. United States*, 547 F. (2d) 1281 (5th Cir. 1977) (asylum claims are not required to be considered in exclusion proceedings).³ However, the issue has been mooted since the Solicitor General represented to the Supreme Court that the Government would grant a hearing on asylum applications in exclusion proceedings. See Memorandum Suggesting Mootness, in *Pierre v. United States*, O. T. 1977, No. 77-53. The Court granted *certiorari*, vacated the judgment, and remanded the case to the Court of Appeals to determine the mootness question. *Pierre v. United States*, 434 U.S. 962 (1977). In the meantime, INS has proposed a regulation to grant hearings on asylum claims in exclusion proceedings. 43 F.R. 48629. Thus, asylum claims must now be heard in an exclusion proceeding.

II. Dual United States and Cuban Citizenship

A U.S. citizen possessing dual citizenship may leave and reenter the United States without regard to any restrictions applicable to aliens. Cuban residents related to U.S. citizens and who are themselves U.S. citizens at birth by virtue of section 301(a) of the Act, 8 U.S.C. § 1401(a), may also enter the United States without regard to such restrictions.

Alien "immediate relatives" of U.S. citizens may be admitted to this country without regard to quota limitations pursuant to § 201(a) of the Act, 8 U.S.C. § 1151(a). That term includes a U.S. citizen's children, spouse, and where the U.S. citizen is at least 21 years old, his parents. § 201(b), 8 U.S.C. § 1151(b). Also, it is permissible first to parole these persons into the United States and permit them thereafter to seek adjustment of their status to that of persons admitted for permanent residence. § 245, 8 U.S.C. § 1255. Other members of the U.S. citizen's family may be paroled into the United States although they may not enjoy the status of immediate relatives of a U.S. citizen.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

³The issue in these cases centered on the interpretation of the United Nations Convention and Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, TIAS 6557, to which the United States became a signatory on November 1, 1968.

Article I of that document incorporates by reference the 1951 Geneva Convention Relating to the Status of Refugees. Article I, as modified by the Protocol, defines a refugee as one who—

... owing to well-founded fear of being prosecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

Article 33 of the Protocol provides in pertinent part that "[n]o Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

December 18, 1978

**78-68 MEMORANDUM OPINION FOR THE ACTING
DEPUTY ASSISTANT ATTORNEY GENERAL,
LAND AND NATURAL RESOURCES DIVISION**

**Department of Justice—Transfer of Funds From
Another Agency—Payment for Attorney Services—
Economy Act (31 U.S.C. § 686)**

This responds to your request for our opinion concerning the legality of the Department of Justice accepting funds from other agencies in order to employ attorneys to assist in the handling of land acquisition cases. Because there are a number of relevant considerations and several significant variables that would affect our ultimate views, we limit ourselves here to outlining the questions we regard as relevant and to reviewing the alternatives that we have identified.

I. Background and Summary

The Land and Natural Resources Division has a large backlog of land acquisition cases, many of which emanate from the Department of Energy (relating to the strategic petroleum reserve) or from the Department of Interior's National Park Service.¹

In the past, this Department has accepted funds from other agencies, including the Departments of Energy and the Interior, for such litigation and has used those funds to employ additional attorneys. Your Division's recent practice has been to hire such persons on a temporary, 1-year basis. For the most part, they have engaged in preparing supporting material or other "agency work," rather than in actually conducting the litigation.

You are considering making a new request to the Department of Energy for such funds.

You ask us to determine whether it is legally appropriate for this Department to accept funds from another agency for the purposes described above and, if the practice is proper, to indicate what kinds of work the attorneys in question may perform. You also request our opinion on other means of obtaining agency assistance in regard to these land acquisition cases.

¹The material supplied by these agencies is often incomplete or out-of-date.

Our conclusions are as follows: In some circumstances, it is proper for this Department to accept funds from another agency, pursuant to § 601 of the Economy Act (31 U.S.C. § 686(a)), for attorney services and to use such funds to employ additional attorneys. The propriety of any such transfer depends, however, upon the particular facts or justification.

Assuming that we can establish a proper basis for accepting agency funds, the type of work that can be done by an attorney paid with such funds depends in part upon the authority of the transferor agency. Because the National Park Service is not authorized to conduct litigation, a Department of Justice attorney employed on the basis of National Park Service funds should ordinarily be limited to supporting—as opposed to conducting—litigation. Where the funding is derived from the Department of Energy, the attorney would have more leeway, because that Department has contingent authority to conduct civil litigation.

Apart from legal issues, practical obstacles may result from the current freeze on Federal employment and the ceilings imposed by the Office of Management and Budget (OMB) and Congress.

There are alternative means of obtaining assistance from the agencies. Agency attorneys might be detailed to this Department under the authority provided by 31 U.S.C. 686 to assist in preparing the cases. And such an employee might be appointed by the Attorney General as a special attorney to conduct the litigation.

II. Discussion

A primary purpose for creating the Department of Justice was to centralize control of litigation involving the United States or a Federal agency. This is reflected in 28 U.S.C. 516, which reads as follows:

Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party . . . and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

A parallel section, 5 U.S.C. § 3106, provides that, except as otherwise authorized by law, an executive department “may not employ an attorney . . . for the conduct of [such] litigation . . . or for the securing of evidence therefor, but shall refer the matter to the Department of Justice.”

There are various ways in which this Department exercises its authority over civil litigation. Often, substantial assistance is obtained from attorneys of the agency involved in a suit. Depending upon the nature of a case, this Department may call upon agency attorneys not only to provide factual material but also to draft pleadings, briefs, and other papers. At times, in conjunction with attorneys of this Department, agency attorneys take part in judicial proceedings.²

²Such participation by an agency attorney who has not been appointed a special attorney under 28 U.S.C. § 543 or § 515(a) raises a legal issue, one outside the scope of this opinion.

As a practical matter, cooperation between attorneys of this Department and agency attorneys is necessary. As long as this Department retains control over the conduct of the litigation, such cooperation seems consistent with the purposes of 28 U.S.C. § 516 and 5 U.S.C. § 3106.³

A related question is allocation of the expense in litigation between this Department and an agency involved in a civil suit. Clearly, when one Department is given sole responsibility for a type of activity, the appropriation of another Department may not properly be used to cover the cost of that activity. *See* 31 U.S.C. 628. With respect to litigation, as the longstanding existence of these cooperative relationships demonstrates, the authority of this Department does not mean that the attorneys of other agencies have no role. It may be assumed that, when Congress appropriates funds for an agency's legal office, Congress intends a portion of such funds to be used to carry out the agency's functions concerning litigation. This may be illustrated by the House hearings on the fiscal year 1979 appropriation for the office of the Solicitor of the Interior Department, in which that office's activities in regard to litigation were discussed.⁴

We are not suggesting that this Department can adopt a practice of charging other agencies for the cost of bringing or defending lawsuits. Our point is that, in general, the other agencies and their attorneys have the responsibility to assist this Department and that agency appropriations may properly be used for that purpose. *Cf.* 39 Comp. Gen. 643, 646-47 (1960) (sustaining payment by the Corps of Engineers of the cost of preparing reports and engineering studies used in defending a suit involving the Corps of Engineers).

A different issue is whether an agency involved in a matter may transfer funds to this Department to defray costs connected with the litigation. A possible basis for such a transfer is § 601 of the Economy Act, 31 U.S.C. 686(a), which reads in part as follows:

Any executive department . . . if funds are available therefor and if it is determined by the head of such executive department . . . to be in the interest of the Government so to do, may place orders with any other such department . . . for materials, supplies, equipment, work, or services, of any kind that such requisitioned Federal agency may be in a position to supply or equipped to render, and shall pay promptly by check to such Federal agency as may be requisitioned . . . [the] cost thereof

One requisite for the use of § 601 is that the agency seeking goods or services have "funds . . . available therefor." Here, the question is whether the Departments of Energy and Interior have funds for legal work in these cases. It is proper to conclude that such activity is at least to some extent covered by the

³Some of these cooperative arrangements are set forth in letters or memoranda of understanding and a compilation of those documents can be found in the Civil Division's Practice Manual.

⁴Hearings on the Department of the Interior and Related Agencies Appropriations for 1979 before a Subcommittee of the House Appropriations Committee. 95th Cong., 2d sess. (1978), Pt. 1, p. 1554 (land acquisition); Pt. 6, p. 667 (environmental suits).

appropriation for the legal staff of the respective departments, but a close review of each Department's appropriation should be undertaken to assess the precise limits on that source of funds.

A further consideration is whether, in the present circumstances, the purchase of legal services from this Department is in accord with the purpose of § 601.⁵ That is, would it be more economical or efficient for this Department, rather than the other agency, to provide the services? Although we are not able to provide definitive answers, we can indicate pertinent factors and possible justifications.

An effort should be made to show why the agency's responsibilities could not be satisfactorily performed by the agency's own staff or by using the funds to increase the agency's staff. One possible rationale would be that, even though "agency work," such as fact-gathering, is involved, it can be performed more efficiently within the Department of Justice, because this Department has a better understanding of the legal issues and the type of record required for a lawsuit. Thus, even though the funds will be used to hire an additional attorney, it is more effective to have the Department of Justice do so. The attorney will be responsible to, and will have the benefit of supervision by, your Division or a United States Attorney. If the additional attorney is to be assigned to a United States Attorney's Office in a city where the other agency has no office, that geographic advantage might be a partial justification for the transfer of funds to this Department.

Before any such transfer is made, however, the justification for it should be spelled out and should be determined to be adequate by the respective departments.⁶

Next question is the restrictions upon the type of work that the attorneys hired with agency funds may do. As a general matter, the agency funds must be used for functions that could properly be performed by an agency attorney. The General Accounting Office (GAO) insists on this limitation, and we concur.⁷ It is, however, difficult to determine precisely how much authority Energy and Interior have. The only clear conclusion is that each agency does have *some* proper role. The meaning of "agency work" concerning litigation varies, depending upon the nature of the lawsuit, the needs of this Department, and the authority of the other agency. Ordinarily, Department of the Interior attorneys cannot make court appearances and, therefore, Interior funds should not be used for that purpose. A Department of Justice attorney whose salary is based

⁵For a discussion of the history of § 601. see 52 Comp. Gen. 128. 131-33 (1972) (contracts funded by EPA and another agency).

⁶The General Accounting Office has taken the position that requisites for use of the Economy Act are (1) that the transferor agency possesses the legal authority to perform the funded undertakings itself, and (2) that, in at least certain circumstances, the transferor agency has independent statutory authority to make fund transfers. The first requirement is a sensible one, and we will address it in more detail in the following section. The second requirement seems to us, however, to be unnecessary. The Economy Act itself is one that should provide sufficient authority for fund transfers, but we have as yet not resolved this interpretative difference with GAO. If you ultimately determine to rely on this Act, this subsidiary issue should be discussed with GAO.

⁷See footnote 5 above.

upon Department of the Interior funds could, however, assist in the drafting of papers and in preparing a case for trial.

Because of the potential litigation authority of the Department of Energy,⁸ it might be proper for a Department of Justice attorney whose salary is derived from the Department of Energy to have basic responsibility for the conduct of litigation. The theory would be that the Department of Energy has funds for conducting litigation itself and, in appropriate circumstances, may elect to transfer such funds to the Department of Justice.

Apart from the legal issues outlined above, there may be practical obstacles to your Division's using agency funds to hire attorneys on a temporary basis.⁹

President Carter recently imposed a freeze upon Federal hiring. It is implemented by OMB Bulletin 79-2 and limits the ability of Federal agencies to fill future vacancies. The freeze applies to full-time permanent employment, but the OMB bulletin states (par. 3) that there is to be no use of temporary hiring to circumvent the freeze.

In addition, each year through the budget process, OMB establishes employment ceilings for each agency.¹⁰ There are two ceilings—one for full-time permanent employment and one for total employment. The latter ceiling encompasses temporary employees. Section 311 of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, provides that the total number of Federal civilian employees on September 30, 1979, may not exceed the number on September 30, 1977.

These limits may mean that it will be difficult for your Division to obtain approval for the temporary positions.

The hiring freeze and the employment ceilings are governmentwide and may also make it unlikely that the problem of backlog can be dealt with by increasing the permanent staff of your Division or the other agencies. There are other alternatives, however, which do not involve additional hiring.

The Department of Energy or Department of the Interior might detail one or more of its attorneys to your Division to assist regarding the land acquisition cases. In the past, in somewhat similar circumstances, agency employees have been detailed to this Department, *e.g.*, to the Civil or Civil Rights Division. The salaries of the detailed persons would be paid by the other agency.

Under 28 U.S.C. 543, the Attorney General has authority to name special attorneys to assist United States Attorneys. Under 28 U.S.C. § 515, the Attorney General may appoint any attorney, as a special assistant or special

⁸Section 502(c) of the Department of Energy Organization Act, 42 U.S.C. 7192(c), provides that, except for Federal Energy Regulatory Commission litigation, litigation of the Department of Energy is subject to the supervision of the Attorney General. The Attorney General may authorize a Department of Energy attorney to conduct civil litigation in any court except the Supreme Court.

Earlier this year, the two Departments entered into a memorandum of understanding regarding civil litigation.

⁹We have not attempted to determine whether employing such persons on a 1-year basis is consistent with Civil Service Commission or other applicable standards.

¹⁰See OMB Circular A-64.

attorney, to conduct any kind of legal proceeding.¹¹ This authority might be used with respect to a Department of Energy or Department of the Interior attorney, who would then be able to take full responsibility for a suit or class of suits.

Regarding the Department of Energy, another possibility, in light of 42 U.S.C. § 7192(c), would be for the Attorney General to assign basic responsibility for one or more cases to Department of Energy attorneys.

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

¹¹28 U.S.C. § 515(b) provides that the salary of such an attorney may not exceed \$12,000 per year. The Executive Office for United States Attorneys takes the position that this limit does not apply to persons appointed under 28 U.S.C. § 543.

December 20, 1978

**78-69 MEMORANDUM OPINION FOR THE ACTING
GENERAL COUNSEL, DEPARTMENT OF
AGRICULTURE**

**Comprehensive Employment and Training Act (29
U.S.C. § 812)—Food Stamp Act of 1977 (7 U.S.C.
§ 2026(b)(2))—Use of Funds for Food Stamp
Workfare Projects**

This is in response to an inquiry by the General Counsel of your Department concerning the funding of "workfare" projects under the Food Stamp Act of 1977 and the availability of funds authorized by the Comprehensive Employment and Training Act (CETA) to meet employment-benefit and administrative costs associated with workfare pilot projects required by § 17(b)(2) of the Food Stamp Act of 1977.¹ We conclude that, subject to limited exceptions, CETA funds are not available to cover such costs.

I. Background

Section 17(b)(2) of the Food Stamp Act directs the Secretary of Agriculture to implement, jointly with the Secretary of Labor, a total of 14 "pilot projects involving the performance of work in return for food stamp benefits. . . ." In order to receive such benefits, certain persons subject to the work-registration requirements of the Food Stamp Act must

. . . accept an offer of employment from a political subdivision or a prime sponsor pursuant to the Comprehensive Employment and Training Act of 1973, as amended (29 U.S.C. 812), for which employment compensation shall be paid in the form of the [food stamp] allotment to which the household is otherwise entitled. . . .²

The number of work hours for participants in the program depends upon such factors as other employment and the amount of food stamp benefits they

¹Title XIII, § 1301, of Pub. Law. No. 95-113, 91 Stat. 913, 977, 7 U.S.C. 2026(b)(2).

²The cited provision of CETA, 29 U.S.C. 812, contains the definition of "prime sponsor" as it originally appeared in the 1973 statute, Pub. Law No. 93-203, 87 Stat. 841. As amended in 1978, the CETA definition of "prime sponsor" appears in § 101, Pub. Law No. 95-524, 92 Stat. 1917, 29 U.S.C. 811.

receive. For some persons, the requirement would be only a few hours each week.

Section 17(b)(2) goes on to state that, before a job offer may be made pursuant to the foregoing provision, "all of the political subdivision's or prime sponsor's public service jobs supported under the Comprehensive Employment and Training Act of 1973 . . . are [to be] filled"

CETA was amended in 1978.³ Title II of the 1973 version authorized public service employment programs. Assistance was available to "prime sponsors," a term that included States and certain units of local government.⁴ Prior to the 1978 amendments, § 205(c) set forth some 25 assurances that must be contained in an application for financial assistance for a public-service employment program, and § 208 set forth some 14 conditions. Section 17(b)(2) of the Food Stamp Act provides that some, but not all, of the CETA provisions concerning assurances and conditions apply to the workfare projects.

The workfare provision of the Food Stamp Act originated in an amendment by Congressman Findley⁵ and was included in the bill reported by the House Committee on Agriculture. Pertinent to the present issue is the following portion of the House report:⁶

The Federal government's responsibilities in connection with workfare would consist of providing food stamp allotments to complying households . . . and nothing else. There would be no Federal cost-sharing for any local or state administrative costs associated with workfare, such as the provision of shovels or brooms, since those are not food stamp program administrative costs of the state public assistance agency pursuant to section 16(a), but are costs borne by CETA sponsors or political subdivisions, and there is no specific provision for paying them under section 17(b)(2). Further, the local and state costs of developing public service employment programs are already underwritten by the Federal government. [See 29 U.S.C. § 843(b) and § 962(b)]

The bill passed by the Senate did not contain any provision regarding workfare. The conference committee adopted a modified version of the House provision.⁷ Except for the statement in the House report, we have found nothing in the legislative history relating to the present issue.

In February 1978, the Acting General Counsel of the Department of Agriculture requested the Solicitor of Labor's views regarding the availability of CETA funds to cover administrative and employment-benefit costs for the

³See the Comprehensive Employment and Training Act Amendments of 1978, Pub. L. No. 95-524, 92 Stat. 1909.

⁴See footnote 2, *supra*.

⁵H. Rept. No. 95-464, 95th Cong., 1st sess. (1977), p. 858 (House report). This report relates to H. R. 7940. On July 26, 1977, the House of Representatives incorporated into H. R. 7171 the provisions of H. R. 7940. 123 Cong. Rec. H 7789 (daily ed.).

⁶House Report, pp. 370-371.

⁷H. Rept. No. 95-599, 95th Cong., 1st sess. (1977), p. 202.

workfare projects. In response, the Solicitor stated that the workfare projects would be separate from CETA programs and that, with limited exceptions (e.g., the cost of counseling a person who is subject to the workfare requirement and also eligible for a CETA program), CETA funds could not be used for the workfare projects.

The Food Stamp Act requires the Secretary of Agriculture and the Secretary of Labor to submit periodic reports on workfare projects "to the appropriate committees of Congress." In May 1978, the first such report was sent to the House Committee on Agriculture and the Senate Committee on Agriculture, Nutrition, and Forestry. The report included the following:

We are also studying the issue of whether CETA sponsors are eligible to receive any Federal funds for administration of workfare. The House Agriculture Committee clearly directed that no food stamp administrative funds should be available for this purpose. The Solicitor of the Department of Labor has advised that CETA funds may not be used for administration of workfare, since the CETA authorizing legislation does not permit funds to be used in support of jobs for which employees are given no wage compensation. The Department of Agriculture is requesting an opinion from the Department of Justice on this issue.

In July 1978, the Department of Agriculture published two proposals regarding the workfare program, a regulation and a notice of intent. 43 F.R. 29950. The proposed notice of intent stated that: "There will be no Federal cost-sharing for any administrative or employee benefit costs incurred by the workfare sponsor." Paragraph D, 43 F.R. 29954.

The previous month the Secretary of Agriculture recommended to Congress that § 17(b)(2) of the Food Stamp Act be amended to extend the submission date of the workfare program final report from March 29, 1979, to October 1, 1980. At the time of the House debate on the question, Congressman Findley inserted a statement in the Congressional Record concerning Agriculture's position regarding inability to use CETA funds for administration of workfare, other than for recordkeeping and data collection.⁸ However, the issue of Federal funding of workfare administrative costs or employee benefits did not come up for consideration in either the House or the Senate. The bill, extending the date for the final report, became law on September 30, 1978.⁹

As noted above, amendments to CETA were enacted in 1978.¹⁰ Although the Act was revised substantially, none of the amendments dealt with the Food Stamp Act workfare program,¹¹ and our review of the legislative history has disclosed no mention of the workfare program.

⁸124 Cong. Rec. H. 10085 (daily ed., Sept. 19, 1978).

⁹Pub. L. No. 95-400, 92 Stat. 856.

The Department of Agriculture Appropriation Act for fiscal year 1979, Pub. L. No. 95-448, 92 Stat. 1073, 1090 (Oct. 11, 1978), does not mention the workfare program.

¹⁰Pub. L. No. 95-524 was signed by the President on October 27, 1978. Regarding the effective date of the CETA amendments, see § 4, 92 Stat. 2018, 29 U.S.C.A. 801 note.

¹¹There is no reference to workfare in the continuing resolution that appropriates funds for CETA activities during fiscal year 1979, Pub. L. No. 94-482, 92 Stat. 1603 (Oct. 18, 1978).

On November 28, 1978, the Department of Agriculture and the Department of Labor published their final workfare regulation and notice of intent. 43 F.R. 55334. The introductory statement notes that the Solicitor of Labor "has issued an opinion that funds available for the administration of public service employment through . . . [CETA] generally cannot be legally used for this [workfare] project."

The notice of intent, which seeks proposals for workfare projects, indicates that the expense of administrative activities and employee benefits is to be borne by the sponsors. There would be reimbursement, however, for the cost of collecting data required for evaluation of the program.

II. Discussion

In the opinion request, the General Counsel expressed the view that, while food stamps would be used for the wages of persons taking part in the workfare projects, Food Stamp Act funds could not be used to meet the administrative expenses of workfare sponsors or the cost of employee benefits for participation in the projects. We agree with that interpretation of the Food Stamp Act, but do not agree with the view that the Food Stamp Act and its legislative history indicate that CETA funds may be properly used for such administrative and employee-benefit costs.

Workfare projects are not CETA projects, but are "legally separate and distinct from CETA programs run by the same State or local government or organization." Therefore, the Solicitor of Labor concluded that CETA funds could not, as a general matter, be used to reimburse sponsors for the costs of administering the workfare projects. We concur. Public-service employment programs under CETA, whether instituted before or after the 1978 amendments, must satisfy a number of conditions. Although workfare projects must meet some of the pre-1978 conditions, such projects are not projects authorized by CETA. No provision in the Food Stamp Act expressly amends CETA, and statements in the House report could not have that effect. The House report (*see* H. Rept. No. 95-464, 95th Cong., 1st sess. (1977), p. 371) cited § 203(b) and § 602(b) of the pre-1978 version of CETA.¹² Those sections provided for the use of CETA funds with respect to public-service employment programs under Title II or Title VI, respectively, of CETA. As pointed out by the Solicitor of Labor, workfare projects do not come under any title of CETA. The separate nature of CETA programs and workfare is not altered by the fact that the workfare sponsor may also be the prime sponsor of a CETA program.

The position of the Solicitor of Labor regarding this matter was brought to the attention of Congress in the May 1978 report of the two Departments and was also reflected in the proposed notice of intent (published in July 1978). If the congressional committees differed with Labor's view, corrective action could have been taken in connection with the 1978 amendment of § 17(b) of the Food Stamp Act or the amendment of CETA. No such action was taken.

¹²29 U.S.C. 843(b) and 962(b) (1975 Supp.).

In these circumstances, it was proper for the two departments to include in the final notice of intent a provision on funding that was consistent with the Labor position.

The Solicitor's letter referred to certain limited situations in which CETA funds could properly be used in connection with the workfare projects. It is our opinion that, except for those situations, CETA funds are not available for workfare projects.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

December 29, 1978

**78-70 MEMORANDUM OPINION FOR THE ACTING
GENERAL COUNSEL, NUCLEAR REGULATORY
COMMISSION**

**Former Officers and Employees—Conflict of Interest
(18 U.S.C. § 207)—Contract—Disqualification
Connected With Former Duties or Official
Responsibilities**

This responds to your request for our opinion on a matter calling for an interpretation of 18 U.S.C. § 207, establishing postemployment restrictions on Federal employees. The relevant facts are as follows:

Mr. C, a geologist employed in the Commission's Office of Nuclear Reactor Regulation (NRR), serves on a Commission task force charged with developing data to assist the Commission in formulating regulations concerning the long-term storage of high-level nuclear waste. In that capacity he reported in 1977 to appropriate Commission officials that the Commission needed additional data on certain geological issues, which it was not equipped to obtain.

In March of that year he met in his official capacity with representatives of a laboratory, a Government contractor, and of a private consulting firm. They discussed the data that C believed was required. He then submitted a memorandum to the task force leader listing certain NRR geoscience research requirements and subsequently submitted more detailed specifications.

During 1977 and 1978, C met several times with the Commission's Office of Nuclear Material Safety and Safeguards (NMSS), the office with primary responsibility for nuclear waste management, and reiterated his concern that the needed geological research was not being conducted. In September 1978, NMSS decided that the research was indeed necessary and asked the laboratory to undertake it, which it has recently agreed to do by contract. The consulting firm, subcontractor of the laboratory, anticipates that it will be requested by the laboratory to do the research.

In October 1978, the consulting firm offered C a position to begin in January 1979, contingent upon his availability to work on the subcontract. Should the laboratory subcontract the performance of technical and scientific components

of the contract to the consulting firm, C would represent the consulting firm in meetings with the NRC's scientific staff to exchange scientific information.

We understand that C played no role in selecting the laboratory to do the research, and that the laboratory has not yet begun the work on the project.

The legal issue is whether § 207 prohibits C from acting for the consulting firm in connection with its performance of the subcontract. We conclude that C would not violate § 207 if his activities are confined as discussed below:

Section 207 reads in relevant part as follows:

(a) Whoever, having been an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, after his employment has ceased, knowingly acts as agent or attorney for anyone other than the United States in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States is a party or has a direct and substantial interest and in which he participated personally and substantially as an officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, while so employed, . . .

(b) * * * * *

Shall be fined not more than \$10,000 or imprisoned for not more than two years, or both: *Provided*, That nothing in subsection (a) or (b) prevents a former officer or employee, including a former special Government employee, with outstanding scientific or technological qualifications from acting as attorney or agent or appearing personally in connection with a particular matter in a scientific or technological field if the head of the department or agency concerned with the matter shall make a certification in writing, published in the Federal Register, that the national interest would be served by such action or appearance by the former officer or employee.¹

I.

We consider first whether, if C accepts the position, he would be required to act as an agent or attorney for the consulting firm in connection with a particular matter in which he personally and substantially participated while a Government employee.

This issue concerns the degree of the connection C had with the laboratory contract, *i.e.*, whether he had the requisite personal and substantial participation therein. He concededly participated in the proposal which led to the Commission's offering the laboratory the contract. He was primarily responsi-

¹The section has been recently amended by the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824. The amendment, however, is not material here.

ble for the Commission's requesting an outside firm to do the research.² He was further intimately involved in the decision concerning the nature of the required research. However, he participated only in the inchoate stage of what would later develop into a contract.

Nevertheless, we are of the opinion that § 207 covers such participation. Implicit in § 207 is the notion that one may not, as a Government employee, having participated personally and substantially even in the preliminary stages of a particular contract, thereafter leave the Government to act as an agent or attorney for a private party with respect to the contract. Were this not so, the policies underlying that provision would be frustrated. Section 207 was primarily intended to prevent situations in which a former Government employee could use inside information or his influence with respect to a matter on which he worked as a Government employee. Much of the work with respect to a particular matter is accomplished before the matter reaches its final stage. For example, an attorney might conduct an exhaustive investigation whether the facts and the law warrant the Government's filing a contemplated lawsuit. Further, he might recommend that the lawsuit be brought. If he could at that point, before the actual filing of the case, leave the Government and contend that he was not barred by § 207 because his work did not extend to participation in an actual "judicial or other proceeding" the purpose of § 207 would be undermined. The same holds true with respect to the preliminary steps leading to a contract. Thus, § 207, if its purpose is to be served, should be read to include personal and substantial participation in the preliminary stages of particular matters.

Moreover, the express terms of § 207 deal with preliminary aspects of particular matters. The section covers participation through decision, approval, disapproval, recommendation, the rendering of advice, investigation, etc. Such activity is frequently associated with preliminary aspects. Indeed, in this case C rendered advice, made a recommendation, and conducted an investigation with respect to the matter that eventually resulted in the laboratory contract.

For these reasons, we conclude that C's activities are covered by § 207.

II.

We now turn to the question whether Mr. C's duties with the consulting firm, as you describe them, would violate § 207. Although the language of § 207(a) is quite broad and encompassing, there is no doubt that C may work on the consulting firm's subcontract if he limits himself to in-house work not involving his contact with the Government. See the comment in the Attorney General's 1963 Interpretive Memorandum (reprinted at 18 U.S.C. § 201,

²We note at the outset that the consulting firm's status as a subcontractor in no way excuses Mr. C from § 207's prohibitions.

note).³ However, the consulting firm job offer is contingent upon C's availability to meet with the Commission's scientific staff "for the purpose of exchanging scientific information being developed under the contract." We believe that in doing so C would be acting as the consulting firm's "agent." But not all communications between a former Government employee and his agency necessarily constitute acting as an agent within the proscriptions of § 207.

In the context of a contract, a former employee acts as the "agent" of a non-Federal person or entity when he urges or requests the Government to take or refrain from taking action or otherwise acts on behalf of that person or entity in dealings with the Government pertaining to the provisions or performance of the contract as to which the contractor and the Government may have differing or potentially differing views. This interpretation, requiring an ingredient of at least inchoate adversariness, is reflected in the list of particular matters to which the ban in § 207 applies: "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter involving a specific party or parties," in which the United States is a party or has a direct and substantial interest. Aside from a contract, the other listed matters appear to be pregnant with at least some adversariness (in the sense of urging a point of view) in all their aspects. A contract between the Government and a private person or entity, on the other hand, may extend over a long period of time and involve numerous contracts between governmental and contractor personnel that jointly facilitate performance of the contract and have no adversarial aspect. Use of the term "contract" in § 207 was not intended to apply to all such communications.

Moreover, each mention of a former Government employee's dealing with Government contracts that we have found in § 207's legislative history indicates that the harm to be remedied is the negotiation of contractual terms, the securing of the contract, the prosecution of a contract claim, or otherwise handling a contractual dispute. *See, e.g.*, Senate Report No. 2213, 87th Cong., 2d sess., at 17; Hearings before the Antitrust Subcommittee (Subcommittee No. 5) of the House Judiciary Committee, 87th Cong., 1st sess., Series 3 (1961), on *Federal Conflict of Interest Legislation*, at 71, 72, 75, 84, 86, and 101. *See also* the Attorney General's 1963 Interpretive Memorandum, quoted in footnote 3, *supra* containing the illustrative example of a "dispute over the terms of the contract"; *see also* Federal Personnel Manual, Chapter 735, Appendix C, at 4. Thus, there is nothing in § 207's legislative history to suggest that it was intended to cover contacts with the Government not

³"An individual who has left an agency to accept private employment may, for example, immediately perform technical work in his company's plant in relation to a contract for which he had official responsibility—or, for that matter, in relation to one he helped the agency to negotiate. On the other hand, he is forbidden for a year, in the first case, to appear personally before the agency as the agent or attorney of his company in connection with a dispute over the terms of the contract. And, he may at no time appear personally before the agency or otherwise act as agent or attorney for his company in such dispute if he helped negotiate the contract."

involving controversial matters with respect to a contract. Section 207 is essentially concerned with preventing the use of influence and inside information by a former Government employee. Hearings before the Senate Judiciary Committee, 87th Cong., 2d sess. (1962), on *Conflict of Interest*, at 21; 1961 Hearings at 71-72; S. Rept. No. 2213, *supra*, at 5, 13; H. Rept. No. 748, 87th Cong., 1st sess., at 4. Roswell Perkins, in his article, *The New Conflict of Interest Law*, 76 Harv. L. Rev. 113, 1121 (1963), stated that the policies underlying the post-employment restrictions of the conflicts of interest law are as follows: a ban against "switching sides"; protection against use of influence derived from personal friendships or past association; and protection against unfair use of inside information acquired while in the Government. Implicit in all of those is the notion that some step is sought to be taken however minor in relation to the overall contract.⁴ This does not, of course, mean that the restriction in § 207 is limited to formal appearances or proceedings. The provision, in our view, does not reach informal meetings, correspondence, or conversations with agency officials in which the former employee urged the position of a contractor with respect to an aspect of the contract in which the position of the contractor and that of the employee's agency were potentially divergent. Moreover, the prohibition against acting as the contractor's "agent" should not be confined to major disputes, renegotiation, or the like. Requests for extensions of interim deadlines or work orders, nonroutine requests for instructions or information from the agency, suggestions about new directions on even relatively minor portions of the contract, and explanation or justification of the manner in which the contractor has proceeded or intends to proceed would all be barred; they involve at least potentially divergent views of the Government and the contractor on subsidiary issues or an implicit representation by the agent that the contractor is in compliance with contract requirements.

However, one who delivered finished material in a truck to the Government on behalf of a contractor was not acting as an "agent" in a representational capacity, as contemplated by § 207. A similarly ministerial delivery or furnishing of scientific data to a Government agency on behalf of a contractor is likewise outside the scope of § 207. In the present instance, C would not be removed from the statutory bar merely because his communications with the Commission may relate to scientific or technological matters. Because of his substantial responsibility for administration of the subcontract, many of his

⁴ This interpretation is even clearer in the recent amendment to § 207(a) (*see* footnote 1, *supra*) which provides sanctions for one who "knowingly acts as agent or attorney for, or otherwise represents, any other person (except the United States), in any formal or informal appearances before, or with the intent to influence, makes any oral or written communication on behalf of any other person (except the United States)" in matters in which he participated personally and substantially. [Emphasis added.] The reference to "representation" and "influence" suggests a situation involving differing positions on the part of the Government and the contractor. It was also implicit in 18 U.S.C. § 284, the predecessor of 18 U.S.C. § 207, which proscribed acting as "a counsel, attorney or agent for prosecution" of claims against the United States. While § 207 expanded the category of covered matters beyond "claims," it did not, in our view, alter the implicit element of at least some divergence or potential divergence of views.

communications—even those that are essentially routine or ministerial furnishing of information—may be instinct with the more subtle type of influence that in our view, the statute proscribes, equally with representations made in more obvious adversarial situations. If his activities are limited as described above, it is our opinion that Mr. C may proceed without violating the prohibitions of § 207.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

January 26, 1977

**78-71 MEMORANDUM OPINION FOR THE DEPUTY
COUNSEL TO THE PRESIDENT**

**Presidential Transition Act (3 U.S.C. § 102 note)—
Provision of Military Aircraft and Hospital
Corpsman to a Former President (31 U.S.C. § 638)**

You have orally asked for the opinion of this Office whether and under what circumstances the President might be able to make available to former President Ford military aircraft for his transportation and a medical corpsman to accompany him on such flights. Our response may be summarized as follows:

(1) The President may direct aircraft assigned to him to transport Mr. Ford on official transition business and may detail a medical corpsman to accompany him on such flights.

(2) The President may, on a one-time basis, direct an aircraft assigned to him to carry Mr. Ford on personal business or pleasure but may not detail a medical corpsman to that flight.

(3) With respect to the flights referred to in (2) the Department of Defense (DOD) may, at the request of the Director of the Secret Service, detail a military aircraft and a medical corpsman should the Director conclude that these are consistent with the statutory authority of the Secret Service to protect the former President.

The question you raise presents itself in at least two different contexts. The first context would involve travel by Mr. Ford where such travel can be shown to be related to the transition itself. In our view, such official travel would be at no expense to Mr. Ford. The Presidential Transition Act of 1963, Pub. L. No. 88-227, 78 Stat. 153, as amended, 3 U.S.C. § 102 note, provides that, for 6 months from the expiration of a President's term of office necessary services may be provided by the Administrator of General Services under § 4 of the Act to the former President, as provided by § 2, "to promote the orderly transfer of the executive power" Certainly travel of that nature would fall within the scope of these provisions. We are not aware that the Administrator has any authority to utilize a military aircraft for that purpose. But it is our view that the President can order such official travel by Mr. Ford to be accomplished in military aircraft. We have taken the position in the past that "in the absence of an expression of a contrary intent by Congress . . . the President must be

deemed authorized by the Constitution to utilize the troops and equipment under his command for reasonable purposes, even if they are not purely military in nature." Memorandum, April 14, 1975, at 2-3 (hereafter April 14 Memorandum). Thus, aircraft placed directly at the President's disposal, such as the aircraft of the military support group detailed to serve the President, can be used to transport Mr. Ford on transition business, without expense to Mr. Ford.

The second context in which your question might arise would involve situations in which former President Ford's movement is of a personal, rather than official, nature. In our view, as asserted in the April 14 Memorandum, *ibid.*, the President may direct aircraft placed at his command to be used for other than "official purposes." This view is based on the authority contained in 31 U.S.C. § 638a(c)(2). That paragraph, which provides generally that Government aircraft may not be used other than "exclusively for official purposes," specifically provides that "the limitations of this paragraph shall not apply to any . . . aircraft for official use of the President . . ." Thus, an inference may be drawn that the President is empowered to devote aircraft assigned to him for other than "official purposes."

However, as the April 14 Memorandum also points out, under Department of Defense regulations, non-Government traffic is generally carried on a reimbursable basis by the person carried. Although certain exceptions to this general requirement are carved out, transport of former Presidents on personal business would not appear to fall within any of these exceptions. We believe that detailing a military aircraft on a regular—as opposed to a one-time—basis for non-Government purposes would both stretch the authority of the President as Commander-in-Chief and would not be justified by the inference drawn from 31 U.S.C. § 638a(c)(2). Furthermore, such travel on a nonreimbursable basis could create a tension between the President's authority and DOD regulations. Those regulations, while they may not technically foreclose such action, might create the appearance of impropriety.

It appears to us that the detailing of a medical corpsman stands upon the same footing. During the transition period, under his Commander-in-Chief powers, the detailing of a corpsman by the President to the former President can be accomplished if such detailing constitutes the provision of "necessary services" to further the transition under § 4 of the Act. For other purposes there would appear to be no authority for the detailing of a medical corpsman by the President. Unlike the President's use of military aircraft assigned to him, we are unaware of any statutory provision like 31 U.S.C. § 638a(c)(2) that would permit, by inference, the use of a medical corpsman to accompany the former President.

One possibility that we have had too little time to explore fully is the extent to which military aircraft and a medical corpsman might be detailed for Mr. Ford's use on personal business in connection with the Secret Service protection afforded to him. The protection of the Secret Service is extended to a former President during his lifetime, 18 U.S.C. § 3056. Section 2 of Pub. L. No. 90-331, 82 Stat. 170, as amended, 18 U.S.C. § 3056 note, provides that all

Federal departments must assist the Director of the Secret Service in carrying out those protective functions. It would therefore seem that a determination by the Director of the Secret Service that military aircraft should be used to transport former President Ford in order to facilitate Secret Service protection could furnish an adequate basis for the detail of available military aircraft to fly the former President. It is our understanding that the Secret Service has determined in the past that in some circumstances the use of military aircraft actually may reduce the overall cost of Secret Service protection as compared with providing the protection that would be required aboard a commercial aircraft. It may be that the Secret Service could apply the same reasoning with respect to the detailing of a medical corpsman.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

January 27, 1977

**78-72 MEMORANDUM OPINION FOR THE DEPUTY
COUNSEL TO THE PRESIDENT**

**The White House Office—Acceptance of
Voluntary Service (31 U.S.C. § 665(b))**

This is in response to your oral request for our views regarding the propriety of the acceptance of voluntary service in the White House. We understand that your immediate concern is with the receipt of such assistance in the processing of the many resumes and applications for employment now being received by the White House. But we also understand that the White House has utilized voluntary secretarial and clerical services in the past on an ongoing basis and that there is interest in continuing this practice if it is lawful. It is our opinion that the practice is lawful.

No officer or employee of the United States shall accept voluntary service for the United States or employ personal service in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property.

On its face, this statute appears to prohibit the acceptance of the kind of voluntary services you have described. However, a 1913 opinion of the Attorney General construing this provision concluded:

[I]t seems plain that the words "voluntary service" were not intended to be synonymous with "gratuitous service" and were not intended to cover services rendered in an official capacity under regular appointment to an office *otherwise permitted by law to be nonsalaried*. In their ordinary and normal meaning these words refer to service intruded by a private person as a "volunteer" and not rendered pursuant to any prior contract or obligation. 30 Op. A.G. 51, 52. [Emphasis added.]

See also, J. Weinstein, A Part-Time Clerkship Program in Federal Courts for Law Students, 68 F.R.D. 265, 269-73 (1975). Thus, 31 U.S.C. § 665(b) does not prohibit a person from serving without compensation in a position that is "otherwise permitted by law to be nonsalaried."

When Congress has established a minimum salary for a position, either directly or by including it under the General Schedule or some comparable

salary schedule, it is unlawful for the employing agency to pay less than the established salary. *See, e.g., Glavey v. United States*, 182 U.S. 595 (1901); *MacMath v. United States*, 248 U.S. 151 (1918); *Saltzman v. United States*, 161 Ct. Cl. 634, 639 (1963); 26 Comp. Gen. 956 (1947); *Federal Personnel Manual*, Chapter 311, Subchapter 1-4.d. Work of a secretarial or clerical nature is generally covered by the Classification Act, which establishes the rates of pay for civil service positions, and there is no express exception in that Act for positions in the White House. *See* 5 U.S.C. § 5102. Also, under the Fair Labor Standards Act, which was made applicable to the Federal Government in 1974, *see* 29 U.S.C. §§ 203(d) and (e)(2) (1975 Supp.), it is unlawful to pay less than the minimum wage to an employee of the United States Government. 29 U.S.C. § 206.

However, we do not believe that these restrictions are applicable here. Of the \$16,530,000 appropriated to the White House Office under the Executive Office Appropriations Act of 1977, 90 Stat. 966, not to exceed \$3,850,000 is appropriated

. . . for services as authorized by 5 U.S.C. 3109, at such per diem rates for individuals as the President may specify and *other personal services without regard to the provisions of law regulating the employment and compensation of persons in the Government service.* . . . [Emphasis added.]

We interpret the underscored language to be an express exception to the Fair Labor Standards Act and to provide that the salary requirements of the Classification Act are inapplicable to positions covered by this portion of the appropriation to the White House Office.* Since Congress has mandated no minimum salary for these positions, it is our view that positions covered by this appropriation may carry a nominal compensation or no compensation at all.

To insure technical compliance with the law, we suggest that the White House administratively allocate the positions for which voluntary services will be accepted to the \$3,850,000 portion of the appropriation for the White House Office. Also, because of the emphasis in the above passage from the Attorney General's opinion quoted above on a prior agreement between the United States and the employee that the employee will serve without compensation, *see also* 7 Comp. Gen. 810, 811 (1928), we suggest that papers relating to the appointment or employment of persons whose services will be voluntary expressly provide that they will serve without compensation.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

*Even if the Fair Labor Standards Act were thought to be applicable despite the language in the appropriation for the White House Office quoted in the text, that Act has been construed not to require a person to be paid where it is clear he has donated his services as a volunteer without any expectation of compensation. *See, Rogers v. Schenkel*, 162 F. (2d) 596 (2d Cir. 1947); *cf., Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947).

January 27, 1977

**78-73 MEMORANDUM OPINION FOR THE DEPUTY
COUNSEL TO THE PRESIDENT**

**Hatch Act (5 U.S.C. § 7324)—Membership of
White House Staff Member on Democratic
National Committee**

You have orally asked for our views as to whether a White House Staff member may lawfully continue to be a member of the Democratic National Committee. Insofar as we have been able to ascertain, our office has not previously been asked to examine such a question. It is our conclusion that such membership would not violate any statutory restriction but that a question exists under applicable Standards of Conduct.

The only relevant statutory restriction of which we are aware is the Hatch Act. It provides in pertinent part:

(a) An employee in an Executive agency or an individual employed by the government of the District of Columbia may not—

- (1) use his official authority or influence for the purpose of interfering with or affecting the result of an election; or
- (2) take an active part in political management or in political campaigns. [5 U.S.C. § 7324(a).]

Under Civil Service Commission regulations, membership on the national committee of a political party is prohibited by subsection (2) of this provision. See 5 CFR 733.122(b)(1). However, the Hatch Act contains an exception providing that subsection (a)(2), quoted above, does not apply, *inter alia*, to "an employee paid from the appropriation for the office of the President." 5 U.S.C. § 7324(d)(1).¹ Anyone whose salary is paid from funds appropriated for salaries and expenses of the White House Office under the Executive Office Appropriations Act of 1977, 90 Stat. 966, is covered by this exception, and his membership on the Democratic National Committee would therefore not be in violation of the Hatch Act.

¹The exception does not extend to the prohibition in subsection (a)(1) against the use of official authority or influence for the purpose of interfering with or affecting the result of an election.

In addition to the statutory restriction, the propriety of membership on the Democratic National Committee should be considered in light of the Standards of Conduct applicable to agencies in the Executive Office of the President. *See* 3 CFR, Chapter I, Part 100.² “Agency” is defined to include the White House Office. 3 CFR 100.735-2(a). The Standards of Conduct were issued in compliance with Executive Order 11222, 3 CFR 306 (1965), and Civil Service Commission regulations implementing that order. *See* 5 CFR, Part 735.

Outside activities of employees of the Executive Office of the President are specifically governed by 3 CFR 100.735-15. Subsection (a) of this provision states that an employee may not engage in any outside activity “not compatible with the full and proper discharge of the duties and responsibilities of his Government employment.” However 3 CFR 100.735-15(d)(2) provides that nothing in section 100.735-15 or 100.735-14 (dealing with the acceptance of gifts, gratuities, and entertainment) precludes an employee from “[p]articipation in the activities of national or State political parties not proscribed by law.” The reference to political activities proscribed by laws is to the Hatch Act, discussed above. *See* 3 CFR 100.735-22(o). Because the Hatch Act does not prohibit a person employed in the White House from being a member of the Democratic National Committee, such membership is not prohibited by the regulations governing outside activities and receipt of gratuities either.

The exception in the regulations just discussed, permitting certain political activities, does not apply to other provisions of the Executive Office’s Standards of Conduct. One other section of the Standards of Conduct that should be considered is 3 CFR 100.735.4(c), which provides:

An employee shall avoid any action, whether or not specifically prohibited by this subpart, which might result in, or create the appearance of:

- (1) Using public office for private gain;
- (2) Giving preferential treatment to any person;
- (3) Impeding Government efficiency or economy;
- (4) Losing complete independence or impartiality;
- (5) Making a Government decision outside official channels; or
- (6) Affecting adversely the confidence of the public in the integrity of the Government.

These standards are necessarily general and are difficult to apply with precision in any particular case. However, it may be suggested that membership of a person employed in the White House on the national committee of a political party could give rise to problems of appearances under a number of these subsections.

The public no doubt expects persons on the President’s staff to be political to the extent of being loyal to the President’s policies and partisan endeavors. But

²The Standards of Conduct were previously codified in Chapter V of 3 CFR. *See* 40 F.R. 24993 (1975).

it can be supposed that the public at the same time expects a certain independence of the President's top advisers that could be, or at least appear to be, compromised by a close official connection to partisan political activities. In the language of the regulation just quoted, membership on the national committee of a political party might perhaps engender the appearance of "giving preferential treatment" to certain groups or "losing complete independence or impartiality" in one's official duties and thereby "affecting adversely the confidence of the public in the integrity of the Government." This appearance might result from the possibility that the individual would be in a position to influence governmental decisions unduly so as to favor the policy or institutional interests of the Democratic Party as opposed to the Republican Party or other groups³ or that he would favor the Democratic Party's interests rather than the President's if a difference of opinion developed between the two. Moreover, membership of a White House staff member on the committee could conceivably give rise to the impression that important governmental decisions were being made by the committee rather than the White House, and therefore that they were being made "outside official channels."

The decision on a question of appearances such as this necessarily depends to a certain degree on the public's perception of an employee's conduct, and for this reason it cannot be said with certainty that problems of appearances will arise under the Standards of Conduct. Nevertheless, we believe that these potential problems of appearances should at least be considered. However, the authoritative construction of the regulations we have discussed in the present context is ultimately a matter for the appointing official.

LEON ULMAN
Deputy Assistant General Counsel
Office of Legal Counsel

³For example, if the individual were employed in the White House Personnel Office, there could be an appearance that the Democratic National Committee would have more influence in selecting persons to fill important Government posts than might otherwise be true. Also, if the individual took an active interest in certain Government grants or contracts, there could be an appearance that he would favor applicants with ties to the Democratic Party or its National Committee.

February 24, 1977

**78-74 MEMORANDUM OPINION FOR THE COUNSEL
TO THE PRESIDENT**

**Travel Expenses—Person Traveling on Behalf of the
President—Use of Appropriated Funds**

Inquiries have been raised concerning the propriety of Federal payment of travel expenses incurred by a person traveling on official business on behalf of the President when the person is not an officer or employee of the United States.

Before answering the specific questions, we make two general observations. First, the President is Commander-in-Chief of the Armed Forces, and has considerable authority in the dispatch of military transportation. When travel is accomplished by military aircraft for an otherwise valid military or humanitarian purpose, incidental official travel by a volunteer Presidential representative can be accomplished concurrently and often at lower expense. Of course, military missions should not be mere shams used to provide transportation for nonmilitary and nonhumanitarian purposes.

Second, our comments are concerned only with situations where the travel involved is for an official purpose of the Presidency and where the traveling representative is acting on behalf of the President in a capacity which he or she may lawfully fill.

1. *Question:* Is it legal to use Executive Office appropriations to pay expenses of a volunteer agent of the President traveling on his behalf?

Answer: Yes, to the extent that the travel is for the official purposes of the the Presidency and can be met from funds already appropriated. See 3 U.S.C. § 102 (expense allowance); 3 U.S.C. § 103 (travel allowance of \$40,000 authorized, to be accounted for solely on the certificate of the President); and the "Salaries and Expenses" and "Unanticipated Needs" sections of the Executive Office Appropriations Act of 1977, Pub. L. No. 94-363, 90 Stat. 966, 968. Note that the "Salaries and Expenses" item appropriates \$100,000 for travel expenses necessary to the White House Office, which is to be accounted for solely on the certificate of the President. The appropriation for "Unanticipated Needs" is expressly made

. . . without regard to any provision of law regulating employment

and pay of persons in the Government service or regulating expenditures of Government funds

2. *Question:* Does it make any difference that this person is in fact a relative of the President?

Answer: No, if the travel is accomplished to perform an official purpose of the Presidency and if the person traveling may lawfully act in the capacity assigned by the President, his relationship to the President is irrelevant. In these limited circumstances, and where the relative is neither appointed to an impermissible office, personally compensated for the services rendered, nor granted authority which cannot be delegated to a person in his or her capacity, we find no statutory impediment to meeting his or her travel expenses incurred on behalf of the President. Of course, questions of propriety may well arise which do not involve purely legal considerations. In addition, Presidential relatives are ineligible for many sorts of Federal appointments.

3. *Question:* Is there any precedent for payment of these expenses by another Administration for family members to travel on official business?

Answer: Yes, Presidents from Franklin Roosevelt to Gerald Ford have regularly been represented by family members at various national and international activities. For example, President Ford once proposed to send members of his immediate family to represent him at the inauguration of President Lopez-Portillo of Mexico.

JOHN M. HARMON
Acting Assistant Attorney General
Office of Legal Counsel

March 7, 1977

**78-75 MEMORANDUM OPINION FOR THE COUNSEL
TO THE PRESIDENT**

**Presidential Authority—Legality of Proposed
Executive Order Requiring Public Disclosure of
Employee Financial Statements—Freedom of
Information Act (5 U.S.C. § 522)—Privacy Act
(5 U.S.C. § 552a)**

You have asked for our opinion on the question whether the President is prohibited from ordering the public disclosure of detailed financial statements filed by certain officers or employees of the Executive branch or of independent agencies. It is our conclusion that the President is prohibited from doing so without the consent of the persons involved.

I. Background

The Civil Service Commission was directed by § 403 of Executive Order 11222, 3 CFR 306 (1965), issued May 8, 1965, to prescribe regulations for the submission of statements of financial interests by such employees as the Commission might designate. The Commission's implementing regulations require statements to be filed by all employees paid at a level of the Executive Schedule, 5 U.S.C. §§ 5311 *et seq.* (1976); other employees classified at GS-13 or above pursuant to 5 U.S.C. § 5332 (1976), or those at a comparable pay level under other authority having procurement, grant, regulatory, or similar responsibilities; and certain employees classified below GS-13. 5 CFR 735.403 (1977).

At a minimum, an employee required to file must disclose the identity of his creditors, his real property interests and those of his immediate household, as well as the identity of companies or organizations with which the employee or a member of his immediate household is affiliated as an officer or employee or in which he has a financial interest through the ownership of securities or participation in pension or similar plans. *See* 5 CFR 735.401 (1977); Federal Personnel Manual, Chapter 735, Appendix D. The amounts of income earned from outside employment and the value of assets need not be reported. Section

405 of Executive Order 11222 expressly provides that the financial statements "shall be held in confidence, and no information as to the contents thereof shall be disclosed except as the Chairman of the Civil Service Commission may determine for good cause shown." See also 5 CFR 735.410 (1977).

We understand that consideration is being given to the issuance of an Executive order by the President that would revise the financial reporting provisions in Part IV of Executive Order 11222 in two principal respects.¹ First, the reports would be far more detailed than those presently filed. For example, employees would be required to report the value of their assets and liabilities, as well as those of their families; liabilities for mortgages and household expenses (which are presently omitted) would have to be included; and extensive reporting of the amounts of gifts, reimbursements, and outside income of the employee, his spouse, and minor children.² Second, the order would require that the statements be made available for public inspection, either in the employing agency or at a central location under the supervision of the Civil Service Commission.

II. Application of the Privacy Act

We assume for the purposes of this opinion that an Executive order requiring public disclosure of financial statements would constitute a reasonable regulation for the conduct of employees and is therefore within the ambit of the President's power under 5 U.S.C. § 7301 (1976).³ But the President's broad power under § 7301 has been clearly circumscribed by the subsequent enactment of the Freedom of Information Act and the Privacy Act, which together govern access to records relating to most Federal employees.

Each financial statement would contain information pertaining to the employee and the employee's spouse and minor children and would be retrievable, using the employee's name, from either a central file maintained by the Civil Service Commission or a separate set of files maintained by the employing agency. It seems evident, then, that an employee's financial statement would constitute a "record" contained in a "system of records" within the meaning of the Privacy Act. 5 U.S.C. §§ 552a(a)(4) and (5) (1976). Such a record may only be disclosed with the prior written consent of the individual to

¹The proposed order apparently would also rephrase the standard for determining who must file financial statements. Under the order, filing would be required of all persons classified at GS-16 or above or at a comparable pay level under other authority, and any other employee in a position where filing is necessary in order to protect the integrity of the Government and to avoid involvement in possible conflicts of interest. It is not clear whether this standard is intended to bring more employees under the filing system or fewer.

²Assets, liabilities, and items of income would be reported within broad categories of value, rather than in specific dollar terms.

³We also assume that public disclosure would not impermissibly infringe on whatever constitutionally based right of privacy there may be in one's financial affairs. See, e.g., *Montgomery County v. Walsh*, 274 Md. 489, 336 A. (2d) 97 (1975), appeal dismissed, 424 U.S. 901 (1976); *Stein v. Howlett*, 52 Ill. 2d 570, 289 N.E. (2d) 409 (1972), appeal dismissed, 412 U.S. 925 (1973); *Fritz v. Gorton*, 83 Wash. 2d 275, 517 P. (2d) 911 (1974), appeal dismissed, 417 U.S. 902 (1974).

whom the record pertains, unless one of the exceptions from the consent requirement specifically identified in 5 U.S.C § 552a(b) (1976) is satisfied. Of the eleven conditions of disclosure, only two are even arguably relevant here—that which permits disclosures required to be made under the Freedom of Information Act, 5 U.S.C. § 552a(b)(2) (1976), and that which permits disclosure for a “routine use” of the record which has been included in the agency’s published notice pertaining to that system of records, 5 U.S.C. § 552a(b)(3) (1976). We do not believe that public disclosure of the financial statements would be permissible under either of these provisions.

A. *Disclosures under the Freedom of Information Act.* Under the Freedom of Information Act, an agency must make an agency record available to “any person,” 5 U.S.C. § 552(a)(3) (1976), unless it is specifically exempt from release under subsection (b). The relevant provision of subsection (b) is exemption 6, exempting from disclosure “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Thus, financial disclosure statements are not *required* to be made available to the public under the Freedom of Information Act—and therefore may not be disseminated under section (b)(2) of the Privacy Act—if to do so would constitute “a clearly unwarranted invasion of personal privacy.”

As stated in the Senate report on the bill later enacted as the Freedom of Information Act, the phrase just quoted enunciates a policy that requires “a balancing of interests between the protection of an individual’s private affairs from unnecessary public scrutiny, and the public’s right to government information.” S. Rept. No. 813, 89th Cong., 1st sess. 9 (1965). *See, Department of the Air Force v. Rose*, 425 U.S. 352, 372-73, 380 (1976); *Wine Hobby USA, Inc. v. United States Internal Revenue Service*, 502 F. (2d) 133 (3d Cir. 1974); *Getman v. National Labor Relations Board*, 450 F. (2d) 670 (D.C. Cir. 1971). This balancing process calls for a determination that privacy interests are implicated, identification of the public interest in release of the information, and a weighing of the public interest against the anticipated seriousness of the invasion of privacy.

Privacy interests protected by exemption 6 are unquestionably implicated in the release of information about an individual’s personal finances. In the Attorney General’s view,

[t]he privacy interest does not extend only to types of information that people generally do not make public. Rather, in the present context it must be deemed generally to include information about an individual which he could reasonably assert an option to withhold from the public at large because of its intimacy or his family. [Attorney General’s Memorandum on the 1974 Amendments to the Freedom of Information Act 9-10 (1975).]

See, e.g., Wine Hobby, supra, at 136-137 and n. 15; *Getman v. National Labor Relations Board, supra*, at 674-675. One’s family finances certainly constitute “information that people generally do not make public” and about which an

individual may reasonably “assert an option to withhold from the public at large.”

The countervailing public interest in financial disclosure derives from the need to prevent real and apparent conflicts of interest among Government employees. Specifically, it appears that public disclosure is intended to permit the interested public to determine for itself whether a given employee has a conflict of interest, rather than leaving this determination entirely to agency officials who may take a narrow view of what constitutes a conflict of interest. It might also be thought that disclosure of financial statements will enable the public to assess the performance of agency officials responsible for preventing conflicts of interest among their employees. The proposal may proceed on the additional premise that the mere possibility that his financial statement will be inspected by an enterprising press or interested party in a specific proceeding, and the prospect of public embarrassment that may result, will deter an employee from having any affiliations or interests that could even remotely give rise to an allegation that he has a real or apparent conflict of interest. Similarly, the prospect of public scrutiny may cause agency officials to examine financial statements more closely.

The typical exemption 6 case involves a specific request for a limited amount of information which may pertain to certain individuals, not a blanket request for release. In perhaps the leading court of appeals case applying the balancing test under exemption 6, the court held that in the context of a narrow request, a court may properly balance the particular privacy interest to be affected against the public interest in the specific disclosure. *Getman v. National Labor Relations Board*, *supra*, at 674-677 and n. 10. Also under *Getman*, “a court’s decision to grant disclosure under exemption (6) carries with it an implicit limitation that the information, once disclosed, be used only by the requesting party and for the public interest purpose upon which the balancing was based.” *Id.* at 677 n. 24. *See also, Wine Hobby*, *supra*, at 136-137. If the information is disclosed only to the requester, who will not in turn release it to the public at large in a manner that reveals the identity of the persons involved, the resulting invasion of privacy is far less than if the information is made available to any member of the public without regard to the uses to which it will be put.

However, the balancing test in this context cannot focus on the merits of a specific request for a given financial statement because the proposed revision of Executive Order No. 11222 contemplates wholesale release of financial statements without regard to the intentions of any particular requester. The invasion of privacy and the public interest in disclosure must therefore be considered in relation to the possible release of information to the public at large.

If financial statements are available to the public at large, it is our view that the potential invasion of privacy is significant. There can be no assurance that the information in the statements will not be used to solicit contributions or to promote commercial purposes, *see, Wine Hobby*, *supra*, or to identify likely targets for theft. *Cf. H. Rept. No. 1497*, at 11. Perhaps more significantly, however, anyone who had the inclination—neighbors, coworkers—could

obtain detailed information about how an individual managed his affairs. As Mr. Justice Powell pointed out in his concurring opinion in *California Bankers Association v. Shultz*, 416 U.S. 21 (1974), upholding the constitutionality of a Federal statute and regulations requiring banks to report certain financial transactions of their customers:

In their full reach, the reports apparently authorized by the open-ended language of the Act touch upon intimate areas of an individual's personal affairs. Financial transactions can reveal much about a person's activities, associations and beliefs. At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy. Moreover, the potential for abuse is particularly acute where, as here, the legislative scheme permits access to this information without invocation of the judicial process. In such instances, the important responsibility for balancing societal and individual interests is left to unreviewed executive discretion, rather than the scrutiny of a neutral magistrate. [416 U.S. at 78.]

Aside from its mere exposure, public financial disclosure "is almost certain invitation to demagogic political attack of one kind or another—upon the poor man as one who cannot manage even his own economic affairs, and upon the rich man as one who is privileged and has lost contact with the mass of the citizenry." *Association of the Bar of the City of New York, Conflict of Interest and Federal Service*, at 255 (1960). Moreover, even where inspection takes place solely to uncover possible conflicts of interest, what constitutes a real or apparent conflict of interest would legitimately be the subject of public debate. Thus, even though agency officials responsible for determining what constitutes a conflict of interest under applicable statutes and regulations may have concluded that there was no legal prohibition against the holding of certain assets, the employee may nevertheless be subjected to criticism in the press and his community for owning them. Exemption 6 was intended to protect persons from such embarrassment and disgrace. *Department of the Air Force v. Rose*, 425 U.S. 352, 377 (1976).

Of course, we cannot say that such uses and abuses of the financial statements will occur with regularity; but they are certainly more than "mere possibilities," *Department of the Air Force v. Rose*, at 380-381 and n. 19, and there is no protection against them. We are not aware of any case requiring public release of personal information under exemption 6 where there would be anything approaching the degree of potential for abuse and harm involved here. Nor, in fact, are we aware of any case that has upheld the release of information concerning an individual in which the detail of disclosure and the degree of the resulting invasion of privacy is at all comparable to that contemplated here, even with protections against wider dissemination. Typically, when detailed facts are released, the individual's name and other identifying characteristics are deleted. See, e.g., *Department of the Air Force v. Rose*; *Rural Housing Alliance v. Department of Agriculture*, 498 F. (2d) 73, 78 (D.C. Cir. 1974). When the individual's identity is disclosed, the invasion of privacy is ordinarily

limited to the prospect of a single contact by an outside party, *Getman v. National Labor Relations Board*, *supra*, or revelation of an isolated fact that would not furnish insights into the person's private life generally. *Id.*; *Robles v. Environmental Protection Agency*, 484 F. (2d) 843 (4th Cir. 1973).

Weighing against this potential invasion of privacy is the asserted public interest in preventing conflicts of interest and in reassuring the public regarding the integrity of the Government. Insofar as actually preventing conflicts of interest is concerned, public disclosure can accomplish this goal only indirectly. There is apparently no plan to eliminate the review of financial statements by agency officials familiar with the employee's work. That review of statements filed by officials familiar with the applicable statutes and regulations and nature of the work of the persons who file—as opposed to haphazard review by members of the press and public⁴—will continue to be the principal prophylaxis against conflicts of interest. Because of this existing and probably more reliable alternative, public disclosure cannot be thought to be essential to prevent conflicts of interest in most cases. *Compare, Wine Hobby* at 137 n. 17; *Rural Housing Alliance v. Department of Agriculture*, at 77-78. And even if public disclosure would result in the identification of a number of conflicts of interest that agency officials had overlooked, this would have been accomplished at the expense of invading the privacy of numerous employees about whom no question will be raised. In our view, the significant invasion of privacy entailed in order to accomplish this incremental result would be "clearly unwarranted."

The more substantial argument for public disclosure appears to be that it is necessary to restore the public's confidence in Government by exposing the holdings of employees and agency review of financial statements to public scrutiny. But the decision to further the public interest by purposefully sacrificing the privacy of personal information is fundamentally inconsistent with the thrust of exemption 6. The Senate report indicates that privacy interests were not to be wholly disregarded in this manner.

It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure. [S. Rept. No. 813, *supra*, at 3.]

As we have pointed out, the courts construing exemption 6 have adhered to this purpose and demonstrated a meticulous concern for personal privacy to the extent possible even when there is a legitimate public interest in disclosure. *See, e.g., Department of the Air Force v. Rose*, at 380-381. For this reason, we do not believe that the extraordinary invasion of privacy entailed in the release

⁴The fact that many statements will probably not be inspected by members of the public at all does not affect the invasion of privacy or the attendant anxieties in making a statement available for public inspection.

of employees' financial statements to the public is consistent with the spirit of exemption 6.

We recognize, of course, that there has recently been rather broad-based support for some type of public financial disclosure by top-level Federal officials. Title III of S. 495, 94th Cong., 1st sess. (1975), which passed the Senate in July 1976 and appeared to have considerable support in the House, would have required detailed public financial disclosure by all officers or employees paid at the rate established for GS-16 or above, and comparable pay levels. President Ford proposed legislation closely paralleling S. 495 in this respect and, of course, President Carter supports public financial disclosure as well. In addition, public interest groups, such as Common Cause, continue to press for public disclosure, and a number of State and local governments have adopted financial disclosure requirements by legislative or executive action.⁵

Against this political climate, it might be argued that the public interest in financial disclosure now outweighs the substantial invasion of the privacy of the officials who would be affected by the proposed Executive order and that the release of financial statements would therefore not constitute a "clearly unwarranted invasion of personal privacy." But we are not concerned here with the current desirability of public financial disclosure as a matter of policy. The issue here is whether the balance must be struck in favor of public disclosure under a statutory standard adopted by Congress in 1966 to protect personal privacy. That standard is necessarily general in view of the wide range of situations in which it must be applied. But the generality of the invasion of privacy against the public interest in release on a case-by-case basis should not obscure the fact that exemption 6 was intended to draw a relatively fixed line between the types of information that, in general, have to be released and those that do not. In other words, we do not believe that exemption 6 was designed to cut agency officials and courts entirely free from all moorings and to permit them to apply their own conception of the proper balance between private and public interests at a given point in time. Viewed in this light, the case-by-case balancing required under exemption 6 is merely the sifting of the particular facts to determine how the relatively fixed standard under that exemption applies. Thus, to the degree that the recent sentiment in favor of public financial disclosure by Federal employees represents a shift in public thinking since the passage of the Freedom of Information Act in 1966 regarding the relative weight of the privacy interests of Government employees and the public interest in financial disclosure, that sentiment is largely beside the point here.⁶

⁵In 1978 Congress passed and President Carter signed the Government in Ethics Act, Pub. L. 95-521, 92 Stat. 1836, Title II of which provides for public disclosure of executive personnel financial reports.

⁶We are not aware that Congress has given specific consideration to whether public disclosure of financial statements would be consistent with the spirit of exemption 6. But its views on this issue, some eleven years after the Act was passed, would not in any event be binding on a court or on the Executive branch in determining what the exemption requires. See, *United States v. Southeastern*

(Continued)

The fact that Congress intended to adopt an identical standard in exemption 6 emerges quite clearly from the legislative history of the provision. For example, the House report states:

The limitation of a "clearly unwarranted invasion of personal privacy" provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual. [H. Rept. No. 1497, 89th Cong., 2d sess. 11 (1966).]

The implication, of course, is that exemption 6 itself "provides a proper balance," which must be applied in particular cases, and that "files the disclosure of which might harm the individual" are to be excluded from disclosure in all events.⁷

This view of exemption 6 also finds support in the treatment Congress expected to be accorded the kinds of files it specifically had in mind in enacting the exemption. The Senate report states:

Such agencies as the Veterans Administration, Department of Health, Education, and Welfare, Selective Service, etc., have great quantities of files, the confidentiality of which has been maintained by agency rule but without statutory authority. *There is a consensus that these files should not be opened to the public*, and the committee decided upon a general exemption rather than a number of specific statutory authorizations for various agencies. It is believed that the scope of the exemption is held within bounds by the use of the limitation of a "clearly unwarranted invasion of personal privacy."

* * * * *

. . . The application of this policy should lend itself particularly to those Government agencies where persons are required to submit vast amounts of personal data usually for limited purposes. For example,

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Cable Co., 392 U.S. 157, 170 (1968); *Waterman S.S. Corp. v. United States*, 381 U.S. 252, 269 (1965); *United States v. Philadelphia National Bank*, 374 U.S. 321, 348-349 (1963). Thus, recent congressional action favoring public financial disclosure is not entitled to any particular weight in assessing the public interest factor under present law.

⁷Similarly, the Senate report indicates that the Freedom of Information Act as a whole, and the section dealing with personal privacy in particular, provides "a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure." S. Rept. No. 813, *supra*, at 3 (1965). This too suggests that the "formula" in exemption 6 itself balances all interests, albeit in a general way.

It is true that in *Department of the Air Force v. Rose*, *supra*, the Supreme Court, in holding that all "personnel files" were not exempt from disclosure without regard to whether the release of certain information from those files would constitute a "clearly unwarranted invasion of personal privacy," rejected the view that Congress had itself struck the balance as to "personnel files" and confined the courts to striking the balance only as to "similar files" under exemption 6. 425 U.S. at 352. But the fact that Congress has not struck a balance with respect to a whole category of files does not mean that Congress has not established a fixed standard for the courts to apply with respect to types of information in those files.

health, welfare, and selective service records are highly personal to the person involved, yet facts concerning the award of a pension or benefit should be disclosed to the public. [S. Rept. No. 813, *supra*, at 9 (emphasis added).]

From this passage, it seems clear that Congress intended that personal data compiled by agencies in order to determine a person's eligibility for a pension or benefit were not to be made available to the public.⁸ This would be true, it seems to us, irrespective of any asserted public interest in the release of such information to enable the public to scrutinize the performance of its public officials in awarding pension and welfare benefits.

In our view, the distinction between the public availability of information regarding the payment of a benefit itself and the privacy of the underlying personal details supporting the award suggests that a similar distinction should be drawn between the facts surrounding a Federal employee's position — his "benefit" — and the underlying personal details which shed additional light on his fitness to perform his duties. And indeed such a distinction has been drawn as a matter of practice.

When the Freedom of Information Act was passed, the Civil Service Commission had adopted a policy, which Congress apparently approved, that the names, position titles, grades, salaries, and duty stations of Federal employees are public information. *See* H. Rept. No. 1497, at 6. *See also* Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 37 (1967). This policy has remained in effect ever since and is embodied in the Commission's regulations issued under the authority of the Freedom of Information Act. *See* 5 CFR Part 294, Subpart G. The regulations state flatly that information other than that specifically authorized to be disclosed under the regulations "is not available to the public," 5 CFR 294.702(f)(1977), without regard to any asserted public interest in the disclosure of other information in the files. It may be that a court would require the disclosure of some other, relatively harmless information from a personnel file, if the information was reasonably segregable or was released in a form that did not reveal the identity of the employee involved. But we are confident that a court would approve the essentials of the Commission's policy of revealing only the specific facts directly relating to an employee's position but not any underlying personal information, especially in view of Congress' apparent approval of this policy. *Cf.*, *Campbell v. Civil Service Commission*, 539 F. (2d) 58 (10th Cir. 1976); *but see, Columbia Packing Co. v. Department*

⁸The Supreme Court appeared to suggest that the passages in the Senate and House reports referring to files maintained by the Department of Health, Education, and Welfare, the Selective Service, and the Veterans Administration might permit disclosure of the facts concerning the award of a pension or benefit only if the recipient was not identified. *Department of the Air Force v. Rose*, *supra*, at 375-376. However, the exception may have been intended to permit the disclosure of the identity of the recipient as well, as may be done under a special statute applicable to the Veterans Administration, 38 U.S.C. § 3301(6). *See* Hearings on H.R. 5012 before a Subcommittee of the House Government Operations Committee, 89th Cong., 1st sess. 262 (1965).

of Agriculture, 417 F. Supp. 651 (D. Mass. 1976).⁹ We are confident too that a court would maintain the basic privacy of information in personnel folders even against a claim that the public is entitled to receive that information in order to determine for itself whether the employee was qualified to be appointed to his position, just as it would reject a similar claim of a right of access to the files of recipients of welfare or veterans' benefits.

The financial statements filed by Federal employees under Executive Order No. 11222 are not part of the employees' personnel folders and would not be under the proposed revision of Part IV of that order. But the limitations on the disclosure of information from personnel folders are highly instructive regarding the protection given privacy interests of Federal employees under the Freedom of Information Act generally. The analogy to personnel information is especially apt here because the detailed financial reports filed under Executive Order No. 11222 are specifically intended to provide a basis for assessing the suitability of a person to hold office or participate in certain decisions, just as is information in a personnel folder. Thus, the legislative history of exemption 6 furnishes additional support for the conclusion reached earlier in this opinion that information contained in financial statements filed pursuant to the proposed revision of Part IV of Executive Order No. 11222 is not the kind of information that Congress intended to be made available to the public under that exemption.¹⁰

B. Applicability of 5 U.S.C. § 552a (b) (3): Disclosure as a "routine use." The other arguably permissible basis for release of employees' financial statements without their consent might be the routine use exception in subsection (b)(3) of the Privacy Act, 5 U.S.C. § 552a(b)(3) (1976). A "routine use" is defined in § 552a(a) as a use of a record "for a purpose which is compatible with the purpose for which it was collected." The argument would apparently be that if the information contained in a financial statement is collected for the purpose of making it available to the public, then making it available to the public is obviously compatible with the purpose for which it was collected. We do not believe that the Privacy Act permits this kind of bootstrapping.

⁹The Senate Report on the Privacy Act states that certain personal information, such as names, salaries, and duty stations of Federal employees, should continue to be made public. S. Rept. No. 93-1183, 93d Cong., 2d sess. 13 (1974). This reflects continuing congressional approval of the Commission's policy and, by negative implication, suggests that other information should not be made public.

¹⁰The longstanding confidentiality of financial statements filed pursuant to the present Part IV of Executive Order No. 11222 also supports the view that the President could not properly order such statements to be made public under the revised order. We have been informally advised by the Office of the General Counsel of the Civil Service Commission that, insofar as that Office is aware, it is the uniform practice of Federal agencies to deny requests for access to such statements, although the issue has apparently not arisen too often. It is true that Executive Order No. 11222 presently requires that financial statements be kept confidential, but a pledge of confidentiality cannot in itself preclude the release of information that is not otherwise protected by exemption 6. See, *Robles v. Environmental Protection Agency*, 484 F. (2d) at 846-847; *Ackerly v. Ley*, 420 F. (2d) 1336, 1339-1340 n. 3 (D.C. Cir. 1969).

As an initial matter, we have some doubt that making financial statements available to the public may properly be termed the "purpose" for which such statements would be collected. The true purpose, it seems to us, is to discover and hopefully prevent possible conflicts of interest. Public disclosure is simply an additional means by which it is hoped this purpose will be accomplished. Given the marked difference in terms of the values the Privacy Act was designed to protect between preventing conflicts of interest through confidential agency review of financial statements and preventing conflicts of interest through public inspection of those statements, we question whether public disclosure is "compatible" with the purpose of preventing conflicts of interest.

The more fundamental difficulty with the argument is that the routine use exception was never intended by Congress to be an independent vehicle for disclosing information to the public at large. Under the Privacy Act, public availability of personal information continues to be governed by the Freedom of Information Act; it was precisely for this reason that exception (b)(2), permitting disclosure without the consent of the subject if required under that Act, was included in the Privacy Act. The routine use exception was included because of the practical necessity of permitting agencies to make the myriad of conventional nonpublic transfers of records in the day-to-day operation of the Government without first obtaining the consent of the individual to whom the records pertain. To permit an agency to ignore the limitations on public dissemination of personal information contained in the remainder of the Privacy Act and in exemption 6 of the Freedom of Information Act simply by publishing a notice designating a certain public release as a routine use would, in our view, reduce the protection of the Privacy Act to an empty promise.

The rather limited scope of the routine use exception and its inapplicability in the present situation emerge quite clearly from the legislative history of the Privacy Act. The Senate bill, S. 3418, 93d Cong., 2d sess. (1974), did not contain a specific exception for routine uses as such. But §§ 202(a) and (b) provided that an agency could disseminate information to persons outside the agency only if the individual gave his consent, the recipient had adopted rules for maintaining the confidentiality of the information, and the information would be used by the sender or recipient only for purposes set forth in the published notice. See *Source Book on Privacy, Legislative History of the Privacy Act of 1974*, House and Senate Committees on Government Operations, 94th Cong., 2nd sess. 138 (Joint Comm. Print 1976) [hereafter *Source Book*]. The third requirement, of course, parallels the provision for publication of routine uses under the Act as passed. Obviously, mandatory public disclosure of financial statements would have been impermissible under this provision because of the requirements of consent and assurances of confidentiality.

Moreover, the Senate report makes clear that the power of agencies to make disseminations outside the agency, even with the subject's consent, was not to be augmented by the bill:¹¹

¹¹In describing the section of the bill that would have required that employees refrain from disclosing personal data *within* the agency other than to persons who had a need for them in the course

(Continued)

. . . [Including the three requirements noted above] prevents an agency from merely citing a notice of intended "use" as a routine and easy means of justifying transfer or release of information. Administration spokesmen were concerned that this might expand interagency dataswapping. By allowing the agency to cite a "use" disclosed by its published notice, the bill is not intended to broaden dissemination and interagency transfer where they must be pursuant to or are required or limited by over 150 Federal statutes. [S. Rept. No. 93-1183, 93d Cong., 2d sess. 69 (1974).]

At the same time, the bill provided that disclosures made pursuant to the Freedom of Information Act were to be exempt from the requirements of consent, assurances of confidentiality, and conformity to published notices of use, as well as certain accounting provisions. § 202(c). This exception was included because of objections from the press that the restrictions might defeat the statutory right of access under the Freedom of Information Act. S. Rept. No. 92-1183, at 71. Senator Ervin, the sponsor and floor manager of the legislation, stated that the effect of these and other provisions in the Senate bill was to prevent agency employees "from making [information] available outside the agency without the consent of the individual and proper guarantees for confidentiality, unless pursuant to open records laws or unless it is for certain law enforcement or other purposes which are cited in the bill." 120 Cong. Rec. 36892 (1974). Because, as shown earlier in this opinion, public disclosure of financial statements is not permissible under the applicable "open records law"—i.e., of the Freedom of Information Act—and because none of the other exceptions in the Senate bill would have applied, such disclosure could not have been accomplished under the Senate bill.

Unlike the Senate bill, the House bill, H.R. 16373, 93d Cong., 2d sess. (1974), contained a special exception from the consent requirement for disclosures made for routine uses of information. Source Book, at 279. The House report states that the consent requirement was perhaps the most important provision. H.R. Rept. No. 93-1416, 93d Cong., 2d sess. 13 (1974). An exception from the consent requirement was believed to be necessary for routine transfers, however, so as not "to impede the orderly conduct of government or delay services performed in the interests of the individual." *Id.* The importance given the consent requirement and the evidence just quoted suggest that the routine use exception was intended to apply to those types of disclosures of an unexceptional nature to which the individual would be unlikely to have any reason or basis to object.

(Continued)

of their duties, the Senate report expressly stated that this was designed to cover "reporting personal disclosures contained in personnel and medical records, including questionnaires containing personal financial data filed under the ethical conduct programs of the agency." S. Rept. No. 93-1183, *supra*, at 51 (emphasis added). If the Senate committee was concerned about gratuitous disclosures of this type within the agency, it seems reasonable to suppose that the committee would not have expected such information to be released outside of the agency where there could be no assurances that it would be kept confidential.

The House bill did not have a separate exception permitting disclosures required under the Freedom of Information Act. All individually identifiable information in Government files would therefore have been exempt from disclosure under that Act and could have been made available to the public only pursuant to agency rules. H.R. Rept. No. 93-1416, at 13. The committee report makes clear that agencies were authorized to "allow by published rule only those [public] disclosures which would not violate the spirit of the Freedom of Information Act by constituting 'clearly unwarranted invasions of personal privacy' " under exemption 6. Because public disclosure of financial statements "would violate the spirit of the Freedom of Information," such disclosure could not have been accomplished as a routine use of financial statements under the House bill.¹²

The compromise bill eventually enacted as the Privacy Act contains both the Senate's express exception from the consent requirement for disclosures required by the Freedom of Information Act and the House's express exception for routine uses. There is no indication in the brief debates on the compromise legislation that Congress intended to depart from the approach taken in the Senate and House bills in making public disclosures of private information to be governed exclusively by the Freedom of Information Act. To the contrary, the staff analysis of the compromise bill introduced in the Congressional Record by Senator Ervin and Representative Moorhead states that the exception for disclosures required under the Freedom of Information Act was intended to preserve the *status quo* with respect to the public disclosure of personal information under exemption 6 of that Act, and it describes the exception for routine uses in a way that does not seem to apply to public disclosures at all:

The compromise definition should serve as a caution to agencies to think out in advance what uses it will make of information. This act is not intended to impose undue burdens on the transfer of information to the Treasury Department to complete payroll checks, the receipt of information by the Social Security Administration to complete quarterly posting of accounts, or other such housekeeping measures and necessarily frequent interagency or intra-agency transfers of information. It is, however, intended to discourage the unnecessary exchange of information to another person or to agencies who may not be as sensitive to the collecting agency's reasons for using and interpreting the material. [120 Cong. Rec. 40881 (1974); *Id.* at 40406.]

¹²It is also significant that aside from the reference to release under the Freedom of Information Act, all other references to the routine use exception during consideration of the House bill involved limited transfers to other Federal agencies, State and local governments, and private companies participating in the industrial security program. See e.g., 120 Cong. Rec. 36957, 36967, 36645, 36655 (1974). This of course reinforces the conclusion in the text that public disclosure under the routine use exception was to conform to the Freedom of Information Act.

The release of the financial statements of Federal employees to members of the public who may not be familiar with the meaning of applicable conflict of interest laws and regulations and without regard to the intended use of the statements would be contrary to the purpose of Congress, as stated in the analysis, "to discourage the unnecessary exchange of information to other persons . . . who may not be as sensitive to the collecting agency's reasons for using and interpreting the material."¹³

III. Conclusion

For the reasons given in Part A of this memorandum, we conclude that the public release of financial statements that would be filed under a proposed revision of Part IV of Executive Order No. 11222 is not "required" under the Freedom of Information Act, and such release therefore may not be undertaken pursuant to 5 U.S.C. § 552a(b)(2) (1976). As explained in Part B, the exception for routine uses in 5 U.S.C. § 552a(b)(3) (1976) was not intended to be an independent means of making public disclosures of information, and that exception therefore cannot furnish the basis for public disclosure of employees' financial statements.

JOHN M. HARMON
Acting Assistant Attorney General
Office of Legal Counsel

¹³Elsewhere, Representative Moorhead stated that while the routine exception was designed to permit ordinary and necessary transfers of information, the bill was "intended to prohibit gratuitous, and ad hoc disseminations for private or otherwise irregular purposes." 120 Cong. Rec. 36967 (1974). Public disclosure of financial statements is, in general, intended to further the public interest in preventing conflicts of interest, but of course any individual inspection of a statement is "ad hoc," and, because of the absence of effective restrictions on use, may be for "private or otherwise irregular purposes."

March 22, 1977

**78-76 MEMORANDUM OPINION FOR THE COUNSEL
TO THE PRESIDENT**

**The White House Office—Expenditure of Appropriated
Funds—Handling Mail for Members of the President’s
Family**

This is in response to your request for our views on whether the White House is authorized to pay the costs of processing mail addressed to members of the President’s family other than Mrs. Carter. We understand that staff salaries and related costs of handling Mrs. Carter’s mail are paid out of funds appropriated for the White House Office.

It is our opinion that White House Office funds may be used for handling mail addressed by the general public to members of the family who reside in the White House, and perhaps for the President’s son who does not live in the White House and the President’s mother as well.

Funds appropriated for the White House Office may be used for salaries and other “necessary” expenses of that Office. Expenses are thought to be necessary if they are reasonably related to the general governmental functions for which the funds were appropriated. 52 Comp. Gen. 504 (1973); 50 Comp. Gen. 534 (1971). It seems reasonable to conclude that mail sent to members of the President’s family because of their relationship to the President should be answered in order to respond to the writers’ concerns and to demonstrate that the White House and the First Family—who are in a sense representatives of the President—are interested in them. In our view, this function is appropriately related to the operation of the White House.

The nexus between the regular governmental functions of the White House Office and its handling of mail of the President’s family is particularly strong for those family members who reside in the White House, because they are presumably more closely identified in the public’s mind with the President’s official duties. The White House Office appropriation is available to assist the President in performing those duties, traditionally including matters relating to the President’s household. Therefore, that appropriation does, in our view,

reasonably cover the expenses of handling mail of members of the household.* It is presumably on this basis that the costs of handling Mrs. Carter's mail are paid from Government funds, and we see no reason to distinguish other members of the President's household in this regard. We note, too, that it is much the same rationale that permits the expenditure of Government funds for official travel by members of the President's family.

The nexus to the official operations of the White House Office would appear to be less direct when the family members involved are not part of the President's household in the White House. However, in our view, since such family members receive mail because of their relationship to the President and are perceived to be acting on his behalf to a degree when they reply to the letters, the processing of their mail is also sufficiently related to the purposes for which funds are appropriated to the White House Office to permit those funds to be used in this fashion.

JOHN M. HARMON
Acting Assistant Attorney General
Office of Legal Counsel

*We believe that on this same theory, Mrs. Carter may assign a member of her staff, paid out of White House Office appropriations, to be responsible for scheduling the affairs of other members of the family who reside in the White House.

April 11, 1977

**78-77 MEMORANDUM OPINION FOR THE COUNSEL
TO THE PRESIDENT**

**Assumption by People's Republic of China of Expenses
of U.S. Delegation—Constitution (Art. I, § 9, cl. 8)**

You have asked for our opinion as to whether there is any legal obstacle to the acceptance, by members of an official delegation who will be visiting the People's Republic of China, of lodging, meals, and transportation at the expense of the Government of that country. The delegation will include Members of Congress and the President's son.¹

Article I, Section 9, Clause 8 of the Constitution provides:

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

The purpose of the prohibition against the receipt of gifts is to prevent foreign influence over officers of the United States. 2 Farrand, *The Records of the Federal Convention of 1787* (1937), at 389; 24 Op. A.G. 116 (1902).

Congress has enacted legislation to implement the constitutional provision. See 5 U.S.C. § 7342. Section 7342 allows the acceptance of gifts from foreign governments by Federal officers and employees in two limited circumstances: (1) where the gift is of minimal value² and tendered or received as a souvenir or mark of courtesy; and (2) where the gift is of more than minimal value but its refusal would be likely to cause offense or embarrassment or otherwise adversely affect the foreign relations of the United States. In the former situation the recipient may retain the gift, but in the latter it is deemed to have been accepted on behalf of the United States and must be deposited with the

¹During a debate in the House on April 6, 1977, Congressman Brademas stated that the official expenses of Members of Congress would be paid from counterpart funds of the United States. 123 Cong. Rec. H. 3145. Representative Brademas' office confirmed this by telephone. To the extent United States funds are used, there would appear to be no legal problems.

²"Minimal value" is defined in applicable regulations as less than \$50. 22 CFR 3.3(e).

State Department's Chief of Protocol for use and disposal as property of the United States under implementing State Department regulations, 22 CFR, Part 3. Although the statutory provision does not expressly so state, it is implicit that any gift not covered by either of these two consent provisions may not be accepted.

The limitations on acceptance of gifts from foreign governments apply to Members of Congress and their staffs who will make the trip to China, as well as Executive branch personnel traveling with the party. *See* 5 U.S.C. §§ 7342(a)(1)(A) and (E); 22 CFR 3.3(a). The statute also applies to a member of the family and household of any of the officials covered by the statute. 5 U.S.C. § 7342(a)(1)(F). Since the statute applies to the President, 5 U.S.C. § 7342(a)(1)(D), the President's son and his family are also subject to the restrictions on the receipt of gifts from foreign governments.

However, we do not believe that the constitutional and statutory provisions just discussed are to be read to prohibit the contemplated arrangements for the Chinese Government to assume the expenses of the members of the delegation. We take this position despite the breadth of the constitutional language that "no Person . . . shall . . . accept of any present . . . of any kind whatever" Although the term "Present" might appear to connote a tangible item, we believe that a foreign government's furnishing of travel and subsistence to an individual officer of the United States would be prohibited by the Constitution as well.³ Similarly, it is our opinion that travel and subsistence furnished to an individual by a foreign government would constitute a "gift" under the statute. *See* 5 U.S.C. § 7342(a)(3). Nevertheless, in the present case we do not believe that the "present" or "gift" of travel, lodging, and food will be "accepted" by individual members of the delegation within the contemplation of the Constitution or the statute.

The trip is being made by an official delegation, not by individual Members of Congress or Executive branch employees travelling on their own behalf. Food, lodging, and travel will be accepted by individuals as members of the official delegation. In this sense, the hospitality is extended as a diplomatic courtesy to the United States Government. Moreover, if the Chinese Government did not assume these expenses, they presumably would be paid for out of funds appropriated to the Congress and to the Executive branch. Thus, it appears that the real beneficiary, in purely monetary terms, of any gift or present involved is the United States Government, not individual members of the delegation.

This is an important distinction, because the constitutional prohibition has been construed to prohibit only gifts made to individual officials, not gifts made to the United States Government. For example, the cited opinion of the Attorney General (24 Op. A.G. 116) indicated that gifts of portraits to be presented to the Navy Department and the Naval and Military Academies could

³The additional phrase "of any kind whatever" indicates that the clause should be given a broad construction.

be accepted on the ground that they were *made to the Government*. The statute implementing the constitutional prohibition suggests this same conclusion in providing that gifts of more than minimal value given to an individual employee are deemed to have been accepted on behalf of the United States. See 5 U.S.C. § 7342(c). We see no reason why the distinction between presents given to individuals and presents given to the United States should not apply to official diplomatic travel, such as that involved in the present case.

In this connection, we have been advised by the State Department's Assistant Legal Adviser for Management (which has responsibility for advising the Chief of Protocol on questions arising under the foreign gifts statute) that 5 U.S.C. § 7342 has not been construed to prohibit a foreign government from paying expenses of Government employees traveling to another country if the agency approves the arrangement in advance for an official agency mission. Presumably this same rationale would apply to trips by Members of Congress where there has been an appropriate determination that the trip is official.

We were also informed that the Comptroller General advised Speaker Albert in an unpublished letter that members of a previous congressional delegation to China could be furnished the same general type of services as those at issue here on the theory that the real benefit was to the United States Government rather than to individuals.⁴ The Comptroller General's letter reportedly placed particular emphasis on the diplomatic considerations involved.⁵

The distinction drawn in the past between travel and subsistence furnished to individuals and that in effect furnished to the United States Government is, in our view, a reasonable construction of the constitutional and statutory provisions. In situations in which the individual official's own agency would pay expenses if the foreign government did not, the official in theory receives no personal benefit from the foreign government. The purpose of preventing foreign influence over officials of the United States that may result from receipt of personal benefits is therefore not directly served by prohibiting the acceptance of the foreign government's hospitality. Per diem payments should of course be reduced or eliminated in such a case to the extent necessary to offset any benefits furnished by the foreign government.

We recognize that a foreign government's invitation for a Member of Congress or other officer or employee of the Federal Government to make what is termed an "official" visit at the other country's expense could in itself carry

⁴During the House floor debate regarding the present trip, Representative Rhodes stated that when he accompanied Speaker Albert on a trip to China at least some of the expenses were borne by the Chinese Government. 123 Cong. Rec. H. 3145 (daily ed., April 6, 1977). This was apparently the same trip.

⁵Representative Brademas mentioned the Comptroller General's ruling on the House floor on April 6, but stated that the ruling was "the law was not violated by reciprocal expense arrangements"—presumably meaning mutual agreements under which the host country pays the expenses of persons visiting from the other country. There may be such an arrangement with China, but we do not believe that the reciprocity element is necessary under the theory set forth herein.

the seeds for the type of foreign influence the constitutional and statutory provisions were designed to prevent.⁶ For this reason, it would be consistent with the spirit of the constitutional and statutory restrictions for the United States Government to insist on paying the expenses of official travel abroad whenever possible, even where payment by a foreign government could legitimately be characterized as a gift to the United States rather than to the individuals involved. But where unique diplomatic concerns make such insistence inadvisable, as apparently is true in the present case, we see no objection to acceptance of the foreign government's hospitality.

JOHN M. HARMON
Acting Assistant Attorney General
Office of Legal Counsel

⁶It is no doubt for this reason that the Department of State has apparently insisted, at least insofar as its own employees are concerned, that any such arrangement have prior approval. In this connection, Representative Rhodes pointed out on the House floor that the House passed a resolution in 1975 permitting the 1975 trip to be at the expense of the Chinese Government. 123 Cong. Rec. H. 3145, *supra*. We are not aware of any similar resolution in the present case. However, the means by which travel by Members of Congress is approved or deemed official is an internal concern of the House. Presumably the President's designation of his son as a representative on the trip under circumstances in which it is apparent that the Chinese Government will pay expenses furnishes analogous official approval.

April 27, 1977

**78-78 MEMORANDUM OPINION FOR THE COUNSEL
TO THE PRESIDENT**

**The White House—The Vice President—
Gifts (3 U.S.C. §§ 110, 111; 16 U.S.C. § 6a)**

You have asked for our views regarding the acceptance of gifts to be used in the White House, the official residence of the Vice President, or the offices of the President and Vice President. We separately answer the questions raised by the proposed gifts.

**I. Gifts of Art and Furnishings for the White House, the Vice
President's Residence or the Offices of the President and Vice
President**

There is express statutory authorization for the acceptance of such gifts. Section 6 of Pub. L. No. 93-346, 88 Stat. 340 (1974), as amended, 3 U.S.C. § 111 note (1976), authorizes the acceptance of donations of art and furnishings for the official residence of the Vice President:

The Secretary of the Navy is authorized and directed, with the approval of the Vice President, to accept donations of money or property for the furnishing of or making improvements in or about the temporary official residence of the Vice President, all such donations to become the property of the United States and to be accounted for as such.

Gifts for use in the White House are authorized by 3 U.S.C. § 110 (1976), which provides in pertinent part:

With a view to conserving in the White House the best specimens of the early American furniture and furnishings, and for the purpose of maintaining the interior of the White House in keeping with its original design, the Director of the National Park Service is authorized and directed, with the approval of the President, to accept donations of furniture and furnishings for use in the White House, all such articles thus donated to become the property of the United States and to be accounted for as such.

This statute authorizes gifts of "furniture and furnishings" for the official residence and the offices of the President and Vice President and other offices that are located in the East or West Wing of the White House.¹ We construe the term "furnishings" to include gifts of art and other decorations that cannot be readily characterized as "furniture." It should be noted, however, that the statute appears to contemplate the acceptance of early American items, and only where this would be consistent with maintaining the interior of the White House in keeping with its original design.

Aside from this specific provision applicable to the White House, the Secretary of the Interior is authorized to accept, in the name of the United States, "gifts or bequests of money for immediate disbursement or other property in the interest of the National Park Service, its activities, or its service, as heretofore authorized by law." 16 U.S.C. § 6a (1976). In our view, this statute constitutes authority for the acceptance of gifts in connection with the Department of the Interior's general statutory responsibility under Pub. L. No. 87-286 for maintenance of the White House and its grounds.² This Office advised the White House in 1974 that 16 U.S.C. § 6a authorized the Secretary of the Interior to accept the donation of a swimming pool at the White House for the President's use.

The mentioned statutes are silent on the question of the acceptance of conditional gifts. As a general rule, such gifts may not be accepted by the Government without the express approval of Congress. *Story v. Snyder*, 184 F. (2d) 454, 456 (D.C. Cir. 1950). The policy of the Curator of the White House has been to refuse gifts offered on the condition that they be displayed in a certain manner or location in the White House, on the ground that this would interfere with the continuing responsibility of the Committee for the Preservation of the White House to maintain the interior of the White House in the manner deemed suitable at a particular time. Executive Order No. 11145, 3 CFR 184 (1964-1965 compilation), reprinted in 3 U.S.C. § 110 note (1976). The type of condition that would be acceptable to the Curator would be, for example, attaching a small plaque to the gift to identify the donor. The current White House policy appears to be consistent with the general rule on conditional gifts outlined above. We recommend that a similar policy on acceptance of conditional gifts be adopted for the Vice President's residence.

It is our understanding that, by arrangement with the National Park Service, maintenance and furnishing of the East and West Wings of the White House are the responsibility of the General Services Administration (GSA). According to

¹Section 1 of Pub. L. No. 87-286, 75 Stat. 586 (1961), describes the "White House" as "all of that portion of reservation numbered 1 in the city of Washington, District of Columbia, which is within the President's park enclosure, comprising eighteen and seven one-hundredths acres"

²The Department of the Interior's responsibility derives from the language in § 1 of Pub. L. No. 87-286 that the White House and its grounds "shall be administered pursuant to the Act of August 25, 1916, 39 Stat. 535; 16 U.S.C. 1-3, and Acts supplementary thereto and amendatory thereof." The Act of August 25, 1916, established the National Park Service in the Department of the Interior.

the Curator's Office, few of the furnishings donated to the White House are used in the East and West Wings; when they are, the items are apparently regarded as being on loan from the collection intended for the residence. We see no reason why gifts donated to the White House, especially those of an historical nature, cannot be used in the East and West Wings in this fashion.

The General Services Administration has jurisdiction over the Old Executive Office Building and would therefore be the proper recipient of any gifts for use in that building. The Administrator of GSA is authorized to accept on behalf of the United States "unconditional gifts of real, personal, or other property in aid of any project or function" within his jurisdiction. 40 U.S.C. § 298a (1976). Because GSA has assumed responsibility for maintenance and furnishing of the East and West Wings, we believe it may accept gifts for use there as well. It should be noted, however, that 40 U.S.C. § 298a (1976) refers only to unconditional gifts.³

II. Gifts of Services Attendant to the Loan of Art or Furnishings to the Residences or Offices, such as Collection, Crating, Transportation, and Insurance

While there is no express statutory authority for the White House or the official residence of the Vice President to receive works of art or other objects on loan, we see no reason to object to this practice.⁴ Nor do we see any basis for objecting to the acceptance of services related to the loan, such as collection, crating, transportation, and insurance.

In 1974 this Office advised the White House that a painting that had been given to the White House on the condition that it be exhibited to the public could be viewed as a loan and be returned to the donor if it was no longer to be displayed. That earlier advice necessarily proceeded on the assumption that such a loan could be accepted.

Moreover, the Comptroller General has ruled that agencies may accept a loan of equipment to be used in performing an agency function, although he noted that this practice should not be encouraged because of the possibility of claims against the Government or the appearance of favoritism in later agency dealings with the lender. 22 Comp. Gen. 153 (1942). In most cases there is little likelihood of an appearance of favoritism toward one who lends items to the White House or the Vice President's residence. With respect to the possibility of claims against the Government, the Committee for the Preservation of the

³This Office advised the White House in 1964 that 40 U.S.C. § 298a (1976) permitted GSA to accept a donation of television lights to be installed in one of the Wings by several networks. It was emphasized that the fixtures, once installed, were to be regarded as property of the United States for all purposes.

⁴See Secretary of the Navy Instruction 4001.2E (Oct. 18, 1978) governing acceptance of gifts for the Vice President's residence under Pub. L. No. 93-346, *supra*, Paragraph 3.e. defines the term "gift" to include loans, except loans of money. See ¶ 4.b. Arguably, 3 U.S.C. § 110 (1976) and 16 U.S.C. § 6a (1976) could also be construed to permit acceptance of loans, which are in a sense only temporary gifts.

White House has in the past purchased an insurance policy covering all items on loan to the White House.

If, as it appears, loans of furnishings may be accepted for use in the White House or Vice President's residence, we see no reason why the lender may not pay the costs incident to the loan. We do not mean to suggest, however, that funds appropriated for the Executive Residence or the Official Residence of the Vice President under the Executive Office Appropriations Act of 1977, Pub. L. No. 94-363, 90 Stat. 966 (1976), may not be used to pay these costs. The appropriations are available for the "refurnishing" and "furnishing" of the two residences, respectively. Presumably they may be spent for the outright acquisition of suitable art and furnishings. Obtaining such items on loan is merely another form of acquisition, albeit of a temporary nature, and we see no reason why appropriated funds cannot be expended to meet the costs of their use by the Government. *Cf.* 22 Comp. Gen. 153, 154 (1942). In this connection, the Curator's Office informed us that it has in the past spent appropriated funds to pay the costs incidental to loans of art and furnishings to the White House.

One final point with respect to loans may be of interest. The Committee for the Preservation of the White House has apparently required lenders of property to state in writing that they will not sell the property in question for a certain period of time after it has been returned by the White House and to promise that the fact that the property was once displayed in the White House will not be mentioned in advertising in connection with its later sale. This obviously is intended to prevent trading on the White House name. It may be appropriate to adopt a similar policy for the Vice President's residence.

III. Gifts for the Purpose of Acquiring Art, Furnishings, or Attendant Services

The special statute authorizing the acceptance of furniture and furnishings for the White House does not appear to permit acceptance of cash donations. 3 U.S.C. § 110 (1976). However, the general statutory authority of the Secretary of the Interior to accept gifts in connection with National Park Service activities specifically mentions money, 16 U.S.C. § 6a (1976), as does the special statute applicable to the Vice President's residence, Pub. L. No. 93-346, *supra*. The statute applicable to GSA does not expressly mention gifts of money, but such gifts would appear to be included in the general phrase in 40 U.S.C. § 298a (1976), "gifts of real, personal, or other property."

IV. The Proper Recipient of Gifts

Under paragraph 12 of Secretary of the Navy Instruction (SECNAV) 4001.2E, the Chief of Naval Operations is designated as the "cognizant official" responsible for processing gifts to the Vice President's residence; but it is the Secretary of the Navy who ultimately accepts such gifts.⁵

⁵If any questions arise regarding the acceptance of gifts for the Vice President's residence, the Administrative Law Section of the Navy's Office of the Judge Advocate General is familiar with

By tradition, the Committee for the Preservation of the White House, established by Executive Order No. 11145, has been designated as the recipient of gifts made to the White House, although it, of course, accepts such gifts on behalf of the United States. As we understand it, donations of funds to be used for furnishing the White House are accepted by the Committee and deposited in a special account maintained by the National Park Service for use by the Committee. All gifts are acknowledged by a certificate issued by the Committee.⁶ The Curator's Office assists the Committee in these matters.

Finally, the regional office of the General Services Administration should be consulted regarding donations of art or furnishings to be used in the Old Executive Office Building or gifts of furniture of no particular historical significance to be used in the East or West Wings of the White House.

V. Solicitation of Gifts

We are not aware of any statute that either authorizes or prohibits members of the President's or Vice President's staff from soliciting gifts of art, furnishings, and attendant services.⁷ To the degree that the President and Vice President become involved in the gift process, we see no reason why their staffs may not assist them. However, the applicable statutes appear to assign primary responsibility for the White House and Vice President's residence to other entities, subject to the general supervision of the President and Vice President. As mentioned above, the Committee for the Preservation of the White House has traditionally assumed responsibility for acceptance of gifts to the White House.

In addition, the restrictions contained in Executive Order No. 11222, 3 CFR 306 (1964-1965 compilation), reprinted in 18 U.S.C. § 201, note (1976), and the implementing regulations for the Executive Office of the President should be considered.⁸ Section 201(a) of the Executive order prohibits any employee covered by the order from soliciting any gift, loan, or other thing of monetary value from any person, organization, or group that:

- (1) has, or is seeking to obtain, contractual or other business or financial relationships with his agency;

(Continued)

internal procedures for gifts to the Navy in general, including those to the Vice President's residence.

⁶We are not aware that a comparable committee has been established for the Vice President's residence, but one could presumably be created by the Secretary of the Navy, with the Vice President's approval. Such a committee could relieve the Vice President's staff and family of any administrative burden in accepting gifts and dispel any potential awkwardness in having them directly involved in the process.

⁷40 U.S.C. § 193p. (1976) makes it unlawful for "anyone *other than an authorized employee or concessionaire* . . . to solicit alms, subscriptions, or contributions" (emphasis added) within the buildings or grounds of the Institution. Although this statute is obviously inapplicable to the present situation, it is the only statute pertaining to solicitation of gifts by Federal employees.

⁸The Office of the Vice President is not included among the agencies to which the Executive Office's Standards of Conduct apply. See 3 CFR 100.735-2(a) (1977). However, we understand that Vice President Rockefeller issued Standards of Conduct regulations for the Vice President's staff which are still in effect and are similar in most respects to those of the Executive Office.

(2) conducts operations or activities which are regulated by his agency; or

(3) has interests which may be substantially affected by the performance or nonperformance of his official duty.

See also 3 CFR 100.735-14(a) (1977). This section was directed primarily at the solicitation of gifts for the employee's personal benefits. Nevertheless, as a matter of policy, solicitations should be avoided where the persons or organizations involved have a significant interest in matters that are likely to be reviewed in the White House or the Vice President's Office. *See also* Executive Order No. 11222, §§ 201(c)(2), (4), and (6); 3 CFR 100.735-4(c)(2), (4) and (6) (1977).

Even where the potential donor has no particular interest in matters pending before the President or Vice President, we believe it would be advisable for members of the President's and Vice President's regular staffs to avoid extensive involvement in the solicitation of gifts or loans. Time spent by these individuals on solicitation of gifts would of necessity be diverted from their ordinary governmental duties, thereby, perhaps, giving the appearance of "[i]mpeding Government efficiency and economy." Executive Order No. 11222, § 201(c)(3); 3 CFR 100.735-4(c)(3) (1977).

Finally, although loans of art and furnishings to the White House and the Vice President's residence are official in nature, they result in at least some personal benefit in terms of use and enjoyment by the President and Vice President, their families, and staff members. To this extent, excessive involvement of staff members in solicitation might create an appearance of "[u]sing public office for private gain," which is prohibited by section 201(c)(1) of Executive Order No. 11222 and 3 CFR 100.735-4(c)(1) (1977).

VI. Forms of Agreement

The Office of the Curator has stated that most donors do not use any particular form or deed for gifts to the White House. The usual procedure is for the donor to address a letter to the Committee for the Preservation of the White House stating that an unconditional gift is being made to the Committee on behalf of the United States.⁹ The Curator's Office also informed us that this arrangement has proved to be satisfactory in the past and that no problems have arisen. We see no reason why the same procedure cannot be used for gifts to the Vice President's residence, especially if a policy is adopted of not accepting conditional gifts.

Vice President Rockefeller executed a deed of gift for certain property he donated to the Vice President's residence, but a copy of this deed was not

⁹The Curator's Office also stated that it makes clear that it is the donor's responsibility to have the property assessed for tax purposes.

retained in the files of the Office of the Navy's Judge Advocate General because it was an unrestricted gift. Generally, deeds should be filed with the Secretary of the Navy through the Chief of Naval Operations, the cognizant official for gifts to the Vice President's residence, as a permanent record of the gift. A letter of acknowledgement from the Secretary of the Navy to the donor would be adequate evidence of acceptance.

JOHN M. HARMON
Acting Assistant Attorney General
Office of Legal Counsel

May 3, 1977

**78-79 MEMORANDUM OPINION FOR THE COUNSEL
TO THE PRESIDENT**

**Promotional Use of the President's Name
(15 U.S.C. § 1051, 15 U.S.C. § 45)**

This is in response to your memorandum of March 8, 1977, requesting our advice as to possible legal remedies for promotional use of the President's name or likeness. From the letters enclosed, it appears that you are concerned with persons who seek to identify the President with a particular commercial product for promotional reasons, including trademark registration, and not with the vendors of pictorial material. The scope of this memorandum is accordingly limited to remedies for appropriation of the President's name for advertising or promotional purposes.

No Federal law restricts the use of the President's name or likeness as such. Except for the law governing the registration of trademarks, limits on the commercial appropriation of an individual's name are primarily a matter of State law.

1. Federal registration of trademarks is governed by 15 U.S.C. § 1051 *et seq.* Section 1052 provides that:

No trade-mark . . . shall be refused registration on the principal register on account of its nature unless it—

(a) Consists of or comprises . . . matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.

(c) Consists of or comprises a name, portrait, or signature identifying a particular living individual except by his written consent

The Patent Office may apply this section and refuse registration on its own motion. *E.g.*, *Application of Continental Baking Co.*, 390 F. (2d) 747 (CCPA 1968). In addition, any person damaged by registration may object within 30 days of the publication of the proposed mark in the Official Gazette of the Patent

Office. 15 U.S.C. § 1063. A registration that violates 15 U.S.C. § 1052(a) or (c) may be cancelled at any time on petition of a person who is damaged by its use. 15 U.S.C. § 1064(c). Findings of fact by the Patent Office on these issues are controlling unless overcome on judicial review by evidence "which in character and amount carries thorough conviction." *Redken Laboratories, Inc. v. Clairol, Inc.*, 501 F. (2d) 1403 (9th Cir. 1974). Resort to the trademark law is therefore available for the purpose of preventing or cancelling the registration of trademarks using the President's name or likeness.

2. The Federal Trade Commission, (the Commission) may have the power to prevent the commercial use of the President's name in some circumstances. Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45 (Supp. V 1975), authorizes the Commission to prevent "unfair and deceptive practices" in commerce, and it is well settled that this includes the power to prohibit deceptive or misleading advertisements.¹ An advertisement is considered misleading if it creates a false impression of the source of the product or it implies a nonexistent endorsement.² Furthermore, the Commission considers the effect of the entire advertisement on the buying public as a whole, including "the ignorant, the unthinking and the credulous," in determining whether it is misleading.³ The Commission may find the total effect misleading, because incomplete or out of context, even if any statement made is literally true.⁴

Under these principles, the Commission could probably prohibit the use of advertisements, labels, or trade names which implied that the President endorsed, profited from, or was connected with the sale of a particular product. The breadth of the test for misleading effect, coupled with the prestige of the Presidency and President Carter's well-known background, would probably allow the Commission to eliminate most of the attempts to attach the President's name to peanuts and peanut products.⁵

3. The States provide various additional remedies for unconsented use of an individual's name or likeness in advertising. The expansion of the First Amendment to limit State power to protect the privacy of public figures and to regulate commercial advertising do not appear to affect State power to prevent

¹E.g., *Resort Car Rental System, Inc. v. FTC*, 518 F. (2d) 962 (9th Cir. 1975); *FTC v. Sterling Drug, Inc.*, 317 F. (2d) 669 (2d Cir. 1963); *Aronberg v. FTC*, 132 F. (2d) 165 (7th Cir. 1942). See generally, *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

²*FTC v. Royal Milling Co.*, 288 U.S. 212, 216-217 (1933); *Niresk Industries, Inc. v. FTC*, 278 F. (2d) 337, 341 (7th Cir.); *Howe v. FTC*, 148 F. (2d) 561 (9th Cir. 1945).

³*Aronberg v. FTC*, 132 F. (2d) 165, 167 (7th Cir. 1942).

⁴*FTC v. Sterling Drug, Inc.*, 317 F. (2d) 669, 674-75 (2d Cir. 1963); *P. Lorillard Co. v. FTC*, 186 F. (2d) 52, 58 (4th Cir. 1950).

⁵It should be noted that the FTC has exclusive jurisdiction to enforce the Act. *Alfred Dunhill Ltd. v. Interstate Cigar Co., Inc.*, 499 F. (2d) 232 (2d Cir. 1974); *Holloway v. Bristol-Myers Corp.*, 485 F. (2d) 986 (D.C. Cir. 1973); *Carlson v. Coca-Cola Co.*, 483 F. (2d) 279 (9th Cir. 1973).

the unconsented appropriation of an individual's name for advertising purposes.⁶

JOHN M. HARMON
Acting Assistant Attorney General
Office of Legal Counsel

⁶The First Amendment protects the publication of information about public figures against State defamation or privacy law unless the publication was made with actual knowledge of or reckless indifference to its falsehood. *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Last term, the Supreme Court held that the First Amendment also protects the right to publish and to receive truthful commercial advertising of lawful activities. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 769-70, 773 (1976). See also, *Bigelow v. Virginia*, 421 U.S. 809, 825-26 (1975). The Court was careful to state, however, that it saw no obstacle in its opinion to the regulations of deceptive or misleading advertising. *Id.* at 771-72. See also 425 U.S. at 775-81 (Stewart, J., concurring).

July 22, 1977

**78-80 MEMORANDUM OPINION FOR THE COUNSEL
TO THE PRESIDENT**

**Federal Election Commission—Appointment of
Members (2 U.S.C. § 437)**

This is in response to your memorandum seeking an interpretation of 2 U.S.C. § 437(c)(3), which provides that members of the Federal Election Commission—

. . . shall be chosen from among individuals who, at the time of their appointment, are not elected or appointed officers or employees in the executive, legislative, or judicial branch of the Government of the United States. Members of the Commission shall not engage in any other business, vocation, or employment

You specifically inquire, first, whether the statute permits appointment of an individual who had resigned from Federal service immediately prior to his “appointment,” and, second, if the answer to that question is in the affirmative, whether the “appointment” is deemed to occur upon nomination, the execution of the commission, or the taking of the oath of office.

First. It is our view that the purpose of the statute is satisfied if the member of the Commission resigns his Federal position immediately prior to his appointment. The purpose of the provision is to insure that the members of the Commission serve on a full-time basis. Moreover, if Congress insists on more than an “immediate break” in government service prior to the appointment to a position, it uses the formula that he be “appointed from civilian life.” *See, e.g.,* 10 U.S.C. §§ 133-137. That clause has been interpreted as requiring that the appointee has not only ceased to engage in Government service but also has entered civil life and civil pursuits. *See* 36 Op. A.G. 389, 402 (1930), and *Guilmette v. United States*, 49 Ct. Cl. 188 (1914).

Second. Having concluded that the resignation may take place immediately prior to the “appointment” to the Commission, we turn to the question as to what constitutes “appointment” within the meaning of the statute. Construing Article II, Section 2, Clause 2, of the Constitution, the Supreme Court has held that the appointment process consists of three steps: nomination, advice and consent of the Senate, and appointment itself, which is usually evidenced by the execution of the commission by the President. *See, Marbury v. Madison*, 5 Cranch 137, 155 (1803). In our view, the statute uses the term “appointment”

in the same sense as does the Constitution; hence, a prospective member of the Commission must have resigned from his Federal position by the time the President formally appoints him to the Commission by executing his commission.

We note that in at least one situation, the interpretation of Article I, Section 6, Clause 2,¹ an Attorney General took the position that a person who is disqualified from holding a civil office may not be nominated to it, even though the disqualification would be lifted by the time of the actual appointment by the President. 17 Op. A.G. 522 (1883).² We believe, however, that this interpretation of the term "appointment" is based on the need to avoid an evasion of the purpose of Clause 2. The aim of that constitutional provision is that, where Congress creates new offices or increases the emoluments of existing ones, members of that Congress should not be appointed to those offices during the terms for which they were elected. The constitutional purpose could be seriously eroded if a disqualified member of Congress could be nominated and confirmed during the period of his disqualification—in particular by the same Senate that participated in the creation of the office involved or increased its emoluments—and thus be virtually assured of the appointment as soon as the disqualification ended.

The purpose of § 437(c)(3), however, is not to disqualify persons because of their past status as Federal officers, but merely to prevent them from serving in that capacity *while* they are on the Commission. This statutory intent does not require that the prospective appointee resign his Federal office prior to nomination, at which time he cannot know whether he will be confirmed. We regard it as sufficient for the resignation to occur prior to the execution of the commission. This reading of the statute is supported by the Conference Report on the Federal Election Campaign Act Amendments of 1974, H. Rept. 93-1438, 93rd Cong., 2d sess. 90 (1974), which states:

[N]o member may be appointed to the Commission who at the time of taking office as such a member is an elected or appointed official of any branch of the United States Government.

It should be observed that the report uses the nontechnical, loose term "at the time of taking office," which perhaps could be interpreted as the time when the appointee enters into office. In our view, this language of the report does not alter the meaning of the statutory term "appointment."

Finally, we assume that the appointment in question concerns an individual who is not subject to the disqualification imposed by Article I, Section 6, Clause 2 of the Constitution.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

¹That clause prohibits the appointment of a Senator or Representative to any civil office, if the office was created or its emoluments were increased during the time for which the Senator or Representative was elected.

²The Attorneys General still adhere to that interpretation of this particular constitutional provision.

August 12, 1977

78-81 MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

Executive Order No. 11222—Standards of Conduct— Government Officials Writing Articles and Books

You have asked our advice regarding the legality and propriety of Presidential appointees' writing articles and books for publication, either with or without compensation, including writing that is related to the official's area of responsibility as well as writing that is not.

For the most part, these types of activities are governed by Executive Order No. 11222 of May 8, 1965 (30 F. R. 6469) and Civil Service Commission and agency regulations implementing the Executive order, rather than by the conflict of interest laws with which the Office of Legal Counsel is concerned. Because each appointee is subject to the standard of conduct regulations of his agency, it would be advisable for the appointee to consult those regulations and to contact the agency's ethics counselor¹ if a question arises concerning the propriety of writing or lecturing in a given instance. In fact, several agencies require their employees to obtain approval before engaging in outside activities concerning their official work. *See, e.g.*, 22 CFR 10.735-204(c) (State); 29 CFR 0.735-13 (Labor); 31 CFR 0.735-38 (Treasury); 45 CFR 73.735-403 (f)(HEW). However, we can offer the following general observations on the issues involved.

I. Compensated Activities

Section 202 of Executive Order No. 11222 establishes the outlines of Executive branch policy on outside activities, including writing:

An employee shall not engage in any outside employment,

¹Under Civil Service Commission regulations, each agency head designates a top-ranking employee of the agency to serve as ethics counselor whose responsibility is to give "authoritative advice and guidance" on questions of conflicts of interest and related matters covered by Part 735 of the Commission's regulations. 5 CFR 735.105. The Ethics Counsel of the Civil Service Commission in turn advises agency ethics counselors on questions of interpretation arising under Executive Order No. 11222 and implementing Civil Service Commission regulations; and the Office of Legal Counsel advises agencies on questions arising under conflict of interest laws.

including teaching, lecturing, or writing, which might result in a conflict, or an apparent conflict, between the private interests of the employee and his official government duties and responsibilities, although such teaching, lecturing, and writing by employees are generally to be encouraged so long as the laws, the provisions of this order, and Civil Service Commission and agency regulations covering conflict of interest and outside employment are observed.

Under applicable laws and regulations, a question would ordinarily be raised whenever a Presidential appointee is to receive compensation for the publication of an article or book that deals with his official duties.

In the most extreme situation, where an article (or speech later reduced to article form) was prepared or delivered as part of the individual's official duties, receipt of nongovernmental compensation for the delivery or publication would violate 18 U.S.C. § 209(a), which (with exceptions not pertinent here) prohibits the receipt of any contribution to or supplementation of salary from outside sources as compensation for an individual's services to the Government.

In addition, Civil Service Commission regulations expressly prohibit the receipt of compensation by *some* Presidential appointees for certain activities that are not actually part of the person's official duties:

[A]n employee who is a Presidential appointee covered by section 401(a) of [Executive Order 11222] shall not receive compensation or anything of monetary value for any consultation, lecture, discussion, writing, or appearance the subject matter of which is devoted substantially to the responsibilities, programs, or operations of his agency, or which draws substantially on official data or ideas which have not become part of the body of public information. 5 CFR 735.203(c).

As the regulation makes clear, it applies only to Presidential appointees covered by section 401(a) of the Executive order, which covers only: (1) agency heads; (2) full-time members of committees, boards, and commissions appointed by the President; and (3) Presidential appointees in the Executive Office of the President who are not subordinate to the head of an agency in that office. Thus, in an Executive department, the Civil Service Commission regulation would apply only to the head of the department. However, several departments, in their own regulations, have extended this prohibition to cover all agency employees.²

²See, e.g., 15 CFR 0.735-12(c)(2) (Commerce); 28 CFR 45.735-12(b) (Justice). See also 7 CFR 0.735-13(a)(4) (Agriculture). The regulations of other Executive departments parallel the Civil Service Commission regulation by applying this limitation only to Presidential appointees covered by section 401(a) of the Executive order. See 32 CFR 40.12(e), as amended, 42 F.R. 3649 (Defense); 45 CFR 73.735-401(e) (HEW); 24 CFR 0.735.204(e)(1) (HUD); 43 CFR 20.735-33(d) (Interior); 29 CFR 0.735 11(a) (Labor); 22 CFR 10.735-204(c) (State); 49 CFR 99.735-11(d) as amended, 42 Fed. Reg. 3120 (Transportation); 31 CFR 0.735-39(b) (Treasury).

Where an article or book does not contain a significant amount of nonpublic governmental information, the scope of the prohibition in the Civil Service Commission regulation and identical agency regulations in particular situations depends on the meaning of the phrase "devoted substantially to the responsibilities, programs, or operations of his agency." The phrase can be given a narrow interpretation barring the receipt of compensation only where the article or book relates to existing statutory responsibilities and programs of the agency. Alternatively, the phrase "responsibilities . . . of his agency" can be read to encompass the general subject matter or sector of the economy or society with which the individual's agency is concerned, even though the writing does not specifically relate to the functions of the agency. A search of our conflict of interest files reveals that we have given the quoted phrase in the comparable Department of Justice regulation the broader of the two readings mentioned above as it applies to top-level Department officials.

In the only memorandum we have been able to locate involving a Presidential appointee, this office advised a former Attorney General that he could accept compensation for the publication of a collection of his essays so long as the subject matter was not substantially related to areas of Department of Justice activity. We took the position that the purpose of the regulation was to preclude an employee of the Department from profiting from publication where it was likely to be attractive to the public because it represented views of a Department official on subject matter within the responsibilities of the Department. Thus, the former Attorney General was advised that he could receive compensation for publication of general jurisprudential essays concerning legal education or ethics, but not those relating to antitrust or civil rights laws. The same interpretation of the regulation underlay this office's conclusion in 1972 that a member of the Board of Parole could not accept compensation for speeches related to the general subjects of correction trends and reforms.³

This broader reading of the Civil Service Commission regulation finds additional support in the more general prohibition in section 201(c)(1) of Executive Order No. 11222 against engaging in any activity "which might result in, or create the appearance of . . . using public office for private gain." This restriction also appears in Civil Service Commission and agency regulations implementing the Executive order. *See, e.g.*, 5 CFR 735.201a(a). In fact, where a high-level official receives compensation for speaking or writing related to his official responsibilities, a significant question of "appearances" may be raised under the general prohibition just quoted, even if the official is not covered by a regulation expressly barring the receipt of compensation for

³On the other hand, we have advised lower-level employees of the Department that they may receive compensation for teaching and writing in the area of law for which they have responsibility. We believe this more liberal policy for lower-level personnel is warranted because their services are not usually sought in order to ascertain the position of the Department on key policy issues; they are not authorized to state that position, and their activities are therefore not likely to be attractive to the anticipated audience because of their affiliation with the Department.

speaking or writing “devoted substantially to the responsibilities, programs, or operations of his agency.”

As a convenient rule of thumb for determining when an outside activity such as writing is sufficiently related to official duties so as to suggest that the receipt of compensation may be improper, reference may be made to a Department of Commerce regulation prohibiting the receipt of compensation for an activity where there is reason to believe that the invitation to do so was extended partly because of the official position of the employee concerned. 15 CFR 0.735-12(b)(3). We emphasize, however, that the application of pertinent regulations in a specific instance is initially a matter for the ethics counselor of the agency involved, with the advice of the Civil Service Commission, which has responsibility for implementing Executive Order No. 11222.

The legality and propriety of a Presidential appointee receiving compensation for a book or article is governed by somewhat different considerations when the subject matter has no relation to the individual’s official duties and responsibilities. It is possible that in a given case the author might be relying on his visibility in office to generate interest in a book or article about his prior experiences or other matters—or seem to be doing so—and thereby create the appearance of using public office for private gain. This would depend, of course, on the particular facts in the specific case.

Where acceptance is proper, the amount of compensation received is limited by the honorarium statute, 2 U.S.C. § 441i, to \$2,000 per article or appearance, and a total of \$25,000 in a calendar year.⁴ It should be noted, however, that this \$2,000 ceiling does not include reimbursement for expenses in connection with the writing or appearance, and the overall ceiling has not been construed to apply to the writing of books, as opposed to newspaper or magazine articles. See Election Law Guidebook, Sen. Doc. No. 216, 94th Cong., 2d sess. 6 (1976). Also, in preparing a book or article, the official would be required to abide by pertinent regulations and other restrictions limiting the use of Government property, personnel, appropriated funds, and nonpublic information for officially approved purposes, and not for private purposes. See, e.g., Executive Order No. 11222, §§ 202, 204, and 205; 5 CFR 735.203, 205, and 206.

⁴It might be suggested that the \$2,000 ceiling imposed by 2 U.S.C. § 441i on the amount of honoraria a Government official may receive indicates that honoraria of less than \$2,000 are not unlawful under any circumstances, as long as the overall ceiling of \$25,000 is not exceeded. We are not aware of any suggestion in the legislative history that Congress intended to preempt all other restrictions on the receipt of compensation, and we would be most reluctant to construe it to do so in view of Congress’ heightened concern in other contexts regarding the receipt of gifts and outside income by officials of the executive and legislative branches. The provision instead appears to impose an *additional* restriction on the amount of honoraria an official may receive, perhaps because the amount of an honorarium often has little relation to the personal effort of the Government official and therefore represents easy means by which a top-level Government official may supplement his income.

II. Uncompensated Activities

Outside activities for which an individual will not be compensated create less of a conflict of interest problem. Of course, the individual would have to abide by restrictions just mentioned prohibiting the use of agency property, personnel, and appropriated funds for personal or other nongovernmental purposes. Regulations also prohibit a Government official, "for the purpose of furthering a private interest," from using or allowing the use of official information obtained through or in connection with his Government employment which has not been made available to the general public. 5 CFR 735.206. Thus, while a Presidential appointee could appropriately release theretofore nonpublic information in an official speech or paper, it would appear that he could not do so in a private publication where the primary purpose was to benefit a private interest rather than to release agency views in an acceptable forum.

Finally, we have interpreted the Justice Department regulation prohibiting activities that create the appearance of using public office for private gain to apply even where the private gain will be realized by a person or organization other than the Government official. This suggests that Department of Justice employees, including Presidential appointees, should avoid lending their official position to support the financial causes of private organizations—through speeches, the writing of articles, or in some other fashion. It may be that comparable regulations of other agencies would be construed in the same fashion.

Our observations on this subject have necessarily been general. These activities are generally governed by Executive Order No. 11222 and implementing Civil Service Commission and agency regulations, as to which we are not in a position to give an authoritative construction. In a given case, it would be advisable for the Presidential appointee to review the regulations of the particular agency involved and to consult the ethics counselor of this agency, especially where prior approval may be required.

LEON ULMAN

*Deputy Assistant Attorney General
Office of Legal Counsel*

September 8, 1977

**78-82 MEMORANDUM OPINION FOR THE COUNSEL
TO THE PRESIDENT**

**National Commission on Neighborhoods
(Pub. L. 95-24)—Powers—Appropriations**

This is in response to your request for our opinion on a proposed interagency agreement between the Department of Housing and Urban Development (HUD) and the newly established National Commission on Neighborhoods (the Commission). The Commission was created by Title II of the Supplemental Housing Authorization Act of 1977.¹ This Act, *inter alia*, authorized additional funds to HUD for housing assistance for lower income Americans. However, in establishing the Commission the Act also appropriated funds to HUD not to exceed \$1,000,000 to carry out the congressional purpose in creating the Commission.² Thus, when the Commission can legally function HUD will be obliged to transfer the appropriated funds from its account to the Commission.

The Commission is to consist of 20 members.³ As matters now stand, it appears that no members of the Commission have been appointed; however, apparently some of the Commission's staff have been selected.⁴ So that the Commission's existing staff may obtain startup expense, HUD has agreed to transfer such funds upon the signing of an agreement between the two agencies. You ask whether such an agreement can be executed before the full membership of the Commission is appointed. In our opinion, no such agreement can be executed at this time.

The most obvious barrier is the absence of a party who can legally enter into the agreement with HUD on behalf of the Commission. It is clear from the Act that only the Commission may execute such an agreement or designate an

¹Section 203(a) of Pub. L. 95-24, 91 Stat. 56.

²Section 207, *id.*

³Section 203(b), *id.*

⁴It is difficult to see how the Commission can have any staff at this juncture since no members have been appointed and the Act gives the Commission sole power to appoint and fix the compensation of its staff.

individual to act upon its behalf.⁵ Nor can the agreement be executed until all the members of the Commission are appointed. Except for the limited authority given to the Chairman or Vice Chairman by § 206(c) of the Act, all powers and duties are vested in the Commission.⁶ Thus, until all the Commission's members are appointed, HUD and the Commission cannot execute a legal agreement.

However, at such time as the Commission is a functioning body, we see no need for the agreement. The Commission is authorized by the Act to receive funds so long as they do not exceed \$1,000,000. All that would be necessary would be a general transfer of funds from HUD to the Commission.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

⁵In the main, the Act is silent as to the Commission's internal organization, practices, and procedures. The clear implication is that these matters are to be decided by the members of the Commission.

⁶See §§ 204 and 206, *id.*

September 9, 1977

**78-83 MEMORANDUM OPINION FOR THE COUNSEL
TO THE PRESIDENT**

**Dual Office—Compensation (5 U.S.C. § 5533)—
Peace Corps—ACTION**

This is in response to your request for our opinion whether a Presidential appointee to the dual positions of Director of the Peace Corps and Deputy Director of ACTION can be paid at the rate that is the lower of the salaries designated for those positions.¹

As a threshold matter, it should be noted that an individual can concurrently hold two Federal executive offices. The only general statute presently regulating dual service by Federal officers or employees is 5 U.S.C. § 5533(a), which provides that

... an individual is not entitled to receive basic pay from more than one position for more than an aggregate of 40 hours of work in one calendar week (Sunday through Saturday).

The statute inferentially recognizes the legality of dual office-holding.²

The inquiry here is whether the governmental official appointed to two different positions can be paid the salary of the lowest paying position. In light of the relevant case law and our prior opinions, we think that in this case the officer must be paid the higher of the two salaries.

A Federal office holder cannot legally waive a salary fixed by law.³ See, *Glavey v. United States*, 182 U.S. 595 (190). The salary of the Director of the Peace Corps is fixed by law pursuant to 5 U.S.C. § 5314(37), as amended. Thus, the parameters have been drawn: On one hand a Federal officeholder can receive only one salary regardless of the number of offices he holds, and on the other, that officeholder cannot legally waive a salary fixed by law. It seems to

¹The position of Director of the Peace Corps is the higher paying position of the two.

²A Presidential appointee once served concurrently as Director of the Office of Economic Opportunity and as Director of the Peace Corps.

³For purposes of our analysis it is irrelevant whether the position of Deputy Director of ACTION is fixed by law.

follow logically that a dual officeholder, if powerless to waive a statutorily fixed salary, cannot waive his entitlement to receive a statutorily fixed salary that is greater than the salary of his concurrent position. The validity of this logic must be measured against the reason for the rule which renders powerless a Federal officeholder to waive his or her statutorily fixed salary.

In *Glavey v. United States*, *supra*, plaintiff Glavey was duly appointed as a “special inspector of foreign steam vessels” and his salary was fixed by statute. After dismissing numerous governmental assertions as to why the plaintiff should not be paid the full statutory salary, the Court quoted from *Miller v. United States*, 103 F. 413, 415-416 (1900):

. . . It is to be assumed that Congress fixes the salary with due regard to the work to be performed, and the grade of man that such salary may secure. It would lead to the grossest abuses if a candidate and the executive officer who selects him may combine together so as entirely to exclude from consideration the whole class of men who are willing to take the office on the salary Congress has fixed but will not come for less. . . . [182 U.S. at 609.]

The *Glavey* Court therefore concluded:

The stipulation that Glavey, who was local inspector, should exercise the functions of his office of special inspector of foreign steam vessels “without additional compensation” was invalid under the statute prescribing the salary he should receive, was against public policy, and imposed no legal obligation upon him. [182 U.S. at 610.]

The *Glavey* rationale thus requires that a public official may not waive the salary of the position in which he serves where that salary is fixed by statute. A lesser salary agreement between the official and the appointing officer would not give effect to the will of the legislature. Consequently, since the higher of the two salaries here is fixed by statute that salary must be paid the appointee to the position of Director of the Peace Corps.

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

September 9, 1977

**78-84 MEMORANDUM FOR THE COUNSEL
TO THE PRESIDENT**

**Presidential Authority—Slovik Case—
Constitutional Law—Posthumous Pardons—
Review of Sentence (10 U.S.C. § 1552)**

You have asked for our opinion regarding the President's authority to act in the case of the late Eddie D. Slovik, who was sentenced to death by a court-martial for desertion and subsequently executed on January 31, 1945. For reasons stated hereafter, we conclude that: (1) the President has no power to review or overturn the August 12, 1977, decision of the Secretary of the Army; and (2) even assuming that the President might issue a posthumous pardon, its issuance would not remove the disability imposed by statute on his widow, Antoinette Slovik, receiving the proceeds of the life insurance that she seeks to collect.

I. Background

Slovik left a widow, who, until recently, apparently made no attempt to collect on the National Service Life Insurance (NSLI) policy of \$10,000 that had been in force on Mr. Slovik during his brief military service.¹

The disbursement of NSLI benefits is entrusted by statute to the Veterans' Administration. See 38 U.S.C. § 701 *et seq.* Under 38 U.S.C. § 711:

Any person guilty of mutiny, treason, spying, or desertion, or who, because of conscientious objections, refuses to perform service in the Armed Forces . . . shall forfeit all rights to [NSLI]. No insurance shall be payable for death inflicted as a lawful punishment for crime or for military . . . offense

Mrs. Slovik, apparently anticipating that the VA would deny a claim by her because of § 711,² filed an application with the Army Board for Correction of

¹The allotment from Mr. Slovik's pay that paid for this insurance was discontinued on December 31, 1944, one month prior to his execution.

²Mrs. Slovik also asked the Board to assist in having Mr. Slovik's remains removed from their present burial site in an "unmarked dishonored place in France, to a more suitable resting place."

Military Records (Board), advancing several arguments as to why his military record should be "corrected" in such a way that § 711 would no longer be a bar. The Board, after proceedings held on June 15 and 29, 1977, at which Mrs. Slovik was represented by counsel, recommended to the Secretary of the Army that Mrs. Slovik's application be denied. On August 12, 1977, that recommendation was approved and the application was denied by the Secretary of the Army.

II. The President's Power of Review

Any review of the Secretary of the Army's decision on the application of Mrs. Slovik is governed in the first instance by 10 U.S.C. § 1552, which authorizes such applications to be entertained and establishes to a limited extent the procedures under which they are to be processed. The more detailed procedures actually employed are, under § 1552, promulgated by the several Service Secretaries after approval by the Secretary of Defense.

Section 1552 does not explicitly grant or deny the President the power to review decisions made by the Service Secretaries or Boards established pursuant to its provisions. It does, however, state explicitly that "a correction under this section is final and conclusive on all officers of the United States." § 1552(a). This language would arguably prevent the President from overturning a decision favorable to an applicant,³ but it does not address a situation where, as here, the decision of the Board and Secretary has gone against an applicant. Section 1552 does, however, require decisions made on applications to be made "under procedures established by [the several Service Secretaries] and approved by the Secretary of Defense" We think that, at a minimum, this means that all such decisions are to be made with some semblance of procedural regularity. The Secretary of the Army has adopted procedures to this end. See 32 CFR § 581.3.

Under 32 CFR § 581.3(f)(2) the Secretary of the Army possesses final authority, subject only to judicial review, to grant or deny an application for correction. As pointed out in a recent case, the Secretary could, by regulation having the approval of the Secretary of Defense, give final decisionmaking authority to the Board itself, thereby preventing even the Secretary of the Army from reviewing the decision of the Board so long as the regulation was in force. See, *Biddle v. United States*, 186 Ct. Cl. 87 (1968). In addition, a number of cases have indicated that the Secretary himself may not reverse a "decision" of the Board where the Board's findings are supported by the record. See, e.g., *Weiss v. United States*, 408 F. (2d) 416, 422 (Ct. Cl. 1969); *Nelson v. Miller*, 373 F. (2d) 474, 478 (3d Cir. 1967).

(Continued)

The Board found this issue to be beyond its jurisdiction, stating that "36 U.S.C. 121 provides the American Battle Monuments Commission with responsibility for maintaining military cemeteries in foreign countries. . . ."

³The scant legislative history of the provision indicates that Congress intended to "make the findings of the boards not subject to review by other Government departments." S. Rept. No. 788, 82d Cong., 1st sess. 2 (1951).

In these circumstances, we think that the President lacks the power of review over a decision made by the Secretary of the Army because § 581.3(f)(2) effectively precludes him from doing so.⁴ It is a generally accepted principle that courts will review and set aside actions taken by the military not in accord with their own regulations. *See, e.g., Peavy v. Warner*, 493 F. (2d) 748, 750 (5th Cir. 1974). Although a departure inuring to the benefit of Mrs. Slovik would probably not be subject to judicial review, we believe that the general principle is fully applicable.⁵

Concluding, as we do, that the President may not exercise review over the *Slovik* case, the question arises whether he might nevertheless request the Secretary of the Army to reconsider his decision or to remand the case to the Board for further consideration. It is certainly arguable that the President's general supervisory power over the execution of the laws under Art. II, § 3, of the Constitution, as well as his power as Commander-in-Chief, would be sufficient to sustain his taking some position in this matter. We do not, however, think that this supervisory power is sufficient to permit him to order reconsideration of the matter so long as 32 CFR § 581.3(f)(2) is effective. We reach this result because such an order would effectively constitute Presidential intrusion into a quasi-adjudicatory procedure different only in degree from his attempting to review the Secretary's decision on the merits.

The President is, of course, free at any time to comment on the merits of decisions made by his subordinates. Whether to do so in a specific situation does not pose a legal question *per se*, but we tend to doubt the propriety of his making any statement on the merits of the Secretary's decision that would in any way compromise possible defense of that decision by this Department in connection with any judicial review that might be sought by Mrs. Slovik. Our review of the case, limited to an analysis of the Board's opinion, indicates to us that its decision could easily withstand judicial review under the narrow scope of review given to courts in these matters.⁶ The President would not be precluded from expressing sympathy for Mrs. Slovik's situation, which was expressed by the Board itself.

III. The Pardon Power

Another source of authority potentially available to the President is the pardon power vested in the President under Art. II, § 2, cl. 1, of the Constitution. In the circumstances of this case, a threshold question arises as

⁴We do not address the question whether the Secretary of the Army might amend the governing regulation so as to provide for Presidential review of some or all of these cases.

⁵We note that were the President thought to have the power to review such decisions, a procedure to effect it would most probably have to be established to avoid raising grave questions concerning judicial review. This is so because courts will not review decisions that are thereafter subject to revision by the Executive branch. *See, Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113-14 (1948). An established procedure would have to assure reviewing courts that a decision before them for review was no longer subject to revision by the President.

⁶The articulated standard of review of such matters is for arbitrariness or capriciousness. *See, Weiner v. United States*, 148 Ct. Cl. 445 (1960).

to whether the President may issue a pardon posthumously. Because this question has never been resolved judicially and the power has been exercised posthumously only on one occasion (apparently inadvertently), we think it prudent to dispose of the question of its use in this case on a narrower ground.⁷ Thus, we turn to the question whether, assuming the President were to pardon Slovik, the effect of that pardon would be to restore to Mrs. Slovik the right to payment of her late husband's insurance policy despite 38 U.S.C. § 711.

Prior Attorneys General have generally taken the position that, while a pardon relieves the offender of all disabilities imposed by way of punishment, it does not relieve an offender of disabilities that attend a conviction. Thus, Acting Attorney General Davis concluded that a statute forbidding the appointment as a naval officer of any person previously dismissed from the naval service by sentence of a court-martial did not impose a punishment on such an officer but rather should be viewed as a qualification for appointment that could not be affected by an exercise of the pardon power. 31 Op. A.G. 225, 226-30 (1918). *See also* 39 Op. A.G. 132, 134-35 (1938); 36 Op. A.G. 193 (1930); 22 Op. A.G. 36 (1898).

Applying the reasoning of these prior opinions to the present case, it is our opinion that § 711, insofar as it prevents the payment of insurance proceeds where the insured was executed pursuant to a criminal sentence⁸ does not constitute a punishment. Rather, as copiously detailed in *Simmons v. United States*, 120 F. Supp. 641 (D. Pa. 1954), the denial of insurance benefits to persons executed as punishment for crimes represents nothing more than Congress' recognition of a longstanding public policy in commercial insurance of excluding from risks covered by life insurance the risk that the insured will be executed for crime. In *Simmons*, a beneficiary of an NSLI policy sought to recover where the insured had been executed by a State for murder. The court, in our view, correctly described the applicable provision of what is now § 711 as involving a contractual exclusion of risk in recognition of prevailing public policy in this area of the law. We do not think that the pardon power reaches an exclusion or disability that is imposed not as punishment for crime committed but to fulfill a readily identifiable public policy.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

⁷Recently, the Deputy Attorney General advised the Counsel to the President that the Department of Justice did not think the President could grant a posthumous pardon. Our own research indicates that there are conflicting internal departmental memoranda on this question and that none can be said to resolve the question definitively.

⁸We do not address the question whether denial of such benefits to a deserter would constitute a punishment because it is unnecessary to do so to dispose of this case.

September 20, 1977

**78-85 MEMORANDUM OPINION FOR A
PRESIDENTIAL ASSISTANT**

Commemorative Proclamations—Issuance of

This memorandum is in response to your request for our opinion on the extent to which issuance by the President of commemorative proclamations is mandatory.

There are some commemorative proclamations issued without congressional request, on the basis of longstanding tradition (*e.g.*, Thanksgiving Day, Small Business Week, Red Cross Month). Others are issued pursuant to joint resolutions of the Congress. Joint resolutions authorizing and requesting issuance of annual proclamations or a permanent proclamation are codified in 36 U.S.C., Ch. 9 (National Observances).

With respect to proclamations issued as a matter of tradition, issuance is discretionary and the President can if he wishes either discontinue issuing such proclamations or he can issue permanent proclamations calling for the observance of the occasion each year in the future so that further proclamations on the subject would not be necessary. Examples of permanent proclamations are Proclamation No. 2957 of December 13, 1951, 3 CFR 143 (1949-1953 Compilation), calling for the observance of Stephen Foster Memorial Day on January 13 each year, issued pursuant to 36 U.S.C. § 158, and Proclamation No. 3537 of May 4, 1963, 3 CFR 285 (1959-1963 Compilation), calling for the observance of Peace Officers Memorial Day on May 15 and Police Week, the week of May 15 each year, issued pursuant to 36 U.S.C. § 167.

All commemorative proclamations are purely hortatory and without legal force or effect, whether or not the Congress has requested that a proclamation on the subject be issued annually. Therefore, if the President should decline to honor a congressional request for issuance of an annual proclamation, it would be without legal ramification.

Perhaps the number of proclamations presented to the President for consideration could be reduced if the Congress were asked to review all existing

requests for issuance of annual proclamations with a view to eliminating some requests and substituting a request for a permanent proclamation.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

September 26, 1977

**78-86 MEMORANDUM OPINION FOR THE COUNSEL
TO THE PRESIDENT**

**Consultants—Employment to Assist Presidential
Nominee at His Confirmation Hearing
(5 U.S.C. § 3190, 31 U.S.C. § 628)**

This responds to your request for our opinion as to the legality of paying a consultant (an attorney) from funds appropriated to the White House Office to assist a nominee to a regulatory agency in his confirmation hearing and to prepare the individual to assume his position, if appointed. The question appears to be a novel one.

Authority to hire consultants is found in 5 U.S.C. § 3109 (1976) which provides in pertinent part:

* * * * *

(b) When authorized by an appropriation or other statute, the head of an agency may procure by contract the temporary (not in excess of 1 year) or intermittent services of experts or consultants or an organization thereof

The current appropriation for the White House authorizes the hiring of consultants in the following terms:

For expenses necessary for the White House Office as authorized by law, including not to exceed \$3,850,000 for services as authorized by 5 U.S.C. 3109, at such per diem rates for individuals as the President may specify and other personal services without regard to the provisions of law regulating the employment and compensation of persons in the Government service.¹

The Civil Service Commission construes § 3109 as authorizing the employment of consultants to obtain advice of a specialized nature unavailable within the agency itself, to obtain outside viewpoints, or to acquire the services of experts who are not needed or available full time.² Conversely, the Commis-

¹Executive Office Appropriations Act, 1977, 90 Stat. 966.

²*Federal Personnel Manual*, Ch. 304, par. 1-3a. We do not necessarily imply that the White House Office is subject to the Civil Service Commission's jurisdiction in this respect by citing its
(Continued)

sion disapproves of the use of consultants to do what can be done as well by regular employees.³ Section 3109 would thus appear to encompass the employment of outside counsel to assist the nominee if, in your judgment, this would provide expert or professional services not available within the White House Office.

But § 3109 does not in itself resolve the problem. We must consider whether services of this type are subject to any other statutory prohibition. Funds appropriated to the White House Office are subject, as are agency funds, to the general restriction of 31 U.S.C. § 628 (1976) which provides:

Except as otherwise provided by law, sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others.

With respect to a general appropriation for necessary expenses, the Comptroller General has consistently ruled that expenditures are authorized "if reasonably necessary or incident" to the activity for which the funds are appropriated. *See, e.g.,* 50 Comp. Gen. 534 (1971); 29 Comp. Gen. 419 (1950). However, expenditures primarily for the personal benefit of present or prospective employees, rather than for a governmental activity, have been disapproved.⁴ The question is whether assisting a nominee is a "reasonably necessary" activity of the White House Office.

To our knowledge, neither the Comptroller General nor any other authority has passed on the question. No objection has been raised to the practice of the Department of Justice of utilizing its own personnel to assist nominees to positions in the Department and to the Federal bench by briefing them on their prospective duties and by on occasion presenting their background to the Senate in the best light. An important function of the White House Office is to assist the President in presenting his viewpoints to Congress. This would seem to cover reasonable advocacy of his nominations. It therefore appears that assisting a nominee to be confirmed can be viewed as an ordinary and necessary activity of the White House Office. If the issue were now to be raised with the Comptroller General, it may be that he would defer to this longstanding administrative practice, particularly since Congress is almost certainly aware of it. *Cf.* 38 Comp. Gen. 758, 767 (1959); 28 Comp. Gen. 673 (1950).

There is, however, a line of Comptroller General decisions holding that "an officer or employee has on his shoulders the duty of qualifying himself for the

(Continued)

interpretation of the statute. The Commission's construction is merely the best available interpretation.

³*Federal Personnel Manual*, Ch. 304, par. 1-3b.

⁴For example, medical examinations of employees at Government expense may be provided without specific authorization when necessary to the safety of other employees or to prevent loss of services from occupational disease but not when there is no prospect of harm to the Government from the employee's illness. *Compare* 30 Comp. Gen. 387 (1951); 22 Comp. Gen. 32 (1942); with 33 Comp. Gen. 231 (1953). Similarly, special clothing or equipment may be provided at Government expense only if the Government, rather than the employee, receives the primary benefit from its use. *See* 45 Comp. Gen. 215 (1965); 3 Comp. Gen. 433 (1924).

performance of his official duties.” 22 Comp. Gen. 460, 461 (1942). Thus, the Comptroller General has disapproved payment of bar admission fees,⁵ reimbursement for preemployment examinations by private doctors,⁶ and use of a general appropriation to employ a doctor to give preemployment examinations on a regular basis.⁷ We doubt that these decisions apply to the present case because obtaining Senate confirmation for a Presidential appointment differs from ordinary employment. While assisting a nominee may serve the nominee’s personal interest, it also advances the official interests of the Presidency. The confirmation process can therefore be viewed as more than simply personal qualification of the nominee. On that basis, we think that White House Office funds may be expended to protect the official interest involved.

LEON ULMAN

Deputy Assistant Attorney General

Office of Legal Counsel

⁵51 Comp. Gen. 701 (1972); 47 Comp. Gen. 116 (1967); 22 Comp. Gen. 460 (1942).

⁶31 Comp. Gen. 465 (1952).

⁷22 Comp. Gen. 243 (1942).

October 17, 1977

**78-87 MEMORANDUM OPINION FOR THE COUNSEL
TO THE PRESIDENT**

**Privacy—Persons Writing to the President—Freedom
of Information Act (5 U.S.C. § 552e (1976))**

This responds to your request for our views as to the means available to protect the privacy of private persons who write to the President and whose letters are referred to the various Federal agencies for response.

It is our position that the President and his immediate staff are not agencies or part of agencies within the meaning of the Freedom of Information Act (the Act), 5 U.S.C. § 552(e) (1976) and thus private letters addressed to the President are not agency records subject to the Freedom of Information Act so long as they are maintained by the President or his staff. *See* Attorney General's 1974 Freedom of Information Amendments Memorandum at 25. However, when such letters are referred to other Federal agencies for reply they will, in the absence of some special arrangement, become agency records subject to the Act. As we understand it, your view is that persons who write to the President ought to be able to do so confidentially and that it would be an invasion of privacy to make their identity publicly available. There are several methods by which their privacy can be maintained.

1. *Demonstrable Bailment.* The ordinary presumption is that any record in the possession of an agency regardless of its origin is an agency record subject to the Act. However, the courts have recognized that the records originating in governmental units not covered by the Act may expressly be "loaned" to an agency that is subject to the Act without becoming an agency record. *Cook v. Willingham*, 400 F. (2d) 885 (10th Cir. 1968) (judicial presentencing report in the hands of the Bureau of Prisons); *Goland v. Central Intelligence Agency*, Civ. No. 76-166, D.D.C., May 26, 1976 (Congressional Record lent to the Central Intelligence Agency).¹ A somewhat similar bailment technique is also used by the Federal Bureau of Investigation and the Civil Service Commission to retain such control as they may have over the public release of certain investigatory records which they originate and subsequently disseminate

¹Affirmed by the District of Columbia Court of Appeals, May 23, 1978.

to other Federal agencies; the records bear a printed legend that they are the property of the originating and not of the holding agency.

In our opinion, the President could probably use an express bailment, evidenced perhaps by a stamped legend on each letter, to reserve ownership and thus control over its release under the Act. (The reservation of ownership would be particularly credible if all or some are recalled by and returned to the White House after the agencies have prepared responses.) Nevertheless, such an express bailment technique would not be adequate in itself to protect the identity or privacy of private correspondents, because the replies generated by the agencies will ordinarily reveal the name and address of the correspondent and the general thrust of his inquiry, problem, or comment, and these replies—or rather their file copies—will be agency records subject to the Act. While it might be possible for the President to assert ownership of these file copies also, such an assertion would be questionable, and a strong argument could be made that they are agency records subject to the Act because they are generated and maintained by the originating agency in the ordinary course of agency business. Were the President to arrange that all agency copies of replies be physically delivered to him, he could, of course, remove them from the coverage of the Act. This alternative, however, seems equally questionable and also administratively unsound in that it would deprive agencies of copies of their own correspondence and, depending upon the nature of the agency response, might violate the Federal Records Act in some circumstances. Pub. L. 90-620, 44 U.S.C. §§ 3101-3314 (1976).

2. *Sanitizing Referrals to the Agencies.* When a private letter is referred to an agency, the President could send the agency a copy of the letter from which the name and address of the correspondent have been deleted and in which a control number has been substituted. The agency would then draft a proposed reply, using the code number of the incoming correspondence, and send the proposed reply to the White House where the identity of the correspondent would be decoded and the reply addressed, perhaps as reviewed and retyped on White House letterhead. In this manner, the identity of the correspondent would, in most cases, not be available in agency records and hence preserved from disclosure under the Freedom of Information Act.

We see at least two disadvantages with this method. First, the effort required to respond to private correspondence addressed to the President might be nearly doubled, in that each reply would have to be handled twice—once by the agency and then again in the White House. Second, in those cases where the letter contains personal identifying information about the writer which the agency will need in formulating a meaningful reply, such as a personal complaint about obtaining social security or other Federal benefits or permits, this proposed method simply would not work except at the price of precluding a meaningful reply. Yet such letters may well be the ones most deserving both of a responsive reply and of privacy protection because of the personal information they may contain. In any case, substituting a code number for the writer's name and address offers no privacy protection where the correspondent is writing about the problems of a relative or friend identified in the body of the letter.

3. *Reliance on the Privacy Exemption in the Freedom of Information Act.* In our view, the names and addresses of private correspondents and other personally identifying data in letters to the President, after referral to agencies for reply, would usually be withholdable under the sixth exemption of the Freedom of Information Act because disclosure would constitute a "clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b) (6) (1976): *cf.*, *Wine Hobby, U.S.A., Inc. v. United States Bureau of Alcohol, Tobacco, and Firearms*, 502 F.(2d) 133 (3d Cir. 1974). Almost all such letters either contain some personal information about the writer or a member of his family, if not information about personal opinions which the writer chooses to communicate to the President but presumably not the the entire public.² In the ordinary case, a requester would have no justifiable interest in determining the identity of the correspondents; any legitimate interest, such as attempting to determine the mix of citizen correspondence addressed to the President, would be served by making available copies of the letters which have been sanitized by deleting names and other identifying information.³ While one can reasonably anticipate that a few requests will relate to matters which have a substantial public interest, and in which withholding of identifying information would be improper under the Act because the legitimate public interest in disclosure of identity outweighs the individual's privacy, it seems to us that disclosure of identification in such rare cases would not be undesirable.

To help assure uniform agency implementation of a decision to use the sixth exemption to protect the privacy of correspondents, the President could proceed either (a) by instructing all agencies to preserve from clearly unwarranted invasions the privacy of individuals involved in correspondence referred from the White House, by withholding the name and other identifying data if such correspondence is to be made available in response to requests under the Act,⁴ or (b) by requiring that such records be maintained in a "system of records" as defined in the Privacy Act. 5 U.S.C. § 552a (1976). In the second way, the Privacy Act's sanctions for improper disclosure would buttress the protection for the privacy of correspondents. However, such added protection, while stronger than that afforded by a Presidential directive or agency policy unsupported by sanctions, would be no greater in scope: The measure of the material that could be protected would still be the sixth exemption and in rare instances identities might have to be released in the public interest. Moreover, the use of the Privacy Act is unnecessarily cumbersome because it would

²In many, and perhaps most, private letters to the President, there would seem to exist a public interest element which should reinforce, rather than counterbalance, the usually minor invasions of the writers' privacy. This is the public interest, which has First Amendment overtones, in protecting the right to petition the President without the chilling effect of fear of publicity. Of course, where the writer is communicating on behalf of an organization, privacy considerations would rarely be applicable, and the mix of public interest factors would be much more likely to call for disclosure.

³*Cf.*, *Rose v. Air Force*, 425 U.S. 352 (1976).

⁴This memorandum assumes that the Freedom of Information Act requests for private letters addressed to the President will typically come from requesters who do not know the identities of the writers of such letters. Where a request is for letters from named writers, privacy interests would have to be protected by deleting privacy information rather than identifying such information.

require agencies which do not presently maintain their referred private correspondence in a Privacy Act system of records to establish a new system of records, thereby subjecting themselves to additional Privacy Act burdens. For example, use of the Privacy Act would often introduce complications if the agency to which the letter is referred finds it must contact another agency to develop a meaningful reply. The use of a Presidential instruction with respect to invoking the sixth exemption should suffice.

Recommendation. We believe that, for the reasons discussed above, the privacy of those who write to the President can best be preserved through use of some form of guidance to the agencies to which the correspondence is referred. In effect, the agencies would be told or encouraged, when processing Freedom of Information Act requests for such material to delete personal identifying information from the letters and responses thereto as contemplated by the sixth exemption of the Act. This method should be effective and impose a minimal administrative burden on the agencies concerned. We would be glad to participate in the drafting of such guidance if it is determined to proceed along these lines.

ROBERT L. SALOSCHIN, *Chairman*
and
THOMAS C. NEWKIRK, *Member*
Department of Justice
Freedom of Information Committee
Office of Legal Counsel

October 25, 1977

**78-88 MEMORANDUM OPINION FOR THE COUNSEL
TO THE PRESIDENT**

**The President—Constitutional Law (Article I, § 7, cl.
2)—Presentation of Enrolled Bills—Absence of the
President**

In light of the President's forthcoming trip abroad, we believe you should be alerted to some of the problems and procedures connected with the presentation and signing of bills during his absence, in the event the matter should arise.

Article I, § 7, cl. 2, of the Constitution provides that all bills and resolutions approved by both Houses of the Congress are to be presented to the President, who then has 10 days (Sundays excepted) within which to approve, veto, or take no action on the bill. The 10-day period begins to run when an enrolled bill is "presented" to the President. When the President is in the United States, presentation does not require delivery to him personally; rather it is done by delivery of the bill to one of the legislative clerks on the White House staff. *See, Eber Bros. Wine & Liquor Corp. v. United States*, 167 Ct. Cl. 665, 674, 690 (1964), cert. denied, 380 U.S. 950 (1964).

This procedure obviously will not work when the President is abroad. Communication problems and preoccupation with the subject matter of his trip (*cf., Eber Bros., supra*, at 676) could then effectively curtail the period for his consideration. In the *Pocket Veto Case*, 279 U.S. 655, 678 (1929), the Court stressed the importance of the availability to the President of the full constitutional period for consideration.

The simplest way of dealing with that situation is through an agreement between the President and the congressional leadership pursuant to which no enrolled bills will be presented during his absence. There have been several such arrangements. *See, e.g.,* Zinn, Charles J., *The Veto Power of the President*, p. 16, U.S. Congress, House, Committee on the Judiciary, Committee Print, Washington, U.S. G.P.O. 1952; *Eber Bros., supra*, at 702, 705, 708. We are attaching for your convenience copies of a memorandum of President Franklin D. Roosevelt dated November 10, 1943; a letter from Attorney General Brownell to President Eisenhower dated July 5, 1955; a letter of President Lyndon B. Johnson dated October 14, 1966, and the reply of the Speaker of the House of Representatives dated October 14, 1966.

In the unlikely event that the President is unable to obtain such a commitment from Congress, including the contingency of urgent legislation that cannot await the President's return, the President normally withdraws the legislative clerks' authority to accept enrolled bills on his behalf when he travels abroad and so advises the Congress. The bills are received by the White House staff not for "presentation" to the President but for forwarding or transmission to the President. Presentation is then effected either when the bills actually are received by him abroad or upon his return to Washington. *Eber Bros.*, *supra*, at 676. While that case suggests that when the President is abroad, Congress has the power to start the running of the 10-day period by making a personal presentation abroad, we are not aware of any actual precedent to that effect.

We should also refer to the considerable time differences between Washington and some of the places where the President will visit. There is a time difference of 10 1/2 hours between Washington and New Delhi; midnight at New Delhi is 1:30 p.m., Washington time. Hence if the President signed a bill on Delhi time, he could lose almost half a day of the constitutional period. Moreover, confusion could arise regarding the computation of the time within which to approve a bill where it is presented in one time zone but action on it is taken in another zone.

Normally acts are dated as of local legal time. Thus, it was held in *Sunday v. Madigan*, 301 F.(2d) 871 (9th Cir., 1962), that the Uniform Code of Military Justice which was to become effective on May 15, 1951, became effective in Korea on May 15 Korean time, although it was still May 14 in the United States. On the other hand, as we have pointed out above, it is important for the President to have the full constitutional period of 10 days for consideration of the action he should take. Similarly, there should be no ambiguity as to when the 10-day period begins and ends. Accordingly, we recommend that if the President acts while abroad, notation of the time when a bill is presented to or approved by him be made according to the date and hour calculated as of Washington time.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

Attachments

“COPY”

November 10, 1943

MEMORANDUM FOR

THE VICE PRESIDENT
THE SPEAKER

As I expect to be away from Washington for some time in the near future, I hope that insofar as possible the transmission of completed legislation be delayed until my return. The White House Office, however, in other cases of emergency has been authorized to forward to me any and all enrolled bills or joint resolutions. They will be forwarded at once by the quickest means. The White House Office will not receive bills or resolutions on behalf of the President but only for the purpose of forwarding them. As soon as received by the President their presentation to the President will have been completed in accordance with the terms of the Constitution. *I suggest, therefore, that if any bill is forwarded to the White House, the entries on the House and Senate Journals show "delivery to the White House for forwarding to the President"*

For security reasons I hope that this can be kept confidential for as long as is necessary.

F.D.R.

OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D.C.

July 5, 1955

The President,

The White House.

My dear Mr. President:

It is suggested that you confer with leaders in Congress so that arrangements can be made under the law for enrolled bills or joint resolutions to be held in Congress until your return.

In this way, your attention to the important matters raised in Summit Talks will not be diverted by consideration of bills which may safely await your return.

If Congressional leadership believes that the matter is serious enough to warrant your immediate attention, it should be advised to forward the bill to the White House with this understanding:

1. That the entries on the House and Senate Journals will carry the statement: "Delivery to the White House for forwarding to the President."
2. That the White House Office will be advised that it will not receive bills or resolutions on behalf of the President but they will only be "received for forwarding them to the President".
3. That where the President acts on an emergency measure his decision will be communicated not only by carrier but also by cable.

This procedure would be used in order that in event of a veto the Congress could receive as much notice as possible to permit it to act.

Respectfully,

/s/ Herbert Brownell, Jr.

Attorney General

THE WHITE HOUSE

WASHINGTON

October 14, 1966

Dear Mr. President:

This will confirm arrangements made between you and members of my staff.

I am leaving on Monday to attend the important conference in Manila and to visit some of our friends in the Pacific and Southeast Asia. I expect to return to Washington about November 2.

In view of the close scheduling and concentrated efforts required by this mission, I think it preferable to defer until my return Presidential consideration of all but the most urgent legislation completed by Congress prior to its adjournment, so that each bill may receive the careful attention which it deserves.

In line with the patterns developed by previous Presidents under similar circumstances, I have issued instructions that bills received at the White House while I am on this trip will be treated not as having been "presented" to the President in the Constitutional sense, but as having been received for forwarding or for presentation upon my return. The bills received and the receipts customarily given to the Congressional messengers during this period will be stamped "Received (date) The White House, for forwarding to the President or for presentation to him on his return from abroad."

Under this arrangement the ten-day period for Presidential consideration provided in Article I, Section 7 of the Constitution will begin either upon my return to the White House or when the bills are actually presented to me while I am away.

Meanwhile, in order that every bill may receive full consideration at the earliest practicable date, the Bureau of the Budget and the Executive departments and agencies will proceed with their preparatory work on all bills as soon as such bills are received at the White House.

The Acting Attorney General has reviewed and approved these procedures.

Sincerely,

/s/ Lyndon B. Johnson

Honorable Hubert H. Humphrey
President of the Senate
Washington, D.C.

THE SPEAKER'S ROOMS
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, D.C.

October 14, 1966

The President
The White House
Washington, D.C.

Dear Mr. President:

I am in receipt of your letter of October 14th in relation to the Bills that pass both branches of Congress and are received at the White House subsequent to your leaving for your trip to the Philippines and other countries. So far as the House of Representatives is concerned, when receipts are received from the White House, similar entries to those stamped on the receipts will be made in the House Journal and the Congressional Record.

With my very best wishes for a most successful and safe voyage abroad and return, and with kind personal regards, I am, as always,

Very respectfully yours,

/s/ John W. McCormack

December 7, 1977

**78-89 MEMORANDUM OPINION FOR THE COUNSEL
TO THE PRESIDENT**

**General Services Administration—Disciplinary
Matter—Authority of the General Services
Administration (5 U.S.C. § 5596)**

This is in response to a request for our views concerning sanctions imposed on three employees of the General Services Administration (GSA). The three employees were charged with the theft of several packages of cigarettes from a blind-operated snack bar. Each of them was suspended without pay for 30 days and was demoted two grades. Each person pursued the matter within the GSA grievance system and then appealed to the Civil Service Commission's Federal Employee Appeals Authority, which upheld GSA's action. Petitions to reopen and reconsider the cases were filed with the Commission's Appeals Review Board and were denied.

Specifically you asked us whether GSA has authority to restore the employees to their prior grades. In our opinion, there are possible legal bases for GSA to take such action.

Retroactive restoration of employees to prior grades or to intermediate grades is authorized if GSA determines that its action in demoting them was "unjustified or unwarranted." This authority is set forth in the Civil Service Commission's regulation concerning adverse actions, 5 CFR § 752.402 (1977). Also, a foundation for such action is provided by the back-pay statute, 5 U.S.C. 5596 (1976), and the Civil Service Commission's implementing regulations, 5 CFR §§ 550.801-.804 (1977). The back-pay regulations make clear that an agency may make such a determination on its own initiative. *See* 5 CFR § 550.803(a) (1977).

Another possibility would be to increase, on a prospective basis, the grade of the employees. Of course, the ordinary requirements for a promotion would have to be satisfied.*

*If there is to be an increase of two grades in one year, waiver of the Whitten amendment may be necessary. *See* § 1310(c) of the Act of Nov. 1, 1951, as amended, 5 U.S.C. 3101 note (1976). The general rule under that provision is that employees in the competitive service may not be promoted to a higher grade without having served at least one year in the next lower grade. There are certain
(Continued)

In our opinion, the fact that GSA's sanctions were upheld in the Civil Service Commission proceedings does not bar GSA from reconsidering the matter. Accordingly, it would seem appropriate for you to refer this matter to GSA for further consideration. The question whether any remedial action should be taken is for GSA, and we express no opinion regarding that matter.

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

(Continued)

exceptions; and, in special cases, an agency head may obtain a waiver from the Civil Service Commission.

December 28, 1977

**78-90 MEMORANDUM OPINION FOR THE COUNSEL
TO THE PRESIDENT**

**Federal Reserve Board—Residency of Board Member
(12 U.S.C. § 241)**

You have asked for our opinion concerning the requirement in 12 U.S.C. § 241 that “not more than one of whom [the Board of Governors of the Federal Reserve System] shall be selected from any one Federal Reserve district” We have been informed that the President wishes to nominate to the Board an individual who resides and has his present principal business activities in a district other than the district from which he is being selected. Specifically, we understand that the nominee is to be “selected from” the Federal Reserve district of which the State of Oklahoma is a part. It appears that the nominee was born in Oklahoma and spent the bulk of his childhood and adolescence in Texas;¹ after his graduation from high school he attended the Coast Guard Academy, obtained his law degree from the University of California and was admitted to the bars of the States of California and New York. After practicing law for several years in New York City, the nominee moved to Providence, Rhode Island, where he has been in business in the private sector for approximately 20 years.

It is our view that the language of the statute, its limited legislative history, and the history of appointments to the Board of Governors indicate that Congress did not intend to impose a strict residency requirement upon the selection process. Therefore we do not think it necessary that the nominee satisfy any strict residency or domicile requirement in order to be selected from the Oklahoma district.

First, the plain language of § 241, when read in its entirety, reflects the congressional intent. While the first clause in the pertinent sentence from § 241 states that no more than one member shall be “selected from any one Federal Reserve district,” the remainder of the sentence instructs the President to “have due regard to a fair representation of the financial, agricultural, industrial, and commercial interests, and geographical divisions of the country.” Plainly, the statute was not drafted as a residency requirement. In other

¹No part of Texas falls within the district of which Oklahoma is a part.

contexts, of course, Congress has specified that nominees to Federal agencies shall be residents of the districts they represent. *See, e.g.*, 12 U.S.C. § 2242(c) (1971) (Federal Farm Credit Board); 10 U.S.C. § 9342 (Air Force Academy cadets). *Had Congress intended to impose a domicile or residency requirement it could have done so.* Instead, it instructed the President to seek nominees who could represent fairly the diversity of geographical and other interests within this country.

Second, our reading of the statute is supported by the following explanation of § 241 from the House Report:

The provision that the President in making his selections shall so far as possible select them in order to represent the different geographical regions of the country has been inserted in very general language in order that, while it might not be minutely mandatory, it should be the expressed wish of the Congress that no undue preponderance should be allowed to any one portion of the Nation at the expense of other portions. The provision, however, does not bind the President to any slavish recognition of given geographical sections. [H.R. Rept. No. 69, 63d Cong., 1st sess. 43 (1913).]²

Third, the history of appointments to the Federal Reserve Board of Governors indicates that Congress itself has not read § 241 as imposing a strict residency requirement. Several examples might be cited:

In 1914, Adolph C. Miller of California was first nominated, confirmed, and appointed to the Board from the San Francisco district. He, as have other Governors, apparently moved to the Washington, D.C., area to take up his full-time responsibilities as a Governor. He was then reappointed from the San Francisco district in 1924 for another 10-year term and, in the President's nomination, was said to be from California, 65 Cong. Rec. 8804 (1924). In 1934, Mr. Miller was again nominated for another term, but this time he was identified as being "of the District of Columbia" and was reappointed and served for the Richmond district.

One of the presently serving Board members, Andrew F. Brimmer, is a second example. Mr. Brimmer was born in Louisiana and served in many positions in academia, the Federal Government and the private sector before his nomination to the Board in 1966. At the time of his nomination he lived in the Washington area and was an Assistant Secretary at the Commerce Department. Immediately before coming to Commerce, Mr. Brimmer was a faculty member at the Wharton School of Finance and Commerce in Philadelphia for several years, that being his only contact with Philadelphia. He was "selected from" the Philadelphia district based on that contact.

Another presently serving Board member, Robert C. Holland, is a third example. Mr. Holland was born in Nebraska in 1925 and lived there until about

²We have been unable to find any other relevant legislative history. The Senate report on the bill is not enlightening and was not a majority report, the bill having been reported out of committee without recommendation. *See* S. Rept. 133, 63d Cong., 1st sess. (1913). The legislative debates, while exhaustive, are likewise not relevant to the question posed herein. *See* 50 Cong. Rec. 4638 *et seq.* (1913); 51 Cong. Rec. 274 *et seq.* (1913).

the age of 21. He then received degrees from the University of Pennsylvania and was an instructor at the Wharton School from 1948-49. He then entered Federal employment, serving from 1949 to 1961 with the Federal Reserve Bank in Chicago, and then held a number of positions in Washington on the staff of the Board of Governors until his nomination and appointment as a Governor "selected from" the Kansas City district (of which Nebraska is a part).

Yet another example is former Board member James Louis Robertson. He was born in Nebraska, obtained his undergraduate degree from George Washington University, and received his law degree at Harvard. He became a career Government employee and at the time of his nomination had worked for the Federal Government for 24 years. Despite the fact that his career and professional training were centered in the East, he was selected from the Kansas City district. *See* Hearing Before the Senate Committee on Banking and Currency, 88th Cong., 2d sess., p. 7 (1964).

Given these precedents, coupled with the language of the statute and its relevant legislative history, we think that the President might well conclude that a nominee who was born in Oklahoma and who was raised in that part of the country could fairly represent the "financial, agriculture, industrial, and commercial interests" of the geographical area covered by the Kansas City district. Ultimately, of course, Congress will have an opportunity in the confirmation process to consider the desirability of that judgment.³

LARRY A. HAMMOND
Acting Assistant Attorney General
Office of Legal Counsel

³As written, the statute suggests that Congress may focus not only on the question of the nominee's ability to represent the region from which he is selected, but also on the question whether the nominee may occasion an over-representation of some other district (in this case the district covering Rhode Island). Our analysis would indicate, however, that the important inquiry will focus upon the substantiality of the nominee's contacts with, and knowledgeability about, the district from which he is selected rather than upon his contacts and relationships in some other region.

January 31, 1978

**78-91 MEMORANDUM OPINION FOR THE COUNSEL
TO THE PRESIDENT**

**Federal Reserve Board—Vacancy With the Office of
the Chairman—Status of the Vice Chairman (12
U.S.C. §§ 242, 244)**

You have requested us to consider the status of the chairmanship of the Federal Reserve Board in the event that the President's nominee has not been confirmed as Chairman by January 31, 1978, the date on which the incumbent's term expires. We have considered three possible resolutions of this question and have reached the following conclusions: First, the incumbent cannot hold over and continue to exercise the powers of the office as *de facto* Chairman; second, under relevant statutory authority, the Vice Chairman is only authorized to preside in the Chairman's absence although an argument could be made that the Vice Chairman possesses inherent authority to assume the duties of the Chairman when a vacancy has occurred. Such an approach, in our opinion, is of doubtful legality. Third, in light of the limited authority of the Vice Chairman, we believe that it is necessary for the President to designate one of the Board members as acting Chairman.

I. Holdover Chairman

Section 242 of Title 12, U.S. Code, provides that "one [member of the Federal Reserve Board] shall be designated by the President as chairman and one as vice chairman of the Board to serve as such for a term of four years."¹ The statutory assurance that "members" whose terms have expired should serve "until their successors are appointed and qualified," 12 U.S.C. § 242 does not address the continuance in office of the Chairman *qua* Chairman and therefore, is inapplicable under these circumstances. Thus, the Chairman's

¹The 1977 amendments to the Federal Reserve Act, 91 Stat. 1387 (not yet applicable), require designation of the Chairman to be accompanied by the advice and consent of the Senate; they also alter the way in which the 4-year term is to run, but are not otherwise of significance to the question at hand.

term expires by operation of law after the statutory term has run. *Badger v. United States*, 93 U.S. 599, 601 (1876). There the court stated:

When this four years comes round, [the officer's] right or power to perform the duties of the office is at an end, as completely as if he had never held the office Whether a successor has been elected, or whether he has qualified, does not enter into the question. [*Id.* at 601.]

Because the incumbent is not entitled to continue to exercise his powers absent reappointment, *see* 11 Op. Atty. Gen. 286 (1865), a vacancy in the position results.²

II. Inherent Authority of the Vice Chairman

Section 244 of Title 12 provides that the Vice Chairman is to "preside" at Board meetings in the "absence" of the Chairman but does not otherwise specify his duties. The term "absence" normally connotes a failure to be present that is temporary in contradistinction to the term "vacancy" caused, for example, by death of the incumbent or his resignation. With regard to numerous other agencies Congress has directed that the Vice Chairman is to serve in the event of the Chairman's absence or incapacity or as a result of a vacancy in the office of the Chairman. *See, e.g.*, 16 U.S.C. § 792 (1976) (Federal Power Commission); 42 U.S.C. § 2000e-4 (1976) (Equal Employment Opportunity Commission). Arguably, since Congress could have done the same here, the absence of such language must be regarded as meaningful.

A review of the legislative history of § 244 reveals no discussion of this point. *See* H. Rept. No. 150, 73d Cong., 1st sess. (1933); H. Rept. No. 254, 73d Cong., 1st sess. (1933); S. Rept. No. 77, 73d Cong., 1st sess. (1933). It is likely that the problem was not even considered since the change to a fixed term, and the resulting possibility of a vacancy in the chairmanship, did not occur until 2 years later. *See* 49 Stat. 705 (1935).³

It might be contended that no great significance should be attached to this specification of very limited duties. Instead, it could be argued that it would be reasonable to assume that Congress did not mean to preclude the Vice Chairman from exercising what might be regarded as an inherent function of his

²Counsel for the Federal Reserve Board has suggested that the incumbent could continue to serve as a *de facto* officer whose actions will be given legal effect with regard to innocent third parties who have assumed such actions to be authorized. *See, Waite v. City of Santa Clara*, 184 U.S. 302, 323 (1902). Such will not be the case, however, where the defects in the officer's title are so notorious as to make those relying on his acts chargeable with knowledge thereof. 63 Am. Jur. 2d. *Officers holding over* § 507 (1972). Because the expiration of the incumbent's term is a well-known fact it would appear that even innocent third parties could not claim lack of knowledge in this case. Moreover, intentional reliance on this stop-gap doctrine is ill-advised where more effective steps can be taken to assure that the chairmanship is legally and continuously filled.

³Originally, service as "governor" and "vice governor" was at the pleasure of the President and was not limited by the specification of a fixed term. *See* 38 Stat. 260, 42 Stat. 620; *see also* 48 Stat. 167 (Chairman and Vice Chairman). No problem of succession was created since a member could hold office until his successor had been qualified, at which time the President could designate the new member as Chairman.

office and temporarily assuming the duties of the chairmanship whenever that office is vacant.⁴ In light of the statute's clear language, however, we believe that this contention should not control and that a third alternative-designation by the President of an acting Chairman, is preferable.

III. Presidential Designation of an Acting Chairman

The Vacancy Act, 5 U.S.C. §§ 3345-3348 (1976), which limits Presidential authority to fill Executive branch vacancies on a temporary basis under certain circumstances, by its terms applies only to executive departments and therefore not to the Federal Reserve Board. We have consistently taken the position that the President possesses inherent authority to make temporary appointments necessary to ensure the continuing operation of the Executive branch. Although no court has squarely addressed the point, the Court of Appeals for the District of Columbia in *Williams v. Phillips*, 482 F.(2d) 669 (D.C. Cir. 1973) seemed to regard this theory as plausible.⁵

Such power has most often been exercised with respect to Executive branch agencies rather than independent regulatory bodies that have under certain circumstances, see, *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), been protected from Presidential control. Where it has deemed insulation from such control necessary, Congress has, however, provided that independent regulatory bodies should choose their own temporary chairmen.⁶ Congress has not limited the President's authority with regard to the Federal Reserve Board in such a fashion; nor has it otherwise clearly specified the procedure to be used in handling a vacancy in the chairmanship. Under such circumstances, action by the President would appear to be appropriate. His discretion in selecting a temporary Chairman is not confined by the statutory scheme. It is therefore our view that he is free to select the Vice Chairman or some member to serve in this capacity.

IV. Conclusion

Because of his limited term, the present Chairman may not hold over in office and continue to perform his official functions. In light of the specific

⁴Some support for this position may be gained from the past practice of the Federal Reserve Board. According to the Counsel for the Chairman, vacancies occurred in both the office of Chairman and that of Vice Chairman early in 1948. On February 3, 1948, the Board met and elected the former Chairman as Chairman *pro tempore*. He served until the new Chairman had been designated and qualified. In following this procedure, the Board appears to have adopted the approach outlined in 12 U.S.C. § 244, albeit that the pertinent language speaks of "absence" rather than "vacancy." ("In the absence of the chairman and the vice chairman, the Board shall elect a member to act as chairman *pro tempore*.")

⁵Since the President has already submitted the name of the nominee to the Senate for confirmation, no problem of the sort at issue in the *Phillips* case—use of the temporary appointment power to avoid the necessity for Senate confirmation—is presented here.

⁶Although the President is charged with designating the Chairman of the Federal Communications Commission, see 47 U.S.C. § 155(a) (1976), the Commission itself is authorized to choose an acting Chairman should that become necessary. *Id.*

statutory limitation concerning service during the Chairman's "absence " the better view is that the Vice Chairman may not, under his statutory authority, automatically serve as Chairman during a temporary vacancy in the office of the Chairman. In the absence of any statutorily prescribed mechanism for filling vacancies, the President may designate one of the members of the Board to serve as acting Chairman until such time as the nominee has been confirmed.

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

February 6, 1978

**78-92 MEMORANDUM OPINION FOR THE COUNSEL
TO THE PRESIDENT**

**Recess Appointments—Constitution (Article II, § 2,
cl. 3)—Legal Services Corporation—Effect of Stat-
utory Holdover Provisions**

This responds to your inquiry whether the holdover provisions of the Legal Services Corporation Act preclude the President from making recess appointments to its board of directors after the terms of the members have expired but while they were serving as holdovers. It is our conclusion that these provisions do not affect the President's power.

Section 2 of the Legal Services Corporation Act of 1974, Pub. L. 93-355, 88 Stat. 379, 42 U.S.C. § 2996c(b) (1976) provides that the term of office of the members of the board of directors of the Corporation is 3 years, except that 5 of the members first appointed have a term of 2 years.* The subsection continues: "Each member of the Board shall continue to serve until the successor to such member has been appointed and qualified." The President appointed five members of the Board for terms of 2 years beginning on July 14, 1975; the terms expired on July 13, 1977. No new appointments were made by the President during the first session of the 95th Congress. On January 19, 1978, prior to the opening of the second session of the 95th Congress, the President made recess appointments to those positions pursuant to Article II, § 2, cl. 3, of the Constitution. That clause provides in pertinent part:

The President shall have Power to Fill up all Vacancies that may happen during the Recess of the Senate

The exercise of the power to make recess appointments thus presupposes the existence of a vacancy. One of the directors replaced by the President asserts that despite the expiration of his 2-year term on July 13, 1977, the position was not vacant because under the statute he continued to serve until his successor has been appointed and qualified.

*The members of the Board are appointed by the President with the advice and consent of the Senate. 42 U.S.C. § 2996c(a) (1976).

It has been the view of this Department, going back to the Attorney General's opinion of 1880 (16 Op. Atty. Gen. 538), that where the statutory term of an officer has expired, the interim filling of his position, either by a court appointment (United States Attorney) or by a holdover provision, does not fill a vacancy in the constitutional sense.

There are various methods designed to provide for the temporary performance of the duties of an officer after he has resigned or his term has expired. Among them are the temporary appointments by the courts as in the case of U.S. Attorneys and Marshals (28 U.S.C. §§ 546, 565) (1976), or holdover clauses as in the cases of United States Attorneys and Marshals (28 U.S.C. §§ 541(b), 561(b) (1976)), of territorial judges (48 U.S.C. §§ 1424(b), 1614 (1976)), and of most, if not all, regulatory commissions. Such a temporary performance after the expiration of the incumbent's statutory term, however, does not "fill" the vacancy. The office remains vacant and the President has the power to make appointments to it during a recess of the Senate. Were it otherwise the Senate could perpetuate in office one serving under a holdover provision by failing to confirm his successor. Moreover, Congress could deprive the President of his constitutional power to make recess appointments by the passage of legislation providing for the interim filling of the office. *See, Peck v. United States*, 39 Ct. Cl. 125, 134 (1904).

In 1880, the Attorney General ruled that the President had the power to make a recess appointment to the office of a United States Attorney although the position was then being temporarily filled by a court appointment pursuant to what is now 28 U.S.C. § 546 (1976). The Attorney General stated:

. . . 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 until the President acts by an appointment.

* * * * *

. . . The office is not the less vacant, so far as his power of appointment is concerned, when the only power conferred upon any one else is a power to make an appointment which shall entitle the appointee to serve until an appointment is made by the President, and no longer. [16 Op. A. G. 539-540 (1880).]

In an analogous situation arising at the same time in another judicial district, Mr. Justice Woods, sitting in circuit, came to the same conclusion as the Attorney General. *In re Farrow*, 3 Fed. 112, 116-117 (C.C. N.D. Ga., 1880).

The Department has consistently held that holdover provisions do not fill a vacancy but merely provide for a temporary method of ensuring the performance of the functions of the office after the expiration of the term of the

incumbent; hence, they do not prevent the President from exercising his constitutional authority to make recess appointments. In 1950, the Deputy Attorney General advised that the President had the power to make recess appointments to the Interstate Commerce Commission and the Reconstruction Finance Corporation, although the officials whose terms had expired were serving under holdover provisions. The Department's analysis in 1960 of bills containing holdover provisions with respect to several independent agencies concluded that those provisions would not interfere with the President's power to make recess appointments. Again, in 1972, the Department advised the Interstate Commerce Commission that the holdover provisions of the Interstate Commerce Act did not preclude the President from making recess appointments.

Peck v. United States, 39 Ct. Cl. 125, *supra*, cited by the General Counsel of the Legal Services Corporation, does not hold to the contrary. It stands only for the proposition that where there is no present vacancy one cannot be created by a recess appointment. The Presidential practice is fully in accord. For example, a United States Attorney cannot be removed during his statutory term by giving a recess appointment to a successor, the reason being that there is no vacancy to be filled. Accordingly, the President must first remove the incumbent. Where, however, a United States Attorney holds over, or serves under a court appointment, a vacancy exists. The President therefore can make a recess appointment that has the effect of removing an incumbent who is merely serving on a temporary basis. That rule governs here.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

April 7, 1978

**78-93 MEMORANDUM FOR THE COUNSEL TO THE
PRESIDENT**

**Veterans—Benefits—Effect of Upgraded Discharges
(38 U.S.C.A. 3103)**

This memorandum supplements our March 14, 1978, memorandum to you regarding implementation of Pub. L. 95-126, 91 Stat. 1106 (1977), 38 U.S.C.A. 3103 (1979), which deals with receipt of veterans' benefits by persons who obtained upgraded discharges. In that memorandum, we concluded that there is one substantial constitutional issue raised by the statute. At a March 22 meeting,¹ a second constitutional question, involving the effect of this statute on Veterans Administration (VA) loan guaranties, was raised.² We were asked to consider whether the operation of the new law, insofar as it has retroactive consequences, might violate notions of due process under the Fifth Amendment. Our conclusion is that the drafters of Pub. L. 95-126 did not intend to alter the obligations of the Veterans Administration that took effect before October 8, 1977, the date the statute was enacted, and that therefore no serious constitutional issue arises. The VA should take appropriate steps to guard against issuance of a guaranty on behalf of a veteran whose eligibility for VA benefits was terminated by Pub. L. 95-126.³

1. Section 5 of Pub. L. 95-126 sets forth the schedule for the implementation of its various provisions. For example, with regard to a person whose original discharge was within one of the barred categories of 38 U.S.C.A. § 3102(a) (1976) and who obtained an upgraded discharge through the Special Program, the termination of VA benefits took effect on October 8, 1977, when Pub. L. 95-126 was enacted. However, § 5(2) (B), which is applicable to such

¹On March 22, our Office discussed this matter with members of President Carter's staff and personnel from the Veterans Administration.

²The Veterans Administration has not determined the number of persons whose discharges were upgraded through the Special Program who have received a certificate of eligibility for a VA-guaranteed loan.

³A recent VA circular, DVB Circular 20-78-18 (March 24, 1978), para. 11, indicates that such steps are to be taken, after a final determination of ineligibility has been made by the VA Adjudication Division.

persons, states that "the United States shall not make any claim to recover the value of any [VA] benefits . . . provided [before October 8, 1977]."

Different effective-date provisions apply with regard to persons whose original discharges were not within a barred category. With respect to those individuals who obtained upgraded discharges through the Special Program and who, on October 8, 1977, were "receiving [VA] benefits," § 5(2) (A) (i) provides that such benefits shall not be terminated until (1) the day when a final adverse "second determination" is made, (2) 90 days after a preliminary adverse "second determination," or (3) April 7, 1978, whichever is earliest.⁴ Section 5(2) (A) (ii) states that the United States shall make no claim to recover the value of VA benefits provided before such earliest day.

2. Regarding VA benefits that are in the form of payments of money, application of the foregoing provisions is relatively clear. Less clear, however, is their application to loan guaranties. With respect to a loan guaranty, the questions become what is the "benefit" to the veteran and at what stage has the benefit been "received" or "provided." A veteran who makes a request for a loan guaranty, will, if he is found to be eligible, receive from the VA a certificate of eligibility. He may then submit that certificate to a lender. After a loan is closed, the VA issues a certificate of guaranty. Such a certificate is, by virtue of 38 U.S.C. § 1821 (1976), "conclusive evidence of the eligibility of the loan for guaranty . . ." and, absent fraud or material misrepresentation, the VA is bound by the certificate.

It might be asserted that a person who obtained a certificate of eligibility, at that point, "received" a "benefit" within the meaning of § 5 of Pub. L. 95-126. In our view, a more sound interpretation is that there is no such "benefit" until a loan has been closed and a certificate of guaranty has been issued. In the latter situation, the rights and obligations of the parties have become fixed. In contrast, a certificate of eligibility would seem merely to represent a potential benefit.

Our interpretation is consistent with the legislative history of Pub. L. 95-126. Our review of that history revealed only one statement concerned with the effect on loan guaranties. During the debate on the bill initially passed by the Senate, the Chairman of the Veterans' Affairs Committee said:⁵

I also wish to make clear . . . that there is no intent in this legislation to diminish the Government's obligations—incurred prior to the date of enactment in the cases of persons whose discharges were previously upgraded under the special program—under such provisions as the home-loan guaranty program under chapter 37 of title 38, United States Code.

⁴No such grace period is provided, however, for persons whose discharges were upgraded through the Special Program, but who were not receiving VA benefits on October 8, 1977.

⁵123 Cong. Rec. S. 28196 (Sept. 8, 1977).

If the Government's obligations are "incurred" when a certificate of guaranty has been issued, it seems clear that there was no intent in the legislation to disrupt the operation of that guaranty.

The next issue relates to the manner in which the statute, as we construe it, should be applied by the VA.⁶ Any certificate of guaranty issued before October 8, 1977, to a person upgraded through the Special Program should not be affected.⁷ Significantly different is the situation in which a veteran (whose discharge was upgraded through the Special Program) obtained a certificate before October 8, 1977, but not a guaranteed loan. Under our reading of § 5, such a person had not received a "benefit" by October 8. Accordingly, the proper course for the VA is to revoke such certificate of eligibility.⁸

Another possible category would be that of the individual (who went through the Special Program) who obtained a VA-guaranteed loan *after* October 8, 1977. Since we do not have evidence today that there are persons in this situation, we need not decide what the proper course for the VA would be. If, however, this situation is found to exist, we have serious doubts about whether the VA should attempt to cancel the guaranty. There would, of course, be a problem of apparent inconsistency with Pub. L. 95-126 if such guaranties have been granted. Nonetheless, an effort by the VA to cancel such a guaranty would run directly counter to the incontestability provision, 38 U.S.C. 1821 (1976), and such action might have serious ramifications for the entire guaranty program. Also there is the possibility that continuing the guaranty may never result in a monetary loss for the Government.⁹

Thus, Pub. L. 95-126, as we interpret it, does not call for alteration of fixed obligations of the VA with respect to loan guaranties. Therefore, constitutional issues which might otherwise arise¹⁰ are not presented.

3. With respect to the constitutionality of Pub. L. 95-126 as it affects VA benefits generally, we adhere to the views expressed in our March 14 memorandum. As shown by the facts alleged in the *Furnish* case, which is the pending case discussed in our earlier memorandum, denial of VA educational assistance to persons who relied on receipt of such assistance can result in substantial hardship.¹¹ Nonetheless, we do not think that the existence of such hardships renders the statute unconstitutional.

⁶See DVB Circular 20-78-18 (March 24, 1978), para. 11.

⁷In this respect, there would be no distinction between persons covered by the barred categories and other (nonbarred) veterans.

⁸There would, of course, be no such revocation if the veteran had received a favorable "second determination."

⁹The guaranty comes into play only in the event of a default by the veteran. Even then, to the extent of any amount paid on the guaranty, the VA is subrogated to the rights of the holder of the obligation. 38 U.S.C. 1816 (1976).

¹⁰See, *Lynch v. United States*, 292 U.S. 571, 579-80 (1934) (statute abrogating contractual obligations of the United States regarding war risk insurance held unconstitutional).

¹¹For some persons whose "second determination" is favorable, the award of educational assistance will be retroactive to the date of their application for benefits. A veteran receiving benefits on April 7, 1978, who later receives a favorable second determination would have the benefits restored back to April 7. See DVB Circular 20-78-18, para. 15. f.

Pertinent cases indicate that Congress has broad power to modify or to withdraw such benefits. *Cf.*, *Flemming v. Nestor*, 363 U.S. 603 (1960) (social security old-age benefits); *Richardson v. Belcher*, 404 U.S. 78, 80-81 (1971) (social security disability benefits); *Ziviak v. United States*, 411 F. Supp. 416, 422 (D. Mass.) *aff'd mem.*, 429 U.S. 801 (1976) (VA benefits for survivors).¹² Here, Congress has not required the recovery of benefits as provided in the past. Congress reviewed the actions of the Department of Defense and the VA relating to eligibility for VA benefits and determined that different standards and procedures should be used in regard to upgrading of discharges. As a result, many persons have lost or will lose entitlement to such benefits. However, there does not appear to be a proper basis for holding that Congress lacks the power to impose such changes.

LARRY A. HAMMOND
Acting Assistant Attorney General
Office of Legal Counsel

¹²In *Ziviak v. United States*, *supra*, 411 F. Supp. at 422, the district court said:

It appears to be well settled that veterans have no vested right to receive Veterans' Administration benefits. Generally, the Supreme Court stated:

Pensions, compensation allowances, and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress.

Lynch v. United States, 292 U.S. 571, 577, 54 S. Ct. 840, 842, 78 L. Ed. 1434, 1439 (1934).

May 18, 1978

**78-94 MEMORANDUM OPINION FOR THE COUNSEL
TO THE PRESIDENT**

**Department of Energy—Appointment of Interim
Officers—Department of Energy Organization Act
(42 U.S.C. § 7342)**

This responds to your request for our opinion concerning the legality of the designation of certain acting officials by the Secretary of Energy.

The Department of Energy was established by the Department of Energy Organization Act of August 4, 1977, Pub. L. 95-91, 91 Stat. 565, 42 U.S.C. § 7101 *et seq.* (Supp. 1, 1977) (the Act). The Act involved the merger of the Federal Energy Administration (FEA), the Energy Research and Development Administration (ERDA), and the Federal Power Commission, and included the transfer of certain functions to the new Department from several other Government agencies (Title III of the Act). When the Department became operative on October 1, 1977, pursuant to Executive Order No. 12009, the Secretary was the only officer required to be appointed by and with the advice and consent of the Senate who subsequently was confirmed. The President filled eight other positions in the Department requiring Senate confirmation on a temporary basis pursuant to § 902 of the Act, 42 U.S.C. § 7342,¹ by designating officers of the predecessor agencies, who had been appointed by and with the advice and consent of the Senate and who had held those positions immediately prior to the effective date of the Act,² to perform the duties of the vacant departmental offices to which they were assigned.

¹Section 902 of the Act provides:

In the event that one or more officers required by this Act to be appointed by and with the advice and consent of the Senate shall not have entered upon office on the effective date of this Act, the President may designate any officer, whose appointment was required to be made, by and with the advice and consent of the Senate, and who was such an officer immediately prior to the effective date of the Act, to act in such office until the office is filled as provided in this Act. While so acting such persons shall receive compensation at the rates provided by this Act for the respective offices in which they act.

²Section 703 of the Act (42 U.S.C. § 7293) terminated the predecessor agencies of the Department of Energy, and, generally speaking, the advice and consent offices in those agencies as of the date when the Department of Energy became operative.

For four positions—the Offices of General Counsel, Inspector General, and Assistant Secretaries for Conservation and Solar Applications and for Energy Technology—we have been advised that no officers were available in the predecessor agencies who had been appointed with confirmation by the Senate. We have also been informed that, because Presidential designations under § 902 from personnel of the predecessor agencies were not possible, the remaining four positions were filled by the Secretary of Energy designating the Acting General Counsel and the Acting Inspector General of the Federal Energy Administration, and the Acting Administrator for Solar, Geothermal and Advanced Energy Systems and the Acting Administrator for Nuclear Energy of ERDA to perform the duties of the respective vacant offices on an acting basis. The Acting Assistant Secretary for Defense Programs, one of the officers designated by the President pursuant to § 902 of the Act, resigned effective January 1, 1978. The Secretary thereupon designated his deputy as the Acting Assistant Secretary to act in his position.

The President has submitted to the Senate nominations for four of the eight positions requiring Senate confirmation.³ He has indicated his intention to nominate an Assistant Secretary for Defense Programs, but as of this writing no nomination has been formally submitted to the Senate. The nominees for the positions of General Counsel, Inspector General, and Assistant Secretary for Energy Technology were recently confirmed by the Senate. Their appointments are imminent, in which event the designation of the acting officials will, of course, terminate. The Acting Assistant Secretary for Energy Technology designated by the Secretary was the only acting official who has been nominated by the President to the same position.

I.

The authority of the remaining five officers to act under Secretarial designation has been questioned on the ground that it is inconsistent with § 902 of the Act (fn. 1; *supra*). It is asserted that § 902 establishes the exclusive manner in which interim appointments to fill initial vacancies in the Department of Energy may be made. We disagree. Although § 902 was designed to give the President the means to make interim designations in the Department of Energy where possible, we doubt that Congress intended to tie his hands and compel him to make what would be unsuitable designations to the detriment of the newly established Department, or to preclude any other method to fill those positions.

There is no legislative history to guide us concerning the scope of § 902. The statutory language, “the President may designate any officer,” indicates that

³Nominations were submitted as follows: Assistant Secretary for Energy Technology, September 13, 1977, resubmitted January 26, 1978; General Counsel, September 22, 1977, resubmitted January 25, 1978; Assistant Secretary for Conservation and Solar Applications, January 25, 1978; Inspector General, April 20, 1978.

the section was intended to confer on the President a discretionary power to be exercised in conformity with the statutory purpose, rather than a binding and exclusive method of appointment, which, as the result of circumstances apparently not anticipated by Congress, would have brought about a highly undesirable result.

When Congress provided for the establishment of the Department of Energy, it was a reasonable assumption that officials on the Assistant Secretary level, requiring Senate confirmation, would hold positions requiring highly specialized technical expertise, and that at least some of the nominations to those positions would go to persons who had held corresponding advice and consent positions in some of the predecessor agencies of the department. It was equally reasonable to expect that some of the nominations might not be acted upon by the time the Department became operative. The question of effectively providing for interim appointments was certainly one that could not be ignored.

The existing procedures provided for in the Vacancy Act (5 U.S.C. §§ 3345-3349 (1976)) were not adapted to initial vacancies in a newly established department of the character of the Department of Energy. Section 3346 provides that in the case of a vacancy in a bureau of an Executive department⁴ the first assistant shall act unless the President makes a designation under § 3347. It is difficult to envisage a "first assistant" before there is an Assistant Secretary.⁵ Section 3347 provides an alternative method of filling a vacancy. The President can designate a department head or any other officer appointed by and with the advice and consent of the Senate to perform the duties of the vacant office. That procedure, however, was unsuited to the situation confronting the Department of Energy for several reasons.

As mentioned above, § 703 of the Act, *supra*, terminated, as of the date when that Department became operative, the predecessor agencies of the Department of Energy and the positions in those agencies that were either expressly authorized by law or compensated according to the Executive Schedule. Because the officers in those agencies who had been appointed by and with the advice and consent of the Senate lost that status under § 703 of the Act, the President could not designate them as acting officers under § 3347. If § 3347 were controlling, his choice therefore would have been limited to those already serving in advice and consent positions in other agencies. This would mean not only that it would be extremely difficult, if not impossible, to find acting officers possessing the necessary technical qualifications for the highly specialized positions in the Department of Energy, but even then the designees could perform those duties only on a part-time basis.

We do not doubt that the temporary filling of positions at the Assistant Secretary level by persons who both lacked the necessary expertise and could

⁴A departmental unit headed by an Assistant Secretary or comparable officer usually constitutes a bureau.

⁵Moreover, the Attorney General has interpreted the term "first assistant" as applying only to officials whose appointment has been specifically provided for by statute. 28 Op. A.G. 95 (1909); 19 Op. A.G. 503 (1890).

not devote their entire time to the new position could readily have presented difficulties for the new Department during the crucial first months of its existence. Moreover, under the Vacancy Act *ad interim* designations could last for only 30 days. Experience amply demonstrates that under present conditions, Senate confirmation frequently takes longer than that.⁶

As we see it, § 902 was designed by Congress to avoid Vacancy Act problems by enabling the President to make *ad interim* designations of experienced officials of the predecessor agencies who could serve on a full-time basis even if they no longer held advice and consent positions, and permit them to serve more than 30 days if necessary. The last sentence of § 902 indicates plainly that Congress intended that the interim designations under that section would primarily, if not exclusively, be given to former advice and consent officers who had served in the predecessor agencies, *i.e.*, the acting official would receive compensation at the rate provided by the Act for the office in which he would serve on an acting basis. We believe it was intended to take care of the following problem: The designee originally was an advice and consent official in a predecessor agency and as such received compensation under the Executive Schedule (5 U.S.C. §§ 5311-5316). When the President designated him to be an acting official he was no longer an advice and consent officer as the result of § 703 of the Act which abolished his former position (*see* n. 2, *supra*); hence he would have to be appointed to a position that did not require Senate confirmation and that carried a lower rate of compensation.⁷ Section 5535 of Title 5 prevents payment to an acting official of compensation in addition to that of the regular position he holds. The last sentence of § 902 thus has the effect of avoiding a reduction in compensation during the confirmation proceedings.

In short, § 902 is specifically addressed to the situation in which the President intended to appoint an advice and consent officer of a predecessor agency of the Department of Energy to a corresponding position in that Department but could not expect confirmation prior to the activation of the Department.

But § 902 was not a complete solution. When the Department of Energy became operative, it appeared that there was no suitable advice and consent officer, either in a predecessor agency or elsewhere, whom the President could designate to serve full-time in an acting capacity in the several advice and consent positions in the Department. If such officers had been available, undoubtedly the President would have restored to the authority given him by § 902.

A mechanistic interpretation of the section leads to a view that is so extreme that we cannot attribute it to the intent of Congress, namely, that the President

⁶In the situation at hand the confirmation of the General Counsel and of the Assistant Secretary for Energy Technology took approximately seven months.

⁷*I.e.*, at a supergrade, rather than in the Executive Schedule usually applicable to positions at the Assistant Secretary level.

was required to designate an advice and consent officer, presumably from another agency, regardless of his qualifications and expertise and his ability to devote himself full-time to the office, or that no designation to the office could be made at all. Either alternative would be inconsistent with what we perceive to be legislative purpose of § 902, that vacancies in the Department of Energy were to be filled during the critical first months of its existence on a full-time basis by officials who possessed the necessary expertise. An interpretation of § 902 to the effect that it was intended to provide the *exclusive* method of filling initial vacancies in the Department of Energy is both inconsistent with its discretionary language and would defeat the purpose it was designed to accomplish. It is a familiar axiom of construction that a statute is not to be interpreted in a manner at variance with its policy and purpose. *United States v. American Trucking Associations*, 310 U.S. 534, 543 (1940); *United States v. Bisceglia*, 420 U.S. 141, 149-150 (1975).

II.

We therefore conclude that § 902 is not intended to establish the sole method of filling vacancies in the Department of Energy. The President no doubt would have used that provision if all its underlying premises could be met, *i.e.*, if qualified advice and consent officers were available who could devote themselves full-time to the acting position. But we do not believe that the section is to be construed as meaning that such vacancies may not be filled at all on a temporary basis, if no advice and consent officers are available. On the contrary, it would appear that the fundamental statutory purpose—that these positions should be filled temporarily on a full-time basis by persons having the necessary expertise—strongly supports the conclusion that the President or the Secretary of Energy should look for other sources of authority to carry out that statutory end.

Having disposed of the question of the Vacancy Act, we think that the Secretary of Energy had to rely on his general powers and responsibilities, including those under 5 U.S.C. § 301,⁸ which he did by designating the most experienced officials in the departmental subdivisions in which vacancies existed. That procedure, while not specifically authorized by § 902, carried out what we regard as its purpose—that the vacancies should be filled by qualified persons on a full-time basis. In this context, the observations of the opinion of the Court of Appeals in *Williams v. Phillips*, 482 F.(2d) 669, 670-671 (D.C. Cir. 1973), are helpful. There the court suggested that keeping the Government

⁸5 U.S.C. § 301 provides:

301. Departmental regulations

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

running warrants the designation of acting officials to fill vacancies in the absence of express statutory authority. Similar considerations should be applicable where the strict requirements of the pertinent statute cannot be met due to unforeseen circumstances. The court, however, added that such extra-statutory designations could not last indefinitely unless nominations were submitted to the Senate within a reasonable time. In the circumstance of that case the court suggested that the 30-day provision of the Vacancy Act, 5 U.S.C. § 3348 (1976), should serve as a guideline; hence that the designee in question was no longer entitled to hold that position when no nomination had been submitted for 4½ months after the vacancy had occurred.⁹ If the *Phillips* decision is used as a guideline, it indicates that the designations of the Acting General Counsel and the Acting Assistant Secretary by the Secretary for Energy Technology met the requirements of that decision. The nominations for the two offices were submitted to the Senate in September 1977, *i.e.*, even before the Department of Energy was activated. Their extended acting service has been due exclusively to delay in the confirmation process.

The case of the Acting Assistant Secretary for Conservation and Solar Applications is not so clear, because a nomination for that office was submitted to the Senate only on January 25, 1978, nearly 4 months after the vacancy occurred. However, the reasonableness of the delay in submitting a nomination must also be measured against the difficulty of finding suitable candidates for the complex and responsible positions in the Department of Energy and the uncertainties created by delays in the enactment of the pending energy legislation. Moreover, it should be noted that the delay in the nomination included the period from December 15, 1977, to January 19, 1978, during which the Senate was in recess between the two sessions of the 95th Congress and during which no nominations could be made. Similar observations could apply to the offices of the Assistant Secretary for Defense Programs and the Inspector General.

III.

Finally, we turn to the legality of the actions taken by Department of Energy officials in an acting capacity, if it should be thought that some or all of them did not hold their positions *de jure*. Under the *de facto* officer rule, one who performs the duty of an office under color of title is considered a *de facto* officer, his acts are binding on the public, and third persons may rely on their legality. *McDowell v. United States*, 159 U.S. 596, 601-602 (1895); *United States v. Royer*, 268 U.S. 394 (1925); *United States v. Lindley*, 148 F.(2d) 22, 23 (7th Cir. 1945), cert. den., 325 U.S. 858. Indeed, the authority of *de facto*

⁹An aggravating element in the *Phillips* case was that the acting officer in that case was charged with seeking to sabotage the statute he was required to administer. That consideration, of course, is absent in the case at hand. To the contrary, the purpose of the designation was to further the administration of the statute and to comply with the spirit of § 902.

officers can be challenged as a rule only in special proceedings in the nature of *quo warranto* brought directly for that purpose. *United States ex rel. Dorr v. Lindley, supra*; *United States v. Nussbaum*, 306 F. Supp. 66, 68-69 (N.D. Cal., 1969); Mechem, *Public Office and Officers*, §§ 343, 344 (1890).

The basis for the *de facto* officer principle is the avoidance of any cloud on the validity of public acts and on the right of the public to rely on them despite subsequent questions as to the authority of the officer to exercise the powers of the office.¹⁰ A typical case of a *de facto* officer is one who continues to serve after his term of office has expired. *Waite v. Santa Cruz*, 184 U.S. 302, 322-24 (1902); *United States v. Group*, 333 F. Supp. 242, 245-46 (D. Maine 1971), *aff'd*, 459 F.(2d) 178, 182 n. 12 (1st Cir. 1972). This consideration is of particular importance in view of the position of the Court of Appeals in *Phillips* that the initially valid designation of an acting official may be vitiated by an excessive delay in the submission of a nomination.

IV.

Finally, the question has been raised whether some of the acting officials have received the compensation for the positions in which they act pursuant to the last clause of § 902. We have been advised by the Department of Energy that these acting officials have not been compensated at the executive level rates provided in § 902, but rather have been paid the appropriate compensation under the GS salary scale that applies to GS positions in the excepted service.

V.

We have read the opinion of the Acting Comptroller General dated May 16, 1978, addressed to this problem. We agree with it to the extent that it concludes that the Vacancy Act is inapplicable to the situation at hand. We disagree, however, with the result reached in the opinion. It totally ignores considerations found by us to be decisive. The Comptroller General apparently has concluded that § 902 provides the exclusive method for making interim appointments at the Department of Energy, but has not addressed the factors which led us to the contrary conclusion. The nonmandatory language of the statute, the absence of guiding legislative history, and the plain purposes of the section all convince us that Congress did not intend to make it the exclusive method. Section 902 was written into the law because Congress desired that the advice and consent positions in the Department of Energy should not remain vacant during the crucial initial months of the Department, and the interim designations should be given to persons having the requisite expertise who

¹⁰Another rationale for the *de facto* officer rule is that a person should not be able to submit his case to an officer and accept it if it is favorable to him, but challenge the officer's authority if the latter should rule against him. *Glidden Company v. Zdanok*, 370 U.S. 530, 534 (1962).

could serve on a full-time basis. For these reasons, we are unable to read into § 902 the consequences suggested by the Office of the Comptroller General.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

August 16, 1978

**78-95 MEMORANDUM OPINION FOR THE COUNSEL
TO THE PRESIDENT**

**Civil Service Reform Act (5 U.S.C. § 1101 *et seq.*)—
Director of Office of Personnel Management**

This responds to your request for this Office's opinion on the constitutionality of § 1102(a) (2) of the Senate Committee on Governmental Affairs' version of S. 2640, the Civil Service Reform bill. Section 1102(a) (2) states that the Director of the Office of Personnel Management (OPM) "may be removed by the President only for inefficiency, neglect of duty or malfeasance in office."* This provision raises a question that we have frequently addressed in a number of different contexts. The question, stated simply, is whether an official within the Executive branch who is charged with carrying out functions of the type assigned to the Director of OPM may be in any significant way insulated from the President's direction and control.

The question here is squarely controlled by the Supreme Court's decision in *Myers v. United States*, 272 U.S. 52 (1926). That case stands for the proposition that officials within the Executive branch who perform primarily executive functions must be removable at the will of the President if the President is to perform his constitutional function "faithfully to execute the laws." While it is true that officials who perform quasi-legislative or quasi-judicial functions may properly be insulated from removal (*see, Humphrey's Executor v. United States*, 295 U.S. 602 (1935); *Wiener v. United States*, 357 U.S. 349 (1958)), the President's removal power must not be constricted where he is dealing with those who are assigned clearly executive functions. The catalogue of responsibilities of the OPM Director set forth in § 1103 of the bill constitutes a rather complete description of functions which may only be characterized as executive in nature. Among his responsibilities, for instance, is the duty to aid the President in preparing rules for the civil service and in providing him with advice on "actions which may be taken to promote an

*See S. Rep. No. 95-969, at 25. It should be noted that the language does not appear in the bill as enacted. See Pub. L. No. 95-454, 92 Stat. 1119, 5 U.S.C. § 1102.

efficient civil service.” In § 1103(a) (1) he is also directly charged with “executing, administering, and enforcing” civil service rules and regulations. By their terms, these functions can only be regarded as executive in nature. As the Court made clear in its recent decision in *Buckley v. Valeo*, 422 U.S. 1, 138 (1976), the enforcement of the laws is a function vested in the President. Given the case law, we think there is no satisfactory basis on which to contend that the President’s necessary removal power can be circumscribed in the manner contemplated by § 1102(a) (2) of this bill.

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

August 31, 1978

**78-96 MEMORANDUM OPINION FOR THE COUNSEL
TO THE PRESIDENT**

**General Accounting Office—Authority to Obtain
Information in Possession of Executive Branch—
Constitutional Law—President—Confidential
Communications—Appointments**

I am responding to your deputy's memorandum of July 27, 1978, asking for our advice with respect to two requests for information, each dated July 27, 1978, received from an official in the General Accounting Office (GAO). One, addressed to your deputy, relates to appointments to the United States Metric Board; the other, addressed to the Chairman of the Council of Economic Advisers (CEA), relates to data and memoranda connected with last winter's coal strike. We note that the requests were not signed by the Comptroller General but by a subordinate GAO official.

We conclude that the Comptroller General lacks authority to obtain the information sought.

I.

The request addressed to the Chairman of the CEA states that it is made in connection with an evaluation of the Administration's estimate of unemployment due to last winter's coal strike, which evaluation is being conducted by the GAO at the request of the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce. The GAO asks specifically for the following data:

A description of the computer model developed by CEA to measure the unemployment impact of the coal strike including (1) assumptions used, (2) variables used, and (3) any limitations of the model.

Memoranda from CEA to the White House and/or DOE concerning the computer model output on unemployment estimates and any comments, suggestions, or recommendations by CEA as to which estimate to use for policy decisions.

The request thus has three elements: A computer model, memoranda to the White House, and memoranda from CEA to the Department of Energy. We have been informed by the CEA that the computer model was developed for the following purposes: Advice to the President and preparation of an affidavit by the Chairman of the CEA to be used in connection with the Taft-Hartley proceedings during last winter's coal strike. We also have been advised that the memoranda from CEA to the White House and from CEA to the Secretary of Energy also dealt with the preparation of the computer model and with advice to the President.

Our analysis proceeds from what we believe are now well-accepted basic premises. First, the Comptroller General is an officer of the Legislative branch. He has long been so viewed by Congress and by the Executive branch. *See, e.g.,* Corwin, *Tenure of Office and the Removal Power*, 27 Colum. L. Rev. 354, 396 (1927); Willoughby, *The Legal Status and Functions of the General Accounting Office*, 12-16 (1927). *See also* Reorganization Act of 1949, Ch. 226., 63 Stat. 205; Reorganization Act of 1945, Ch. 582., 59 Stat. 616. His functions derive from and must be based upon the performance of appropriate congressional functions. Second, confidential Executive branch communications are presumptively privileged. *See, United States v. Nixon*, 418 U.S. 683 (1974); *Nixon v. G.S.A.*, 433 U.S. 425 (1977). We think it clear that this privilege, in order to be meaningful, must extend beyond the President personally to those who serve under and advise him. Thus, confidential communications between close Presidential advisers also fall within the "presumptive privilege" identified by the Supreme Court. *See, Nixon, supra*, at 682 ("A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions . . ."); *Nixon v. Administrator*, 433 U.S. 446, n. 10 (acknowledging the "legitimate governmental interest in the confidentiality of communications between high government officials, *e.g.,* those who advise the President"); *Nixon v. Sampson*, 389 F. Supp. 107, 150 n. 112 (D.D.C. 1975).

This conclusion is based on the same practical considerations that led the Supreme Court in *Gravel v. United States*, 408 U.S. 606, 617 (1972), to conclude that a Senator's legislative side is entitled to the protections afforded by the Speech and Debate Clause.

Third, it must also be acknowledged that, unlike the privilege governing sensitive military, diplomatic, and foreign affairs matters, the presumptive privilege for confidential communications is not absolute. Congress has constitutional functions which it must carry out, and where collisions occur between its exercise of those functions and the Executive branch's need to preserve confidentiality, a careful weighing of the respective interests must be undertaken. *Nixon v. G.S.A., supra*; *United States v. A.T. & T. Co.*, 567 F. (2d) 121 (D.C. Cir. 1977), *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F. (2d) 725 (D.C. Cir. 1974). As stated in the most recent decision by the D.C. Circuit Court of Appeals, where genuine and substantial competing interests are raised there is "an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation

of the needs of the conflicting branches in the particular fact situation." *United States v. A.T. & T. Co.*, 567 F. (2d) at 127.

With these basic considerations in mind the Comptroller General's subordinate's request can be analyzed. First, it would appear that the three sorts of documents requested fall within the presumptive constitutional privilege and, therefore, a decision not to disclose the requested documents might be properly based on the determination that disclosure here would interfere with necessary relationships of confidentiality. For the reasons stated above, we think that such a decision can extend not only to the direct communications between the Chairman of CEA and the President but also to the communications between the Chairman and the Secretary of Energy and to the computer workup done in order to assist the Chairman in providing advice to the President.

Before finally arriving at that conclusion, however, we think attention should be given to the Comptroller General's subordinate's reasons for seeking the material and the authority upon which that request is based.

In response to an inquiry from your deputy, the General Counsel of the General Accounting Office stated in a letter dated August 11, 1978, that GAO's "right to access to the records" in question stems from 31 U.S.C. § 54 (1976). This statute, which is GAO's basic provision with respect to its authority to seek documents, derives from § 313 of the Budget and Accounting Act of 1921, Ch. 18, 42 Stat. 26, and reads as follows:

§ 313. All departments and establishments shall furnish to the Comptroller General such information regarding the powers, duties, activities, organization, financial transactions, and methods of business of their respective offices as he may from time to time require of them; and the Comptroller General, or any of his assistants or employees, when duly authorized by him, shall, for the purpose of securing such information, have access to and the right to examine any books, documents, papers, or records of any such department or establishment. The authority contained in this section shall not be applicable to expenditures made under the provisions of section 291 of the Revised Statutes [31 U.S.C. § 107 (1976)].

As a matter of normal statutory construction we doubt whether this provision provides a foundation for the request made in this instance. By its terms, § 313 directs "all departments and establishments"¹ to comply with requests from the Comptroller General for information concerning the "powers, duties, activities, organization, financial transactions and methods of business of the respective offices." Because the information in question here plainly does not relate to the powers, duties, organization, financial transactions and methods of business of the CEA, this provision can only apply if the term "activities" is given its very broadest meaning.

¹In view of the broad definition of the term "departments and establishments" in § 2 of the Budget and Accounting Act (31 U.S.C. § 2 (1976)), we assume *arguendo* that the term includes the Executive Office of the President, in which the CEA is located, and the White House Office.

The very breadth of that term suggests the application of the *ajusdem generis* rule of statutory construction to ascertain its import. Since the other terms of the section refer to organizational and fiscal matters, we can properly regard the work "activities" as relating to activities of that nature. That view is supported by the fact that § 313 was enacted at a time when the Comptroller General's functions were limited to those areas. The information sought here does not relate to fiscal or organizational matters; we therefore question whether the request can be based directly on § 313.

Although the most recent letter from the General Counsel of GAO does not explicitly so state, the Comptroller General himself has heretofore taken the position that § 313 does not constitute an independent source of investigatory power. Instead, that section has been cited as an aid in carrying out powers and responsibilities elsewhere conferred on the Comptroller General. In other words, if some statute directs the Comptroller General to investigate, review or evaluate, § 313 has the function of enabling him to obtain information from the Executive branch. In the words of Comptroller General Staats, § 313 is of a "supportive" nature.²

While we have not been directed by the General Counsel to any other applicable provision, § 204(a) of the Legislative Reorganization Act of 1970, as amended, is the only statute of which we are aware that could serve as a basis for this request. That section directs the Comptroller General "to review and evaluate the results of government programs and activities carried on under existing laws." Pub. L. 93-344, 88 Stat. 326 (1974). When the section was originally enacted in 1970 it was limited to fiscal and budgetary matters. Pub. L. 91-510, 84 Stat. 1140 (1970), H. Rept. 91-1215, p. 80. While certain amendments in 1974 made only minor changes in the wording of § 204(a), the relevant conference report discloses a congressional purpose to expand its scope so as to enable Congress to utilize the facilities of GAO in connection with its legislative oversight functions.³

²Memorandum submitted by the Comptroller General in Defense Production Act Amendments, Hearings before the Subcommittee on Production and Stabilization of the Committee on Banking, Housing and Urban Affairs, U.S. Senate, 92d Cong., 2d sess., on S. 669 and 1901, pp. 51, 53. See also in this connection Morgan, *The General Accounting Office*, 51 *North Carolina Law Review* 1279, 1352-1353 (1973).

³The pertinent portion of the Conference Report on the Congressional Budget Act of 1974, S. Rept. 93-924, p. 72, reads:

SECTION 702. REVIEW AND EVALUATION BY COMPTROLLER GENERAL.

The Senate amendment expanded the review and evaluation functions and duties of the Comptroller General, including assistance to committees and Members.

The conference substitute is a revision of the Senate provision. It amends section 204 of the 1970 Legislative Reorganization Act to expand GAO assistance to Congress. As amended, section 204(a) provides that the Comptroller General shall evaluate Government programs at his own initiative, when ordered by either House, or at the request of a congressional committee. Section 204(b) provides that upon request, the Comptroller General shall assist committees in developing statements of legislative objectives and methods for assessing program performance. The managers consider oversight of executive performance to be among the principal functions of congressional committees and they recognize that the usefulness of program evaluation can be

(Continued)

The request for information concerning the computer model may come within the scope of § 204(a) if it can fairly be said to relate to some legislative oversight of the manner in which programs and activities of the CEA are carried on under existing law. The only substantive piece of legislation involved in the Chairman's activities here was the preparation of an affidavit under the Taft-Hartley Act. It should first be noted that this activity is not among the statutory functions imposed on CEA under § 4(c) of the Employment Act of 1946. Ch. 33, 60 Stat. 23, 15 U.S.C. § 1023(c) (1976). To the contrary, when the Chairman of CEA prepared and executed the affidavit, he was not administering a program subject to legislative oversight but was acting in his capacity as an adviser and assistant to the President.

Assuming *arguendo* that the preparation and execution of a Taft-Hartley affidavit by the Chairman of the CEA might come within the scope of § 204(a) in connection with the exercise of legislative oversight of the manner in which the Taft-Hartley Act is administered, the fact is that it appears from the request that the House Subcommittee on Energy and Power is not engaged in legislative oversight with respect to Taft-Hartley and does not appear to have jurisdiction over that program or activity. Hence, § 204(a) would not appear to constitute an authority for the review and evaluation by the Comptroller General of the manner in which the Taft-Hartley Act is administered.

We presume, although it is not entirely clear, that it might be claimed that this investigation is addressed to the more general question whether there is in existence adequate legislation to avert energy shortage crises in the future.⁴ If this is GAO's interest, it is not clear to us how the information requested should prove relevant to that inquiry. We believe that in order to make the kind of "accommodation" suggested by the District of Columbia Circuit Court of Appeals, you would want to know a good deal more about the reasons why this particular information is being requested. Ordinarily, the examination of a single historical incident would not serve as a very useful aid in evaluating the need for legislation. Moreover, to the extent that the examination of a particular episode is deemed important, we would think that the relevant factual details could be gathered without requiring the disclosure of this kind of confidential information.

In summary, it appears to us that there is a substantial basis upon which a decision might be made not to share this information with the Comptroller General's staff. From the information given us by GAO we cannot readily ascertain the authority underlying the request. Nor can we assess the relevance or importance of the information sought. We suspect, however, that a more detailed factual inquiry would likely demonstrate that the interest in preserving

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enhanced by the clear expression of legislative objectives and the employment of modern analytic methods. The managers further believe that statements of intent can be most appropriately developed by the committee of jurisdiction. Members must be provided upon request with all related information after its release by the committee for which it was compiled.

⁴There is a suggestion to this effect in the letter to Chairman Schultze dated July 27, 1978.

the confidentiality of Executive branch communications would exceed the interest GAO might identify in support of its request.

II.

The second request, addressed to your deputy, asks for detailed information as to whether recent Presidential appointments to the U.S. Metric Board complied with the specific qualification requirements of 15 U.S.C. § 205d (1976). This request, also signed by a subordinate GAO official, was made at the request of an individual member of Congress.

It is our view that compliance with this request is not required. Since the information sought does not involve fiscal matters, the Comptroller General's authority must be based on § 204(a). *See supra*. A request for information under that section, however, presupposes action by either House of Congress or by a committee having jurisdiction over the program or activity under review or evaluation; a request of a single member does not authorize the Comptroller General to proceed.⁵

Beyond that, the request for information may well be outside the jurisdiction of the Comptroller General as an arm of Congress. Under the Constitution, Article II, § 2, the power of appointment of the members of the Board is vested in the President and the Senate, and not in Congress as a whole. Hence, it is the responsibility of the President and Senate to determine whether there has been compliance with the qualification requirements of 15 U.S.C. § 205(d) (1976). As James Madison said during the First Session of the First Congress during the Great Debate concerning the removal power of the President:

The Legislature creates the Office, defines the powers, limits its duration and annexes a compensation. This done the Legislative power ceases.⁶

Moreover, the appointment of officers of the United States by the President by and with the advice of the Senate does not constitute a Government program or activity carried out under existing law as required by § 204(a).

Finally, it should be noted that there is considerable question whether Congress has the power under the Appointments Clause significantly to restrict the President's discretion in fulfilling his duty to nominate officers of the United States. *See, Buckley v. Valeo*, 424 U.S. 1 (1976). The process whereby the President is restricted in naming members to the Board would raise serious questions if the President were therefore deprived of discretion in performing his nominating function. 40 Op. A. G. 551 (1947); 13 Op. A. G. 516, 525

⁵Section 204(a), it is true, enables the Comptroller General to proceed on his own initiative. However, it cannot be anticipated that the Comptroller General will take that step after having received the request of a single Congressman, since such a step could have the effect of jeopardizing his "role as an independent nonpolitical agency of the legislative branch." *See also* Mansfield, *The Comptroller General*, 258; Morgan, *The General Accounting Office*, *supra*, at 1299-1300.

⁶ANNALS OF CONGRESS, First Congress, First Session, Col. 582.

(1871); *cf.*, *Myers v. United States*, 272 U.S. 52, 121 (1926). We would have an even greater concern if it were concluded that those who submit names of qualified applicants could not be assured that the names remain confidential. The President might well conclude that in order adequately to fulfill his nominating responsibility he must have candid and straightforward advice from those who submit the names. If the President were so to conclude we think his decision not to disclose would be justified both on the ground that confidentiality is essential to the Appointments Clause process and on a more generalized presumptive constitutional privilege.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

November 6, 1978

**78-97 MEMORANDUM OPINION FOR THE ASSISTANT
TO THE PRESIDENT FOR DOMESTIC AFFAIRS
AND POLICY**

**Enrolled Bills—Effect of Order of Approval by the
President—Revenue and Energy Tax Acts of 1978
(26 U.S.C. § 46)**

This responds to the inquiry of your office concerning the effect of the President's contemplated order of signing on provisions of the Revenue Act of 1978 (Revenue Act) and of the Energy Tax Act of 1978 (Energy Act) relating to the 10 percent investment tax credit on certain depreciated property. Because the Revenue Act extends the 10 percent rate indefinitely by rewording § 46(a) (2) (B) of the Internal Revenue Code of 1954, 26 U.S.C. § 46(a) (2) (B) (1976), which Congress had already amended in the Energy Act, the President's approval of the two bills in either order will necessarily result in the revision of § 46(a) (2) (B), as provided in the Revenue Act, and will extend the 10 percent credit indefinitely. (A chart is appended to this opinion to facilitate understanding of the successive revisions of the Internal Revenue Code.)

Section 38 of the Internal Revenue Code of 1954, 26 U.S.C. § 38 (1976), provides for an investment tax credit with respect to certain depreciable property. The amount of the credit allowed is determined by § 45 of the Code. As originally enacted in 1954, the general rate permitted for qualified property was 7 percent. 28 U.S.C. § 46(a) (1) (current version at 26 U.S.C. § 46(a) (2) (1976)).

In 1975, Congress amended § 46 to raise temporarily the general investment tax credit from 7 percent to 10 percent. Tax Reduction Act of 1975, § 301(a), Pub. L. 94-12, 89 Stat. 26, 36 (1975). Under "transitional rules" added to § 46 by § 301(a) of the 1975 Act, 26 U.S.C. § 46(a) (1) (D) (current version at 26 U.S.C. § 46(a) (2) (D) (1976)), the 10 percent credit applied, in general, to qualified investments made prior to January 1, 1977.

In 1976, Congress enacted a major revision of § 46. Subsection 46(a) (1) (D) became § 46(a) (2) (D), and was amended to extend the general 10 percent credit to qualified investments made prior to January 1, 1981. Tax Reform Act of 1976, § 802(a), Pub. L. 94-455, 94 Stat. 1520, 1580 (1976).

On October 14, 1978, both Houses of Congress passed a conference-approved version of the Energy Tax Act of 1978, H.R. 5263, 95th Cong., 2d sess. Section 301(a) of the bill again effects a major amendment of § 46, but its version of subsection 46(a) (2) (D), which would become § 46(a) (2) (B), would still result in a drop of the regular business investment credit rate from 10 percent to 7 percent on December 31, 1980.

Congress several hours later again amended § 46 in passing the Revenue Act of 1978, H.R. 13511, 95th Cong., 2d sess.¹ Under § 311 of the Revenue bill, § 46 of the Code would be further amended to create a general tax credit rate of 10 percent with no time limitation. Section 311 accomplishes this purpose by rewording § 46(a) (2) (B), as already amended by the Energy Act, to eliminate any time limit on the extension of the 10 percent rate.

That Congress, in enacting the Revenue Act, both recognized and intended to amend further the amendment of § 46(a) (2) (B) as enacted in the Energy bill is clear from the way in which § 311 of the Revenue Act describes § 46(a) (2) (B). Section 311 reads:

(A) 10-PERCENT INVESTMENT CREDIT.—Subparagraph (B) of section 46(a) (2) (defining regular percentage) is amended to read as follows:

(B) REGULAR PERCENTAGE.—For purposes of this paragraph, the regular percentage is 10 percent.

The reference in § 311 to “Subparagraph (B) of section 46(a) (2) (defining regular percentage)” makes sense only if the Energy Act has already amended 46(a) (2) (B) because, without the amendment effected by the Energy Act, § 46(a) (2) (B) would not define regular percentage, as indicated in § 311. Currently, without the Energy Act in force, § 46(a) (2) (B) as revised in 1976 discusses credit allowances in excess of the 10 percent rate, a wholly different subject. Section 311 is sensible only if Congress considered and intended to amend the amendment to § 46 it had already passed in the Energy Tax Act. This conclusion is buttressed by other sections of the Revenue Act that refer expressly to the Energy Tax Act of 1978.²

Regardless of the order in which the President signs the two Acts passed by Congress on October 14, 1978, a court subsequently construing them will be bound by two elementary principles: statutes are to be interpreted, so far as possible, to give effect to the intent of the legislature; statutes *in pari materia*,

¹As indicated by the Congressional Record, 124 Cong. Rec. D1564, D1567, D1573, D1575 (daily ed., Oct. 14, 1978), each House passed the Revenue Act subsequent to its own approval of the Energy Tax Act. Were the relevant provisions of the acts in conflict, application of the general rule that where statutes *in pari materia* are absolutely repugnant, the one passed later will prevail, Sutherland, *Statutes and Statutory Construction* §§ 23.17, 51.03 (4th ed. 1972), would still lead to the conclusion that the Revenue Act would control.

²See, e.g., the technical amendment effected by the Revenue Act of 1978, § 311(c) (2).

especially when enacted closely in time, are to be interpreted, so far as possible, to avoid a contradiction between them. We conclude that the intent of Congress as manifested in the language of the Revenue bill and as evidenced in identical paragraphs of the committee reports on the Revenue Act of 1978, S. Rept. 95-1263, 95th Cong., 2d sess. 112 (1978); H. Rept. 95-1445, 95th Cong., 2d sess. 62 (1978), to extend permanently the 10 percent investment tax credit rate, requires an interpretation of both bills that would extend the 10 percent rate indefinitely. The President, by signing the Revenue Act first, is incapable of altering Congress' clearly expressed meaning.³

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

³A contrary result would be inconsistent with the legislative role delegated by the Constitution entirely to Congress.

APPENDIX

Legislation	Regular Rate of Investment Tax Credit Provided	Time Limit	Section In Which Time Limit Appears	How Amendment to Time Limit Is Accomplished
Internal Revenue Code of 1954	7 percent (26 U.S.C. §46(a) (1))	None	—	—
Tax Reduction Act of 1975	10 percent	Investments made prior to 1-1-77	26 U.S.C. §46(a) (1) (D)	Transitional time rules inserted in new §46(a) (1) (D).
Tax Reform Act of 1976	10 percent	Investments made prior to 1-1-81	26 U.S.C. §46(a) (2) (D)	§46(a) (1) (D) moved to §46(a) (2) (D); dates changed to conform to extended time limit.
Energy Tax Act of 1978	10 percent	Investments made in period ending 12-31-80	26 U.S.C. §46(a) (2) (B)	Transitional rules eliminated; time limits embodied in entirely rewritten version of §46(a) (2) (B).
Revenue Act of 1978	10 percent	None	—	§46(a) (2) (B) rewritten to abolish time limit on 10 percent rate and reversion to 7 percent rate.

EXTENSIONS OF THE 10 PERCENT REGULAR RATE
INVESTMENT TAX CREDIT

December 18, 1978

78-98 MEMORANDUM OPINION FOR THE GENERAL COUNSEL, CENTRAL INTELLIGENCE AGENCY

Supremacy Clause (Art. VI, cl. 2)—Central Intelligence Agency—Polygraph Examinations of Employee of CIA Contracts

Your Office has requested our views on State law that may bear on your Agency's administration of polygraph examinations of certain key employees of United States corporations having classified contracts with the Central Intelligence Agency (CIA).

I.

Our discussion begins with the question whether the CIA is authorized as a matter of Federal law to administer polygraph examinations in order to protect adequately classified information from public disclosure.

Several provisions of law, of both general and particular applicability, support the CIA's authority. As a general matter, Executive Order No. 12065, 43 F.R. 28949 (June 28, 1978), reprinted in 50 U.S.C. § 401 Note (Supp. II 1978), requires Federal agencies to ensure the security of classified information. The pertinent provisions of that order provide:

No person may be given access to classified information unless that person has been determined to be trustworthy and unless access is necessary for the performance of official duties.

(§ 4-101¹)

Controls shall be established by each agency to ensure that classified information is used, processed, stored, reproduced, and transmitted only under conditions that will provide adequate protection and prevent access by unauthorized persons.

(§ 4-103)

¹Information Security Oversight Office Directive No. 1 (approved September 29, 1978) issued pursuant to Executive Order No. 12065, §§ 5-202(d), 6-204, states that:

A person is eligible for access to classified information only after a showing of trustworthiness as determined by agency heads based upon appropriate investigations in accordance with applicable standards and criteria. (§ IV. B. 2.)

Agency heads listed in Section I-201 may create special access programs to control access, distribution, and protection of particularly sensitive information classified pursuant to this Order or prior Orders.

(§ 4-201)

The order also mandates that "classified information disseminated outside the Executive branch shall be given protection equivalent to that afforded within the Executive branch." § 4-105. This provision, in conjunction with those above, appears to require security precautions in instances where classified information is to be given to the employees of CIA contractors.

Several other provisions of law are relevant. First, the Director of the CIA is made responsible by statute "for protecting intelligence sources and methods." 50 U.S.C. §§ 403(d)(3), 403g (1976). Second, Executive Order No. 12036, 43 F.R. 3674 (Jan. 26, 1978), reprinted in 50 U.S.C. § 401 Note (Supp. II 1978), requires the CIA to "protect the security of its installations, activities, information and personnel by appropriate means, including such investigations of applicants, employees, contractors, and other persons with similar associations with the CIA as are necessary." § 1-811. This provision as well as others in the order (*see* §§ 2-206(d), 2-208(c)), explicitly allows for investigations of those contractors handling sensitive information.

It seems evident that, on the basis of the foregoing authorities, the CIA is authorized and required to conduct investigations of its contractors' employees in order to ensure the security of classified information. In light of this duty and on the basis of information supplied by your Agency, the use of polygraph examinations is an authorized Federal function. Although there is no Federal law explicitly authorizing such a process, that lack cannot be deemed controlling. *See, United States v. Macdaniel*, 32 U.S. (7 Pet.) 1, 13-14 (1833). Where a statute imposes a duty, it authorizes by implication all reasonable and necessary means to effectuate the duty. *United States v. Jones*, 204 F. (2d) 745, 754 (7th Cir. 1953); *United States v. Kelly*, 55 F. (2d) 67 (2d Cir. 1932); 2A Sutherland, Statutes and Statutory Construction, § 55.04, at 384 (4th ed. 1973).² The use of polygraph tests, we are told, provides a means whereby information submitted by employees can be evaluated and verified with a view toward determining whether employees may be entrusted with classified information. We are also informed that this technique elicits information that could not otherwise be elicited, and, therefore, tightens security in a way which could not otherwise be done. In the view of the CIA, these factors make polygraph examinations an "extraordinarily useful device." On this basis, a polygraph examination can be seen as a reasonable and necessary means to the effectuation of duties imposed on the CIA under Federal law and, therefore, under the authorities cited above, its use is authorized.³

²The same general rule is set forth in Executive Order No. 12036, § 1-811, which authorizes "appropriate means" to protect security.

³We understand that those to be tested are knowingly performing work for the CIA, are informed of the CIA's involvement in the testing, and consent to it. That being the case, we do not believe that any problems arise under the prohibition on the CIA's performance of internal security or law enforcement functions, *see* 50 U.S.C. § 403(d)(3) (1976), even as that prohibition was interpreted

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We believe, however, that a caveat is in order. Executive Order No. 12036, § 1-811, allows for "such investigations of . . . contractors . . . as are *necessary*." This requirement might be read to preclude the administration of polygraph tests on an undifferentiated basis to all employees of a contractor. Rather, some evaluation and determination as to the need with respect to a particular contractor's employees, or to certain classes of such employees, would appear to be more consonant with this provision. Since polygraph testing is apparently now being administered only to "key employees," who either have access to a great deal of classified information or have an unusually comprehensive knowledge of CIA projects, it appears that the need is taken into account.

II.

Massachusetts has enacted the following statute:

Any employer who subjects any person employed by him, or any person applying for employment, to a lie detector test, or causes, directly or indirectly, any such employee or applicant to take a lie detector test, shall be punished by a fine of not more than two hundred dollars. This section shall not apply to lie detector tests administered by law enforcement agencies in the performance of their official duties.

[Chapter 149, § 19B, Mass. Gen. Law]

One question is whether this statute may legitimately be applied to either the CIA itself or its contractor in Massachusetts. Your office believes that, by its own terms, the statute does not encompass CIA polygraph examinations. The interpretation of the statute is a function which must be performed by the appropriate State officials, although it is proper for you to urge on them your interpretation. We address here only the question of the validity of the statute, assuming that it does impinge on the performance of a Federal function. For the reasons that follow, we believe that Massachusetts may not apply the statute to either the CIA or its contractors.

A.

It is a fundamental principle of Federal constitutional law that, by reason of the Supremacy Clause, Article VI, cl. 2, the legitimate activities of the Federal Government may not be impeded by a State. *Mayo v. United States*, 319 U.S. 441, 445 (1943). We thus do not believe that Massachusetts can prohibit the CIA from conducting polygraph examinations the CIA is authorized to conduct under Federal law.

Concededly, the situation here is different from the usual Supremacy Clause question. In the ordinary case, courts are called upon to review State laws that conflict with a Federal statute or regulation. Although the Director's authorization of polygraph examinations does not, in terms, proceed from statute or

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in *Weissman v. CIA*, 565 F. (2d) 692 (D.C. Cir. 1977). Nor are we aware of any other general prohibition, in either a statute or Executive order, on the use of polygraph testing by intelligence agencies.

regulation, we do not believe that this is of any real consequence. It is not the abstract inconsistency between the express terms of State and Federal law which is the concern underlying the Supremacy Clause. *Cf., Los Alamos School Board v. Wugalter*, 557 F. (2d) 709, 714 (10th Cir. 1977) (potential or peripheral conflicts between State and Federal law will not render a State law invalid). Rather, the evil that the clause addresses is obstruction to the accomplishment and execution of lawful Federal purposes and objectives. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). This may occur not only when State law conflicts with the express terms of the Federal law, but also when State law impedes the performance of activities conducted under the authority of Federal law. *See, United States v. Public Service Commission*, 422 F. Supp. 676 (D. Md. 1976) (three-judge court) (authority of the General Services Administration to conduct cross-examinations in State utility rate proceedings beyond time limit imposed by the State); *In Re New York State Sales Tax Records*, 382 F. Supp. 1205 (W.D. N.Y. 1974) (exercise of grand jury powers prevails over state nondisclosure law); *see also, United States v. City of Chester*, 144 F. (2d) 415, 420 (3rd Cir. 1944). Since we have concluded that the administration of polygraph examinations is an activity authorized by Federal law, we do not believe that it may be impeded by State law.

We recognize that, in certain circumstances, State law applies to, and controls, the exercise of various Federal functions. [This obtains, however, only where the application of State law would not undermine those functions.] *Mayo v. United States*, *supra*, at 446. We are informed that the application of the statute to the CIA would result in its inability to perform satisfactory security checks, and this in turn would substantially impair its procurement operations. On this basis, we do not believe that the above rationale justifies application of the Massachusetts statute.

The Supremacy Clause question often becomes one of assessing congressional intent, *i.e.*, whether in the statutes under which the Executive branch is implementing some regulation or program, Congress intended Federal action to override inconsistent State laws. In some instances an examination of the legislative history and the structure of a statute reveals that Congress did not intend to interfere with State regulation. Where, however, there is a clear conflict between the implementation of a legitimate Federal function and a State law, and there is no evidence that Congress contemplated that the Federal interest would be subordinated, the State enactment must yield. We believe that conflict to exist here.

III.

The question remains whether, even though the Massachusetts statute may not be applied to the CIA itself, it is applicable to the CIA's contractor. We reiterate that we express no views as to the interpretation of the statute insofar as the CIA's contractor is generally concerned. Rather, we discuss only whether the statute may legitimately be applied to the contractor in connection with its work for the CIA.

This question does not admit of an easy answer. It is clear that the mere fact that a particular entity is performing work for the Federal Government does not exempt it altogether from State regulation. *Railway Mail Association v. Corsi*, 326 U.S. 88, 95-96 (1945) (applying State nondiscrimination law to postal

union); *Stewart and Co. v. Sandrakula*, 309 U.S. 94 (1940) (State safety requirement applicable to Federal contractor); *Public Housing Administration v. Bristol Township*, 146 F. Supp. 859 (E.D. Pa. 1956) (Federal contractor required to adhere to building code requirements). On the other hand, it also seems clear that a company's performance of work for the Federal Government may at times exempt it from State or local regulation. *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187, 190 (1956); *Pacific Coast Dairy v. Department of Agriculture of California*, 318 U.S. 285 (1943); *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F. (2d) 159, 166 (3rd Cir. 1971).

The approach the courts take in assessing the application of State statutes imposing burdens on Federal contractors is much the same as their approach with regard to statutes imposing burdens on the Federal Government itself. That is, the courts look to whether the statute would frustrate the operation of Federal functions. *Railway Mail Association v. Corsi*, *supra*, at 95-96; *Leslie Miller, Inc. v. Arkansas*, *supra*, at 190; *Stewart and Co. v. Sandrakula*, *supra*, at 103-04. Under this standard, the application of the Massachusetts law to the contractor would frustrate Federal functions to the same extent as if the law were to apply to the CIA itself. According to the CIA, such an application would inevitably result in the contractor's refusal to allow his employees to take part in the polygraph examination program, which, in turn, would result in less than adequate security and ultimately would jeopardize CIA procurement. In our opinion, the decisions under the Supremacy Clause would not allow State law to cause this sort of disruption of a Federal program, even if the State law is being applied only to a contractor.

IV.

For the foregoing reasons, we do not believe that the Massachusetts law in question may legitimately be applied to either the CIA or its contractors so as to preclude authorized polygraph examinations. However, a word of caution is appropriate. The application of State law to Federal contractors is generally dependent on the particular facts and circumstances; *see, Mayo v. United States*, 319 U.S., at 447-448; *Los Alamos School Board v. Wugalter*, 557 F. (2d), at 712, 714. This is a question which necessarily entails a judgment predicated on any number of different factors. Moreover, as the considerable volume of case law in the State-Federal conflict area demonstrates, disputes of this type often result in litigation and resolution pursuant to standards that are often difficult to apply with precision. It is, therefore, an area in which prelitigation predictions should be cautious.

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

December 21, 1978

**78-99 MEMORANDUM OPINION FOR THE COUNSEL
TO THE PRESIDENT**

**Judges—Members of Congress—Constitutional
Restriction on Appointment (Article I, § 6, cl. 2)—
Omnibus Judgeship Bill (28 U.S.C. § 133, as
amended)**

This responds to your inquiry concerning any legal restriction against the appointment of former or sitting Members of Congress to civil offices created by Congress at the time such persons were Congressmen. Specifically, the issue concerns the appointment of former members of the 95th Congress to the new judgeships created by the Omnibus Judgeship Bill; 28 U.S.C. § 133, as amended by 92 Stat. 1630.

The relevant legal provision is Article I, § 6, cl. 2, of the Constitution:

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

This provision poses no obstacle with respect to any current member of the House of Representatives since each member's term will expire, under the Twentieth Amendment, at noon on January 3, 1979.¹ The same cannot be said for each current Senator. A Senator is, under the Seventeenth Amendment, elected for a term of 6 years. However, under the Constitution, Article I, § 3, cl. 2, the terms of Senators are staggered so that one-third are chosen every second year. Accordingly, only those whose terms expire at noon on January 3, 1979, will be eligible under Article I, § 6, cl. 2, for appointment to the subject

¹Even if a member of the House of Representatives were reelected to a new term in the past election he would not be disqualified for appointment to one of the judgeships because the judgeships were created during the term expiring at noon on January 3, 1979, the term that constitutes the period of disqualification.

judgeships at that time. While other Senators will not be eligible in 1979 for appointment to the judgeships, their disqualification will lapse upon the expiration of their elected terms.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

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