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Foreword

The Attorney General has directed the Office of Legal Counsel to publish selected opinions on an annual basis for the convenience of the executive, legislative, and judicial branches of the government, and of the professional bar and the general public. The first eight volumes of opinions published covered the years 1977 through 1984; the present volume covers 1985. The opinions included in Volume 9 include some that have previously been released to the public, additional opinions as to which the addressee has agreed to publication, and opinions to Department of Justice officials that the Office of Legal Counsel has determined may be released. A substantial number of Office of Legal Counsel opinions issued during 1985 are not included.

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

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OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

Disqualification of Prosecutor Because of Former Representation

In matters that are substantially related to an Assistant United States Attorney's representation of clients prior to joining the government, the attorney should not participate in any investigation or prosecution that foreseeably involves individuals or entities who, although they arguably had not been the attorney's "clients," were contacted by the attorney in the course of his prior representation and indirectly paid the attorney's legal fees, unless the attorney's participation is essential to the conduct of the Department's law enforcement operation.

Under the Supremacy Clause of the Constitution, a state court or bar association may regulate the conduct of federal attorneys acting in the scope of their federal authority only to the extent that such regulation is not inconsistent with the exigencies of federal employment.

January 11, 1985

MEMORANDUM OPINION FOR THE DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

We have been asked to provide advice for a Special Assistant United States Attorney (the AUSA) concerning his potential prosecution of suspected pornographers who indirectly paid his legal fees while he was engaged in the private practice of law. We understand that the pertinent facts are as follows.

When in private practice, the AUSA represented an unspecified number of individuals charged with displaying or selling obscene materials, to whom we shall refer collectively in this memorandum as XYZ. He was aware at the time that XYZ had obtained the sexually explicit materials for which they were prosecuted from Corporation A, controlled by a Mr. B. The AUSA was also aware that XYZ received reimbursement for legal fees from A and B, although the fees were paid to the AUSA's firm by XYZ. In addition, during this period, the AUSA acknowledged that he communicated with a subsidiary corporation, C, wholly owned by either A or B, regarding the status of certain of these cases. C provided financial support to the individual clients by giving them credit on purchases from C in amounts directly proportionate to the AUSA's legal fees.

The AUSA's position was created by the Immigration and Naturalization Service to prosecute multi-state conspiracies involving alien smuggling activity. In this capacity, the AUSA has reviewed FBI reports on A and B that contain facts that the AUSA believes "far exceed any knowledge" he may have had of A and B's activities when he was active in the defense of obscenity cases. He anticipates that A and B will be the targets of further FBI investigation and possible prosecution by the Department of Justice.

Based on these facts, the AUSA, a member of the Arizona Bar,[1] has inquired whether he should disqualify himself from participating in the counseling of FBI agents in their pursuit of covert criminal investigations that may involve A and B. He has also inquired whether ethical considerations would preclude him from prosecuting a conspiracy case involving A and B.

The starting point for an analysis of attorney disqualification would ordinarily be the Model Code of Professional Responsibility of the American Bar Association (Model Code). The Model Code has been expressly adopted by the Supreme Court of Arizona, with certain amendments. 17A Ariz. Rev. Stat. Ann., S. Ct. Rule 29(a) (1983). The Department of Justice has consistently maintained, however, that rules promulgated by state bar associations that are inconsistent with the requirements or exigencies of federal service may offend the Supremacy Clause of the Constitution.[2] This position is supported by the case of *Sperry* v. *Florida*, 373 U.S. 379 (1963), in which the Supreme Court held that when Congress and the Executive had authorized nonlawyers to practice before the United States Patent Office, the State of Florida could not prohibit such conduct as the unauthorized practice of law. Similarly, this Office has concluded that a Department attorney, acting under Departmental orders in an undercover operation, cannot be guilty of violating state ethical rules "if his acts are authorized by federal law, including the Department's regulations prescribing ethical standards," just as a federal employee, under appropriate circumstances, may perform authorized federal functions without regard to the limits of state criminal law. *See* Memorandum for Thomas P. Sullivan, United States Attorney, Northern District of Illinois, from Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal Counsel 14 (Aug. 1, 1978) (citing *In re Neagle*, 135 U.S. 1, 75 (1890)).

We analyze below the Model Code and its treatment by the courts of various jurisdictions. When possible, we have relied primarily on decisions of federal courts, but have found it necessary to include some decisions of state courts as well. We do not assume that any of these decisions are binding on the federal officials who will ultimately make the decision about the AUSA's participation in this case, unless mandates of the United States Constitution are involved. Rather, the principles are explained in order to assist you in formulating the managerial judgment that will determine the resolution of the issue. In addition to the Model Code, we have sought general guidance from the American Bar Association's new Model Rules of Professional Conduct, which replaced the old Model Code in August 1983, but which have not yet been adopted by most states. We discuss, first, the attorney's duty of confidentiality to former clients and its

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[1] The AUSA is also a member of the Illinois Bar. Because our conclusions are based on general principles, we do not anticipate that any different result would obtain under Illinois law. Illinois has adopted the ABA Model Code with no relevant amendments. *See* 110A Ill. Ann. Stat. foll. I 772 (Smith Hurd Supp. 1983).

[2] The Supremacy Clause provides that the "Constitution, and Laws of the United States which shall be made in Pursuance thereof . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

application to the present circumstances. In Part II, we address other considerations that may bear upon your decision regarding the disqualification. Finally, we address the application of the general principles to Department of Justice officials.

For the reasons discussed below, we conclude that the AUSA's participation in these obscenity prosecutions probably would not violate the mandatory Disciplinary Rules of the Model Code so as to justify disciplinary action by the Arizona Bar against him. Nevertheless, we conclude that the attorney's duty to preserve client confidentiality under the Model Code could reasonably be applied to information that the AUSA received about A and B in the course of his prior representation. In addition, we believe the Ethical Considerations of the Model Code, including the requirement that attorneys avoid even the appearance of professional impropriety, as well as the constitutional protections afforded a criminal defendant, might lead a court to bar the AUSA's involvement in the prosecution of individuals whose interests are so closely intertwined with the subject of his former professional activities. The ethical obligations of attorneys are only heightened in the case of a public prosecutor. We therefore recommend for prudential reasons that the AUSA not participate in any investigations or prosecutions foreseeably involving Corporation A, Mr. B, or Subsidiary C that relate to his prior representation, assuming that his participation is not considered essential to the conduct of the Department's law enforcement operation, even though his disqualification may not be clearly compelled by the prevailing ethics rules.

I. Duty of Confidentiality

The general principles are simply stated. First, a lawyer has a duty to protect confidential information of "one who has employed or sought to employ him." Model Code EC 4–1 (1979). Canon 4 of the Model Code provides that "a lawyer should preserve the confidences and secrets of a client," and therefore a lawyer may not use such confidences to the disadvantage of the client. Model Code DR 4–101(B)(2). This duty outlasts the lawyer's employment, terminating only upon consent of the client. Model Code EC 4–6. The current Model Code contains no procedural disqualification provision for one whose subsequent employment might require disclosure of client confidences.[3] Refusal of such employment is suggested in EC 4–5 as an aspirational standard only.

Nevertheless, courts have held that Canon 4 implicitly requires disqualification if divulgence of client confidences could occur.[4] In order to encourage clients freely to discuss confidential problems with their attorneys, courts have

[3] Canon 5, which provides that "a lawyer should exercise independent professional judgment on behalf of a client," does contain a disqualification provision. DR 5–105(A) requires a lawyer to decline proffered employment if the exercise of his independent professional judgment is likely to be adversely affected by a conflict of interest. The purpose of this provision is primarily to protect the lawyer from competing client interests, rather than to protect the confidentiality of client information. American Bar Foundation, *Annotated Code of Professional Responsibility* 228 (1979). Although the provision is arguably relevant here, its principal application is in simultaneous multiple client representation. *Id.*

[4] This determination is based, in part, on EC 4–5, which states that "no employment should be accepted that might require such disclosure [of client confidences]."

imposed a strict prophylactic rule which bars an attorney from representing an interest directly adverse to that of a former client. *Cord* v. *Smith*, 338 F.2d 516, 524–25 (9th Cir. 1964); *Bicas* v. *Superior Court*, 567 P.2d 1198, 1201 (Ariz. Ct. App. 1977). Imposing such a disability upon the attorney is designed to protect the former client from even the possibility of disclosure and wrongful use of information conveyed in confidence. *Meyerhofer* v. *Empire Fire & Marine Ins. Co.*, 497 F.2d 1190, 1196 (2d Cir.), *cert. denied*, 419 U.S. 998 (1974); *see also* Annotation, 52 A.L.R.2d 1243, 1250 § 4 (1957). In the case of public prosecutors, the obligations arising out of Canon 4 of the Model Code may be compounded by constitutional considerations. A prosecutor whose former dealings with the defendant have made him privy to facts related to the prosecution may be barred from the case in order to preserve a fair and impartial trial as guaranteed by the Due Process Clause of the Fifth or Fourteenth Amendment. *Gajewski* v. *United States*, 321 F.2d 261, 267 (8th Cir. 1963); *Young* v. *State*, 177 So. 2d 345, 347 (Fla. Dist. Ct. App. 1965); *People* v. *Rhymer*, 336 N.E.2d 203, 204 (Ill. App. Ct. 1975). The special status of a prosecutor is recognized in the Model Code: the prosecutor has an obligation not merely to convict but to seek justice. Model Code EC 7–13. Accordingly, the courts have developed a rule for the disqualification of prosecutors, which has frequently been stated as follows: "an attorney cannot be permitted to participate in the prosecution of a criminal case if, by reason of his professional relations with the accused, he has acquired knowledge of facts upon which the prosecution is predicated or which are closely interwoven therewith." *Young* v. *State*, 177 So. 2d 345, 346 (Fla. Dist. Ct. App. 1965); *People* v. *Gerold*, 107 N.E. 165, 177 (Ill. 1914); *State* v. *Leigh*, 289 P.2d 774, 777 (Kan. 1955); *see* Annotation, 31 A.L.R.3d 953, 957–58 (1970).

This disqualification rule rests on a generally irrebuttable presumption that in the course of an attorney-client relationship, confidences were disclosed to the attorney by the client. A court will not inquire whether disclosures were in fact made or whether the attorney is likely to use confidences to the detriment of his former client. *See, e.g.*, *NCK Org. Ltd.* v. *Bregman*, 542 F.2d 128, 134 (2d Cir. 1976); *Richardson* v. *Hamilton Int'l Corp.*, 469 F.2d 1382, 1384–85 (3d Cir. 1972), *cert. denied*, 411 U.S. 986 (1973). The court's inquiry is limited solely to whether the matters of the present proceeding are "substantially related" to matters of the prior representation. *T.C. Theater Corp.* v. *Warner Bros. Pictures*, 113 F. Supp. 265, 268–69 (S.D.N.Y. 1953).

The courts have generally applied the disqualification rule and the presumption rigorously. For example, in the leading case of *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973), Judge Kaufman, writing for the court, held that a plaintiff's counsel in patent litigation, who had previously represented the part-owner of the defendant corporation involving an issue identical to that in the present proceedings, would be disqualified from asserting the related claim against his former client. Interpreting Canon 4, the court adopted the rule that "[w]here it can reasonably be said that in the course of former representation an attorney *might* have acquired information related to

the subject matter of his subsequent representation, the attorney should be disqualified." *Id.* at 571. The courts will not require the former client to demonstrate that his attorney actually possessed confidential information in addition to having access to it, for even if such proof were available, the former client might not be able to use it for fear of disclosing the very confidences he wishes to protect. *See* Note, *Attorney's Conflict of Interests: Representation of Interest Adverse to that of Former Client*, 55 B.U. L. Rev. 61, 76 (1975); *Alpha Inv. Co.* v. *City of Tacoma*, 536 P.2d 674, 676 (Wash. Ct. App. 1975).

The courts will not presume irrebuttably that an attorney has acquired confidential information when the person seeking disqualification was not actually the attorney's client, but was the codefendant of a former client in the prior proceeding. The mere possibility that in preparing a cooperative defense the attorney may have received confidences of the codefendant is insufficient to establish grounds for disqualification. Under these circumstances, the court will disqualify the attorney only if it finds that the attorney was actually privy to confidential information of the former codefendant. *Wilson P. Abraham Constr. Corp.* v. *Armco Steel Corp.*, 559 F.2d 250, 253 (5th Cir. 1977); *Fred Weber, Inc.* v. *Shell Oil Co.*, 432 F. Supp. 694, 697 (E.D. Mo. 1977). The presumption has also been found to be rebuttable in other situations in which the person urging disqualification was not himself an actual client of the attorney. For example, a prosecuting attorney was entitled to rebut the inference that as a result of his former representation of the defendant's father-in-law in a separate matter, he had acquired confidences or secrets related to the defendant's case. *United States* v. *Newman*, 534 F. Supp. 1113, 1125–26 (S.D.N.Y. 1982). These principles define the inquiry that will determine whether and to what extent the AUSA owes a duty to protect confidences he may have acquired from A and B in the course of his former representation. First, we must consider whether A and B were "clients" of the AUSA and can thus claim the benefit of the irrebuttable presumption that he possesses confidences of theirs. Second, if A and B were not "clients" in the traditional sense of the word, we will examine whether they are nevertheless entitled to be protected by a continued obligation of confidentiality arising out of Canon 4. Finally, we must determine whether there is a "substantial relation" between the former obscenity representation and the prospective prosecution of A and B.

A. Client Status of A and B

The Model Code does not define the term "client." This omission poses problems in applying the Model Code's provisions to the undefined relationship that the AUSA maintained with Corporation A, Mr. B and Subsidiary C, who financed and participated in the AUSA's representation of criminal defendants. "The canons and disciplinary rules do not address themselves frankly and explicitly to this special set of relationships, and there is awkwardness in attempts to apply the canons and rules." *Moritz* v. *Medical Protective Co.*, 428 F. Supp. 865, 872 (W.D. Wis. 1977) (referring to interrelationships among insurer, insured, and attorney).

This awkwardness can be alleviated somewhat by resort to analogies. Like the attorney who represents both an insured and an insurer, the AUSA had direct obligations to his clients XYZ, while maintaining some concomitant relationship with the financiers A and B. One court, acknowledging that such a situation is *sui generis*, held that the insurer, which chooses the attorney for the insured, is the "client" of the attorney and the attorney must observe Canon 4 obligations to both the insurer and the insured. *Id.* Thus, when an insurance policy imposes on the insurer the duty to defend a claim against the insured and entitles the insurer both to select the lawyer who will represent the insured and to supervise the defense, then that insurer enjoys an attorney-client relationship with the attorney it selects. *Id.* This determination is supported by the "community of interest" that exists between the insurer and the insured. ABA Comm. on Professional Ethics, Formal Op. No. 282 (May 27, 1950). That interest is largely financial. *Moritz*, 428 F. Supp. at 872.

An application of this analogy to the AUSA's case would require further facts than those provided to us. It would be germane, for example, whether A and B had a formal agreement to pay the legal fees of XYZ; whether A and B had the right to choose and supervise the attorney for the defense of XYZ; and whether A and B also had agreed to pay fines or penalties imposed on XYZ, so as to establish a community of financial interest. Without this information, we can only identify the possibility that A and B could be considered "clients" of the AUSA by resort to insurance case law.

Another possible analogy is the relation between a parent corporation and the attorney for a subsidiary corporation. Some authorities indicate that in such a situation, the parent can be considered a client of the attorney. In one case, the court held that the evidentiary attorney-client privilege, notwithstanding the general rule that the privilege is waived if an outsider is made privy to attorney-client information, was preserved when an officer of the parent company participated in confidential discussions between the subsidiary and its attorney. In this context, a third person who was informed in order to further the interest of the principal client, and to whom disclosure was "reasonably necessary" to further the purpose of the legal consultation, was found a "client" to the extent of preserving the privilege. *Insurance Co. of N. Am.* v. *Superior Court*, 166 Cal. Rptr. 880 (Ct. App. 1980). In order to apply this analogy conclusively, we would again need further facts upon which to base our judgment. For example, it would be significant whether the communications between A and B and the AUSA were made to further the defense of XYZ, whether they included any confidences or secrets of XYZ,[5] and whether XYZ consented to such disclosures.[6]

[5] The Code defines "confidences" as "information protected by the attorney-client privilege under applicable laws," and "secrets" as "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." Model Code DR 4–101. The ethical obligations of an attorney consequently encompass not only privileged information but also other information.

[6] If the communications had included confidences or secrets, and no consent had been given by XYZ, then either A or B would have been included in the client relationship, or the AUSA might have breached his obligation to protect the confidences of XYZ under DR 4–101(B).

Even without identifying a third-party payor as a "client," the Supreme Court has recognized the danger of divided allegiance that may result from third-party payment of legal fees, especially in a criminal case. In *Wood* v. *Georgia*, 450 U.S. 261 (1981), the Court found an impermissible conflict of interest in an attorney's representation of two employees of an "adult" movie theater charged with distributing obscene materials. The conflict arose because, under an employment agreement, the owner of the theater undertook to furnish several forms of assistance to the employees if they should face legal trouble as a result of their employment, including payment of legal fees, fines, and bonds. *Id.* at 266. Recognizing a significant risk that a lawyer in this situation will be reluctant to encourage his client to offer testimony against the employer or otherwise to take action detrimental to the employer in marshaling a defense, the Court concluded that the employees had been deprived of due process rights. *Id.* at 269. Although the Court did not explicitly find that the employer was itself a "client" of the lawyer, the Court stated that the lawyer was the "agent" of the employer, and thus subject to a possible conflict of interest. *Id.* at 267; *see also In re Abrams*, 266 A.2d 275, 278 (N.J. 1970) (it is "inherently wrong for an attorney who represents only the employee to accept a promise to pay from one whose criminal liability may turn on the employee's testimony"). Thus, the courts have recognized that in the criminal setting, the loyalty incident to a fee arrangement can be significant, although these cases do not resolve whether the loyalty gives rise to a duty of confidentiality to the third-party payor.[7]

Although these examples do not resolve the AUSA's issue directly, they illustrate the possibility that persons not immediately identifiable as "clients" may still be placed in a position to share some of the attributes of an attorney-client relationship. Some authorities, in contrast, have determined that the payment of legal fees by a third person, in and of itself, does not create an attorney-client relationship between the attorney and his client's benefactor sufficient to sustain a claim of privilege for communications between them. *Priest* v. *Hennessy*, 409 N.E.2d 983, 987 (1980) (third party merely paid legal fees; court refused privilege to fact of fee arrangement); *see ABA/BNA Lawyer's Manual on Professional Conduct* 80–4301 (1984) (submission of Maryland State Bar Association Committee on Ethics). Thus, the third-party payment of legal fees without further participation in the defense may be insufficient to establish a basis for the strict evidentiary attorney-client privilege or the more fluid Canon 4 relationship.

The determination whether A and B were, in fact, "clients" of the AUSA would entail the application of facts beyond the information provided to us. However, we do not believe such a determination is necessary to reach our conclusion here. The Model Code and the case law have given an expansive

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[7] The Model Code discourages third-party fee arrangements. It permits such an arrangement only with consent of the client after full disclosure, and charges the attorney with the responsibility to ensure that his independent judgment is not impaired thereby. Model Code DR 5–107, EC 5–23. The Model Code does not make clear, however, what obligations, if any, the lawyer may have to those who pay his fees.

interpretation to the attorney-client relationship in the context of Canon 4, as discussed below. In our view, they provide a sufficient basis for encompassing A and B within the scope of the AUSA's obligations of confidentiality, irrespective of a formal attorney-client relationship.

B. Alternative Basis for Obligation of Confidentiality

The Model Code states clearly that the obligation of a lawyer to protect confidences is broader than the scope of the evidentiary attorney-client privilege. Model Code EC 4–4.[8] Not only does it protect a client's "secrets" as well as "confidences," *see supra* note 5, but it also is owed by the attorney to "one who has employed or sought to employ him." Model Code EC 4–1. The Model Code does not explain why this phrase was chosen rather than the term "client." It is not clear whether the phrase "one who has employed or sought to employ him" was intended to include one who pays the legal fees of a client, but the effect of the phrase is to broaden the class of individuals to be protected by the policy of encouraging frank communications for preparation of an attorney's case.

Interpreting the attorney's Canon 4 duties, courts have frequently applied the Canon broadly in an effort to protect the confidences of those who might not qualify as "clients" in the strict sense of the term: "The sole requirement under Canon 4 is that the attorney receive the communication in his professional capacity." *Doe* v. *A Corp.*, 330 F. Supp. 1352, 1356 (S.D.N.Y. 1971), *aff'd*, 453 F.2d 1375 (2d Cir. 1972). In addition, there is authority for the proposition that a "fiduciary obligation or an implied professional relation" may exist in the absence of a formal attorney-client relationship. *Westinghouse Elec. Corp.* v. *Kerr-McGee Corp.*, 580 F.2d 1311, 1319 (7th Cir. 1978). Thus, "'[i]t is clear that where an attorney receives confidential information from a person who, under the circumstances, has a right to believe that the attorney, as an attorney, will respect such confidences, the law will enforce the obligation of confidence irrespective of the absence of a formal attorney-client relationship.'" *United States* v. *Newman*, 534 F. Supp. 1113, 1125 (S.D.N.Y. 1982) (quoting *Nicholas* v. *Village Voice, Inc.*, 417 N.Y.S.2d 415, 418 (Sup. Ct. 1979)).

In one case, the Florida District Court of Appeal found that Canon 4 precluded a prosecutor, who had been a member of a public defender's office that represented the defendant, from participating in the prosecution of the case if he had ever interviewed the defendant in his former capacity. The court thus did not invoke the irrebuttable presumption that confidences were conveyed to the attorney — a presumption accorded only to former "clients" of an attorney — but instead permitted the defendant to establish that he had, in fact, conveyed confidences. Without seeking to identify an "attorney-client" relationship between the prosecutor and the accused, the court considered whether the prosecutor's former "professional relations" and "dealings" with the accused

[8] The Model Rules of Professional Conduct explain that "[t]he confidentiality rule applies not merely to matters communicated in confidence by the client but also *to all information relating to the representation*." Rule 1.6 comment, 52 U.S.L.W. 6 (Aug. 16, 1983) (emphasis added).

were sufficient to deprive the accused of a fair trial. *Young* v. *State*, 177 So. 2d 345, 346 (Fla. Dist. Ct. App. 1965).

The Nebraska Supreme Court disqualified a prosecutor who had had a "loose office arrangement and association" with one of the defendant's lawyers, even though the partnership had been practically dissolved, each partner practiced separately, they did not share fees, and no conversation regarding the defendant had taken place between them. Again, the court did not attempt to establish the existence or non-existence of an attorney-client relationship between the prosecutor and the accused. Rather, it focused on the possibility that the accused was denied the impartiality to which he was entitled. Such a division of forces in a law office "would be altogether out of harmony with the age-old ethics of the profession." *Fitzsimmons* v. *State*, 218 N.W. 83, 84 (Neb. 1928).

A prosecuting attorney who represented himself over the telephone to the defendant as defense counsel and induced her to impart confidential information prejudicial to her defense came "within the spirit if not the letter" of the rule against prosecuting a former client, and was consequently disqualified. The court noted that had the attorney acquired the same information in the role of an actual defense attorney he would have been barred from prosecuting the defendant. Thus, although there was no actual attorney-client relationship, Canon 4 was invoked. *State* v. *Russell*, 53 N.W. 441, 444 (Wis. 1892). Similarly, a prosecuting attorney who, before becoming prosecutor, had met with the defendant and quoted a price for representing him should have been disqualified from the case on Canon 4 grounds, even though he never actually represented the defendant. *Satterwhite* v. *State*, 359 So. 2d 816, 818 (Ala. Crim. App. 1977). If an attorney has discussed a defendant's case with him, the attorney is thereby disqualified even if there is no contract of employment or attorney-client relationship. *Id.*

As discussed above, a criminal defendant who established that the prosecuting attorney had represented his codefendant in a prior case was entitled to disqualify the prosecutor if he could show that the prosecutor had obtained the defendant's confidences as a result of the prior representation. *Wilson P. Abraham Constr. Corp.* v. *Armco Steel Corp.*, 559 F.2d 250, 253 (5th Cir. 1977). The obligations of Canon 4 have therefore been extended even to one in a collateral position with respect to the attorney and his principal client. In each of these cases, despite the absence of an attorney-client relationship, the attorney was barred from representing an interest that would risk disclosure of information confided in the attorney by a person whom the court found to fall within the ambit of the non-disclosure policy.

The rule is perhaps better illustrated by the cases in which the relation between the attorney and the defendant was held to be too attenuated to require automatic disqualification from the subsequent matter. From those decisions a common principle emerges: when the attorney-client relationship is not direct, the attorney will be permitted to prosecute the case only if he could not possibly have gained confidential information regarding it. *See, e.g.*, *Gajewski* v. *United States*, 321 F.2d 261, 268 (8th Cir. 1963) (no disqualification from criminal

prosecution on account of prior civil representation because misuse of confidential information inconceivable); *Dunn* v. *State*, 264 So. 2d 823, 825 (Miss. 1972) (no disqualification on account of prior discussion with defendant regarding possible representation, because facts of case never discussed); *Autry* v. *State*, 430 S.W.2d 808, 810 (Tenn. Crim. App. 1967) (same; no confidential communication passed between attorney and accused); *State* v. *Henry*, 9 So. 2d 215, 217 (La. 1942) (no disqualification on account of discussion with defendant's relatives; trial court found attorney had "no information of any kind from the defendant or anyone else" regarding case). These opinions appear to recognize that the evil to be avoided by a decision to disqualify is the potential misuse of confidential information, or the appearance thereof. If the court is satisfied that no such information was acquired, disqualification will not be ordered.

In light of these elaborations upon the ethical duties of an attorney, we conclude, first, that any communications that took place between A and B and the AUSA would appear to fall within the general policy of Canon 4. "A communication must be regarded as confidential where it possibly is so, although it is not entirely clear that the relations exist." H. Drinker, *Legal Ethics* 134 (1980). Information imparted to an attorney by his client's benefactor for the purpose of assisting in the client's defense is part of the overall attorney-client channel of communication that Canon 4 is designed to foster. Because "the issue is . . . whether there exist sufficient aspects of an attorney-client relationship for purposes of triggering inquiry into the potential conflict," *Glueck* v. *Jonathan Logan, Inc.*, 653 F.2d 746, 748–49 (2d Cir. 1981), we believe that the precise circumstances under which A and B communicated to the AUSA are a critical element of the inquiry. Even if the communications between the AUSA and A and B could not be shielded in a court proceeding by the privilege reserved for only a limited class of attorney-client conversations, if these communications were reposed in an attorney acting in his professional capacity in the defense of a client, then they should be protected. Second, if confidences were conveyed to the AUSA, he could not claim the benefit of the case law in which the courts found that it was impossible for the attorney to have acquired confidential information under the circumstances.

Canon 4 analysis is unaffected by the possibility that all the information the AUSA acquired about A and B may already be known independently by other investigative and prosecutive officials. The Model Code itself emphasizes that the ethical obligation of a lawyer to guard confidences and secrets, "unlike the evidentiary privilege, exists without regard to the nature or source of information *or the fact that others share the knowledge*." Model Code EC 4–4 (emphasis added). The ethical precept is not nullified even if all confidential information to which a lawyer had access is independently known to others from any source. *NCK Org. Ltd.* v. *Bregman*, 542 F.2d 128, 133 (2d Cir. 1976). On balance, therefore, we believe the better course is for the AUSA to observe the obligations of Canon 4 with respect to any confidences and secrets of A and B that he acquired in his role as defense attorney.

C. Substantial Relation Between Former and Subsequent Matters

The third aspect of a disqualification analysis seeks to ascertain whether the matter of former representation is "'substantially related' to the issues likely to arise during the course of the litigation." *Redd* v. *Shell Oil Co.*, 518 F.2d 311, 315 (10th Cir. 1975). In the present case, we must determine whether the representation of XYZ and the involvement of A and B in the obscenity cases are so closely connected with the prospective prosecution of A and B on charges of conspiracy to commit obscenity-related offenses that confidences might be jeopardized. *See Richardson* v. *Hamilton Int'l Corp.*, 469 F.2d 1382, 1385 (3d Cir. 1972), *cert. denied*, 411 U.S. 986 (1973). The requisite substantiality is present if the factual contexts of the two matters are similar and if there is reasonable probability that confidences were disclosed which could be used against the client. *Trone* v. *Smith*, 621 F.2d 994, 998 (9th Cir. 1980).

The courts have employed the "substantial relation" test as a further means to ensure the protection of client confidences. *Duncan* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 646 F.2d 1020, 1028 (5th Cir. 1981); *American Roller Co.* v. *Budinger*, 513 F.2d 982, 984 (3d Cir. 1975). The overlap of subject matters, issues, and other facts between the two representations must be delineated with specificity to allow for the careful comparison that the rule requires. *Duncan*, 646 F.2d at 1029. It is clear that the inquiry is meticulously factual; "merely pointing to a superficial resemblance" is insufficient. *Id.*

Applying that principle to the AUSA's situation, we believe there may well exist a substantial relation between the information acquired in the course of representing XYZ on obscenity charges and a conspiracy prosecution of A and B for obscenity-related activities. However, we do not have sufficient facts about the two prosecutions to draw the fine lines required by the cases. The determination whether there is a substantial relation must be made with a full knowledge of the two matters, and the knowledge we have acquired is limited. Although the prospective prosecutions of A and B are presumably distinct from those of XYZ, it appears that the overall business operation which is the target of investigation involves facts common to the two. The AUSA has stated that the information he reviewed in FBI files regarding A and B "far exceeds" any knowledge he may have acquired from his representation of XYZ, not that it is unrelated or qualitatively different. The sexually explicit materials that clients XYZ were charged with displaying were supplied by A and B, so that facts relating to the publications themselves would likely overlap. In addition, the basic legal obscenity issues are likely to be very similar.[9] Moreover, the scope of the proposed investigation as described is evidently quite broad. At least in theory, it is possible that the investigation could eventually lead to involvement of the AUSA's "conspiracy" objective, and we believe the possibility that clients XYZ could be implicated in such a conspiracy sharpens the substantial relation between the matters. Of course, if XYZ were implicated, everything

[9] Even if the prosecutions of XYZ were brought under state law and the proposed conspiracy charges will be based on federal law, there would undoubtedly be a significant similarity of legal issues.

we have discussed regarding the AUSA's duties to A and B would apply *a fortiori* to XYZ, with whom he maintained a formal attorney-client relationship. We believe, therefore, that very careful consideration must be given to whether a court would find a substantial relation between the former representation of XYZ (with assistance from A and B) and the current investigation or prosecution of A and B.

We reiterate the general rule: "an attorney cannot be permitted to participate in the prosecution of a criminal case if, by reason of his professional relations with the accused, he has acquired knowledge of facts upon which the prosecution is predicated or which are closely interwoven therewith." Although we are not in possession of enough facts to apply these words conclusively to the present situation, we believe that a court would likely find that "by reason of his professional relations," the AUSA has acquired knowledge of facts "which are closely interwoven" with the prospective prosecution. If such a finding could be made on these facts, no more concrete predicate would be required to indicate the need for disqualification of a criminal prosecutor.

III. Other Considerations

A. Appearance of Impropriety

Canon 9 of the Code imposes upon attorneys an obligation to avoid even the appearance of professional impropriety. Model Code DR 9–101; EC 9–6. One commentator has gone so far as to urge that this canon be used to disqualify attorneys even when the connection between former and subsequent representations is not great enough to satisfy the substantial relation test of Canon 4. *See* Note, *Ethical Considerations When an Attorney Opposes a Former Client: The Need for a Realistic Application of Canon Nine*, 52 Chi.-Kent L. Rev. 525, 535–37 (1975).

In *Rodriguez* v. *State*, 628 P.2d 950, 957 (Ariz. 1981), the Arizona Supreme Court took this approach and held that a public defender did not violate the Disciplinary Rule when he failed to withdraw from representation of a defendant whose defense could have implicated a former client of the office. Canon 9 required disqualification of the attorney, however, because there was an unavoidable appearance that confidential information gained from the former client could be used to his disadvantage. Some courts have declined to adopt this "blanket approach" to Canon 9. *See, e.g., Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 518 F.2d 751, 757 (2d Cir. 1975) (Canon 9 "not intended completely to override the delicate balance created by Canon 4"); *Board of Educ.* v. *Nyquist*, 590 F.2d 1241, 1247 (2d Cir. 1979) ("[W]hen there is no claim that the trial will be tainted, appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest cases."). More often, courts will decide a disqualification issue on the basis of Canons 4 and 9 in combination, and Canon 9 generally serves to resolve any doubts in favor of disqualification. *See* Model Code EC 9–2.

B. Possible Effects of Failure to Disqualify

The possible adverse consequences of participation in this matter are varied. First, the AUSA could be found to have violated the Disciplinary Rule prohibiting disclosure of client confidences. In our opinion, however, his involvement would not fall strictly within the letter of the Disciplinary Rules so as to warrant a finding of violation. The ambiguity of A and B's "client" status, while not automatically obviating the necessity for disqualification, would lessen the likelihood that a court would impose disciplinary sanctions in this unique situation without some showing of intentional wrongdoing. *Cf. In re Ruffalo*, 390 U.S. 544, 550 (1968) (lawyer facing penalty of disbarment is entitled to due process protections). To justify discipline against an attorney, a court must be satisfied by clear and convincing evidence that the attorney has violated one or more of the Disciplinary Rules. *In re Mercer*, 652 P.2d 130, 133 (Ariz. 1982). Because transgression of a prophylactic rule does not necessarily connote any actual wrongdoing, and because there is no clear requirement of withdrawal under these circumstances in the Disciplinary Rules themselves, we believe a court would not find intentional misconduct sufficient to justify professional censure.

Professional discipline is not the only possible consequence of an erroneous decision to participate in the case, however. Even if conduct were insufficient to support an ethical violation, it could still require the attorney's disqualification from a particular matter. The vast majority of criminal cases in which disqualification was required have not resulted in disciplinary action against the attorney. Rather, courts have granted reversals of convictions on the ground that the defendant was denied a fair trial. *See, e.g., State* v. *Leigh*, 289 P.2d 774, 777 (Kan. 1955) (reversal although no claim of intentional misconduct by the attorney); *People* v. *Rhymer*, 336 N.E.2d 203, 205 (Ill. Ct. App. 1975) (same). A federal court dismissed an indictment because the prosecutor who presented the case to the grand jury had had impermissible professional dealings with the accused. *United States* v. *Catalanotto*, 468 F. Supp. 503, 507 (D. Ariz. 1978). Although there is a paucity of federal cases involving the issue of disqualification of a prosecuting attorney on these grounds, in analogous state cases the prosecutor's relation to the accused has been the basis for post-conviction relief, *see Young* v. *State*, 177 So. 2d 345, 348 (Fla. Dist. Ct. App. 1965), a new trial, *see State* v. *Halstead*, 35 N.W. 457, 459 (Iowa 1887), recusal orders, *see Love* v. *Superior Court*, 168 Cal. Rptr. 577, 581 (Ct. App. 1980) (recusal order for discrete six-person section of district attorney's office "tainted" by former representation), and mistrials, *see Burkett* v. *State*, 206 S.E.2d 848, 851 (Ga. 1974) (reversible error for trial court merely to disqualify prosecutor without granting mistrial). In sum, the prosecuting attorney who approaches the ethical standards too lightly risks not only professional censure but also the loss or postponement of a conviction.

C. Vicarious Disqualification

Under the Model Code, "if a lawyer is required to decline employment or withdraw from employment *under a Disciplinary Rule*, no partner, or associ-

ate, or any other lawyer affiliated with him or his firm, may accept or continue such employment." Model Code DR 5–105(D) (emphasis added).[10] This imposition of a disability upon the entire "firm" — a term not defined in the Model Code[11] — is referred to as "vicarious disqualification" or "imputed knowledge." Its rationale is, once again, the possibility that confidential information possessed by an attorney will filter out to others who could use it to the disadvantage of a client.

Authorities disagree regarding whether the imputation of knowledge from one member of a firm to the others should be extended to non-profit organizations such as legal services agencies and prosecutors' offices. The imposition of vicarious disqualification is premised, in part, upon the community of economic interests among members of a firm who share profits, and those interests are not present in public offices. American Bar Foundation, *Annotated Code of Professional Responsibility* 249 (1979) (Comment on DR 5–105(D)); ABA Formal Op. 342 (Nov. 24, 1975), *reprinted in* 62 A.B.A. J. 517 (1976).

Recognizing these differences, many courts have declined to apply the vicarious disqualification rule devised for civil firms to nonprofit legal organizations, including prosecutors' offices. They reason that the premise of the rule, the free flow of information within a law partnership, is not presumptively applicable outside the partnership context. *See, e.g., United States* v. *Standard Oil Co.*, 136 F. Supp. 345, 360 (S.D.N.Y. 1955); *In re Charles Willie L.*, 132 Cal. Rptr. 840, 843 (Ct. App. 1976). Other courts recognize that "particular caution is in order before an entire prosecutorial office, as distinguished from a particular prosecutor in that office, is recused." *Chadwick* v. *Superior Court*, 164 Cal. Rptr. 864, 867 (Ct. App. 1980). The United States District Court for the District of Arizona disqualified a member of the United States Attorney's office who had represented the defendant in a substantially related matter to avoid the appearance of impropriety, and took the further step of disqualifying the Tucson office of the United States Attorney. It denied, however, the motion to disqualify the entire district office, expressing the view that the prosecution could properly be conducted by the larger Phoenix office, on the rationale that the size and complexity of substantial governmental agencies makes imputation of knowledge impossible. *United States* v. *Catalanotto*, 468 F. Supp. 503, 506 (D. Ariz. 1978).

On the whole, the weight of national authority appears to reject recusal of an entire prosecutorial office. *See Chadwick*, 164 Cal. Rptr. at 871 (canvassing jurisdictions). Federal courts are particularly reluctant to order disqualification

[10] As adopted by Arizona, however, DR 5–105(D) has a different scope. It appears to require vicarious disqualification only when an attorney has been recused because of a conflict of interest (Canon 5) rather than the risk of disclosing client confidences (Canon 4). 17A Ariz. Rev. Stat. Ann., S. Ct. Rule 29(a), DR 5–105(D) (1983 Supp.). There is as yet no case law explaining the difference in application between the Model Code and the Arizona amendment.

[11] The Model Rules of Professional Conduct define "firm" as including "lawyers in a private firm, and lawyers employed in the legal department of a corporation or other organization, or in a legal services organization." Rule 1.10 comment, 52 U.S.L.W. 9 (Aug. 16, 1983).

of an entire United States Attorney's office. For example, a district court granted a motion to disqualify an entire United States Attorney's office on the ground that one of several defendants had been represented by one of the current Assistant United States Attorneys. The Sixth Circuit reversed, holding that the vicarious disqualification rule of DR 5–105(D) is "inapplicable to other government lawyers associated with a particular government lawyer who is himself disqualified by reason of DR 4–101 . . . or similar disciplinary rules." *United States* v. *Caggiano*, 660 F.2d 184, 191 (6th Cir. 1981) (quoting ABA Formal Op. 342), *cert. denied*, 455 U.S. 945 (1982). As explained by then-District Judge Kaufman in *United States* v. *Standard Oil Co.*, 136 F. Supp. 345, 363 n.34 (S.D.N.Y. 1955):

> [T]he hands of government cannot be tied because of the former associations of one of its officials; therefore, that top person disqualifies himself from handling that particular matter, and the conflict of interest question is considered resolved. Similarly, the particular lower ranking attorney disqualifies himself and another attorney handles the matter. No such opportunity is given to one partner in a law firm to disqualify himself and qualify the firm. The only explanation for the difference in result is that the practical exigencies are more compelling in the former situation than the latter. This is another illustration of the fact that ethical problems cannot be viewed in a vacuum; practical, everyday facts of life must be considered.

The Department would vigorously oppose any attempt to disqualify an entire United States Attorney's office on the basis of a past professional affiliation of one of its assistants because of the extreme interference such a recusal order would cause with the Department's ability to carry out its prosecutorial functions. This position finds support in the ABA's new Model Rules of Professional Conduct. Those rules specifically prohibit a lawyer who is a public officer from participating "in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter." Rule 1.11(c)(1), 52 U.S.L.W. 11 (Aug. 16, 1983). The comment states clearly that the paragraph "does not disqualify other lawyers in the agency with which the lawyer in question has become associated." *Id.*

Although we would take the position that a court should not disqualify the entire office, we would urge the AUSA to observe the restrictions upon communicating with others that underlie the vicarious disqualification rule. We have been told that the AUSA has reviewed FBI files regarding A and B. We have no facts to indicate that he may have discussed confidential information with other members of the staff, but we underscore the importance of not assisting in the case once a decision to disqualify has been made.

III. Application of Canon 4 to Federal Officials

Several sources of authority could be viewed as imposing on the AUSA or other Department of Justice attorneys the obligations of Canon 4 discussed above. As members of the bar of a state or the District of Columbia,[12] Department lawyers may be subject to the ethical standards of the state bars, including Canon 4. Both Arizona and Illinois have adopted the Model Code. *See supra* note 1 and accompanying text. In addition, as representatives of the United States in litigation, Department lawyers may be subject to Canon 4 or a similar rule as adopted by the federal district courts as local rules. The local rules of the United States District Court for the District of Arizona, for example, provide that "the Code of Professional Responsibility, as set forth in Rule 29(a) of the Rules of the Supreme Court of the State of Arizona, shall apply to court proceedings in the United States District Court for the District of Arizona." D. Ariz. R. 7(d) (1982). Finally, the Department's Standards of Conduct exhort Department attorneys to use the Model Code as a source of "guidance" for their conduct. 28 C.F.R. § 45.735–1. Although we have never read this provision in the Standards of Conduct to impose upon the Department's lawyers obligations that are not fully consistent with the performance of their official responsibilities, we must anticipate that the organized bar or the federal courts or both may attempt to impose the restrictions of Canon 4 even in situations where we would not.

The imposition of conduct regulations by a state court or bar association upon federal lawyers acting in the scope of their federal authority must be assessed in light of the Supremacy Clause of the Constitution. *See supra* note 2. The activities of the Federal government are presumptively free from state regulation, unless Congress has clearly authorized state regulation in a specific area. *See Hancock* v. *Train*, 426 U.S. 167 (1976). In the area of professional conduct, Congress has directed that Justice Department attorneys must be licensed and authorized to practice under the laws of a State, territory, or the District of Columbia. *See supra* note 12. In prior interpretations of that requirement, this Department has been willing to assume that Congress "intended that the attorneys would be subject to reasonable conditions of continued bar membership where those conditions are not inconsistent with the requirements or exigencies of federal employment," and that Congress could reasonably have intended federal employees to be subject to "reasonable and established ethical rules for the bar generally." *See* Memorandum of the Department of Justice, Re: "In the Matter of the Petition of the Board of Governors of the District of Columbia Bar," at 5 (Sept. 11, 1979). Nonetheless, bar rules that are inconsistent with the requirements or exigencies of federal service may also offend the Supremacy Clause.

[12] Department of Justice authorization and appropriations statutes routinely provide that the Department's funds may not be used to pay the compensation of any person employed as an attorney unless that person is duly licensed and authorized to practice as an attorney under the laws of a state, territory, or the District of Columbia. *See, e.g.*, Pub. L. No. 96–132, § 3(a), 93 Stat. 1040, 1044 (1979); Pub. L. No. 95–624, § 3(a), 92 Stat. 3459, 3462 (1978); Pub. L. No. 95-86, § 202, 91 Stat. 419, 428 (1977); *see also* Pub L. No. 98–411, § 203(a), 98 Stat. 1545, 1558–59 (1984) (continuing the requirement of § 3(a) of Pub. L. No. 96–132).

Whether the limitations of Canon 4, as imposed by a state bar, are a significant enough intrusion into the authorized functions of this Department to offend the Supremacy Clause would depend on the circumstances of the AUSA's case. On the one hand, there is the arguable congressional authorization for at least some state professional regulation of Department lawyers as evinced by the language in the Department's authorization statutes. In addition, the attorney's obligation to preserve client confidences traces its roots far beyond the Model Code of Professional Responsibility, and may have implications for the due process rights of the criminal defendant. Further, the Department's own regulations permit an employee's supervisor to relieve an employee from participation in a criminal investigation or prosecution if he determines that a personal relationship exists between the employee and a person or organization that is substantially involved or has specific and substantial interest in the matter. 28 C.F.R. § 45.735–4. The Department's own practice, therefore, supports observance of the ethical guidelines in this instance.

On the other hand, the Department has a strong interest in pursuing its prosecutions free from interference from any other governmental entity, state or federal. The strength of this interest would depend upon the need for the AUSA's services in this particular operation. That he was hired as a Special Assistant United States Attorney for the purpose of prosecuting alien cases would suggest that his services in the obscenity prosecution are not indispensable. This is a determination that must be made by officials more familiar than we are with the circumstances of this particular investigation.

On balance, we believe that generally the extension of the Canon 4 obligations to individuals who were not "clients" in the strict sense of the word would not be in the Department's interest. We believe in this case, however, that very careful thought should be given to the broad application that courts have given to the Canon 4 principles and a determination made regarding the relevance of those interpretations to the AUSA's situation. We believe the broad construction of Canon 4 is not binding on the Department, assuming some overriding interest on the other side, but that as a prudential matter, the better course may be to protect the integrity of the prosecution by removing the AUSA from the case. Although we can appreciate the AUSA's interest in participating in the case, we think that under these facts it would be reasonable, if perhaps incorrect, for the public or the defendants to question the AUSA's capacity for independent judgment or his ability to preserve the confidences he may have obtained as a defense attorney. As we have emphasized, however, this decision should be made by Department officials who are in possession of more detailed facts than we have been given and who are in a position to judge the AUSA's importance to the investigation and prosecution of these obscenity cases.

Conclusion

The many considerations, discussed above, that bear upon a disqualification under these circumstances have led us to conclude that the AUSA probably

should not participate either in counseling agents involved in the investigation of A and B or in the prosecution of A and B. The relationship between the AUSA and A and B may not be close enough to establish that his participation in the case would violate the Disciplinary Rule prohibiting the disclosure of client confidences. However, it may nevertheless be sufficient to deprive A and B of a fair trial or to create an appearance of impropriety. We cannot conclude that, as a matter of law, the AUSA's participation in the case could not provide a ground for a disqualification order or an eventual attack upon any convictions obtained. As a prudential matter, we therefore recommend that he disqualify himself from the case.

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Office of Legal Counsel

Issuance of a Preferred Stock Dividend by the Federal Home Loan Mortgage Corporation

The Federal Home Loan Mortgage Corporation is authorized, under 12 U S.C. § 1455(f), to issue a dividend of preferred stock to its shareholders, the Federal Home Loan Banks. The Federal Home Loan Banks are further authorized to distribute that stock as a dividend to their shareholders.

January 25, 1985

MEMORANDUM OPINION FOR THE COUNSEL TO THE DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET, AND THE CHAIRMAN, FEDERAL HOME LOAN BANK BOARD

This responds to the request of the Counsel to the Director, Office of Management and Budget (OMB), for the opinion of this Office concerning the issuance by the Federal Home Loan Mortgage Corporation (FHLMC) of a preferred stock dividend to its shareholders, the twelve Federal Home Loan Banks (FHL Banks).

OMB contends that the preferred stock dividend was unlawful because the FHLMC is statutorily authorized only to sell preferred stock and not to issue a preferred stock dividend. In contrast, the FHLMC and the Federal Home Loan Bank Board take the position that the preferred stock dividend should be considered as two separate transactions, the preferred stock dividend from the FHLMC to the FHL Banks, and the separate dividend of this FHLMC preferred stock declared by the FHL Banks to their shareholders. The FHLMC argues that each of these transactions was permissible under the applicable statutes. The FHLMC's outside counsel has also taken the position that the transaction was authorized by statute.

We conclude that the FHLMC's analysis is correct, and that the FHLMC was statutorily authorized to issue the preferred stock and to distribute it as a stock dividend.[1] We are aware of no facts or legal authorities that even remotely support the conclusion that the preferred stock transaction was unlawful.

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[1] We take no position with respect to whether the FHLMC was financially in a position to pay such a dividend. That factual question is beyond the expertise of this Office and, in any case, we do not understand that this issue has been raised as a question of either fact or law.

I. Background

The FHLMC is a corporate instrumentality of the United States created by the Federal Home Loan Mortgage Corporation Act (FHLMC Act), 12 U.S.C. §§ 1451–1459. The FHLMC was established primarily for the purpose of increasing the availability of mortgage credit for housing by assisting in the development of secondary markets for conventional mortgages, which in turn increases the liquidity of residential mortgage investments. The FHLMC carries out this task principally through the purchase of first lien, conventional residential mortgages from mortgage lending institutions and the resale of these mortgages in the form of guaranteed mortgage securities.

The FHLMC is governed by a Board of Directors that consists of the members of the Bank Board, who also have responsibility for overseeing the Federal Savings and Loan Insurance Corporation. *See id.* § 1452(a). The FHL Banks provided the FHLMC's initial capital of $100 million and now own all of the FHLMC's common stock. *See id.* § 1453. Since 1981, the Board of Directors of the FHLMC has paid cash dividends periodically to the FHL Banks. The FHL Banks are all separate corporate instrumentalities of the United States, which were created pursuant to the Federal Home Loan Bank Act, *id.* §§ 1421–1436. Each FHL Bank is governed by a board of directors, the majority of which is elected by the FHL Bank stockholders, with the remainder being appointed by the Bank Board. *See id.* § 1427. The stockholders of each FHL Bank are various financial institutions (principally savings and loan associations) that have subscribed for and own stock in that FHL Bank. *See id.* § 1426.

We understand that the FHL Banks historically have paid dividends to their stockholders in the form of both cash and shares of stock in the FHL Bank. *See* 12 C.F.R. § 522.6. We also understand that cash dividends paid by the FHLMC to the FHL Banks generally have been passed through by each FHL Bank to its stockholders. The transaction at issue was initiated when the Board of Directors of the FHLMC adopted resolutions creating the preferred stock and authorizing the issuance and distribution of the preferred stock to the FHL Banks in proportion to their respective holdings of the FHLMC's common stock. In December 1984, each FHL Bank declared a dividend, consisting of the shares of the preferred stock issued to that FHL Bank, to its members of record as of the close of business on December 31, 1984. These FHL Bank dividends were subsequently approved by a resolution of the Bank Board.

II. Analysis

We concur with the position of the FHLMC that the question presented raises two separate legal issues: (1) whether the FHLMC was statutorily authorized to issue a preferred stock dividend to the FHL Banks; and (2) whether the FHL Banks were authorized to pass this preferred stock on as a dividend to their shareholders.

A. The Validity of the FHLMC Preferred Stock Dividend

OMB does not dispute that the FHLMC is statutorily authorized to issue dividends to the holders of its common stock.[2] *See* 12 U.S.C. § 1453(d). Thus, the only question is whether the dividend may be in the form of preferred stock. Both OMB and the FHLMC agree that the only directly relevant statutory authority with respect to the first issue is contained in 12 U.S.C. § 1455(f).[3] This section was added to the FHLMC Act in 1982 as § 6 of an act that extended a number of federal housing programs. *See* Pub. L. No. 97–289, § 6, 98 Stat. 1230, 1232 (1982 Act). In 1984, further language was added to this provision by § 211 of the Secondary Mortgage Market Enhancement Act of 1984. *See* Pub. L. No. 89–440, § 211, 98 Stat. 1689, 1697 (1984 Act). These enactments will be considered separately below.

1. The 1982 Act

As originally enacted, § 1455(f) read: "The Corporation may have preferred stock under such terms and conditions as the Board of Directors shall prescribe. Any preferred stock shall not affect the status of the capital stock issued under § 1453 as nonvoting common stock." This statute sets forth a broad and unambiguous delegation of authority to the Board of Directors of the FHLMC to issue preferred stock "on such terms and conditions as the Board of Directors shall prescribe." There is no restriction stated in the statute on what the FHLMC may do with the preferred stock once it is issued.[4] Given this broad statutory power granted to the FHLMC by § 1455(f) with respect to the issuance of preferred stock, and its subsequent disposition, there seems to be ample power to issue the preferred stock in the form of a dividend to holders of its common stock, as the FHLMC has done in this case.

This conclusion is supported by the general rule that the issuance of stock dividends is generally within the power of a corporation:

> In the absence of a constitutional or statutory prohibition, if the directors of the corporation, acting in good faith, are of the opinion that it is for the best interests of the corporation and its stockholders to retain profits in the business of the corporation, or as a surplus fund to meet future needs, instead of dividing them among the stockholders as a dividend in cash or property, it is within their discretion to do so and to pay a dividend by issuing reserved or additional stock.

[2] In fact, OMB urges the payment in these circumstances of a cash dividend instead of a stock dividend.

[3] We note that the FHLMC Act states that, except as otherwise provided by the Act or by subsequent laws "expressly in limitation of the provisions" of the Act, "the powers and functions of the Corporation and of the Board of Directors shall be exercisable, and the provisions of this chapter shall be applicable and effective, without regard to any other law." *Id.* § 1459.

[4] OMB takes the position that "[t]he issue is not the legality of *having* such stock outstanding — we fully *concede this; the issue, rather, is the terms and conditions upon which such stock may be issued.*" OMB further concedes that § 1455(f) authorizes the FHLMC to sell the preferred stock to the public, notwithstanding that the statute does not specifically discuss what the FHLMC may do with the stock once it is issued.

11 M. Wolf, *Fletcher Cyclopedia of the Law of Private Corporations* § 5360, at 742 (1971) (footnote omitted).

Despite the apparent clarity of this statutory authorization, OMB contends that the legislative history of the 1982 Act demonstrates that the provision was not intended to authorize a preferred stock dividend. OMB points to the remarks of Representative Gonzalez, who made the following statement on the floor of the House with respect to the provision that became § 1455(f):

> The resolution would also provide the Federal Home Loan Mortgage Corporation with the authority to issue preferred stock. The intent of this provision is to enable the Mortgage Corporation to contribute to a housing recovery by allowing it to increase its purchases of newly originated mortgages during the hoped for housing recovery in 1983. It will also enable the Mortgage Corporation to continue its highly successful SWAP Program at current volume levels should this need continue.

128 Cong. Rec. 25946 (1982). OMB argues that this statement demonstrates that the preferred stock provision was enacted only for the purpose of raising capital and therefore that preferred stock may only be sold and not issued as a dividend. We disagree with this conclusion for a number of reasons.

First, a fair reading of Representative Gonzalez's statement does not necessarily support the conclusion for which it has been cited by OMB. Representative Gonzalez simply stated that raising or preserving capital was the principal purpose for which the provision was adopted; his statement does not evince an affirmative intent to deny the authority to issue preferred stock for other reasons. It is frequently the case that a statute enacted for a particular purpose or to meet a particular need is subsequently utilized for additional purposes because of its broad language. *See* 2A C. Sands, *Sutherland Statutory Construction* § 49.02 (3d ed. 1973). Thus, the mere description of this provision's principal purpose does not limit its use to that purpose, in contravention of the clearly applicable broad language of the statute itself.

Second, even if Representative Gonzalez's statement supported the restriction of the broad language of the statutory authorization to the purpose of raising or preserving capital, the declaration of a preferred stock dividend would not necessarily be inconsistent with such a purpose. Given the decision of the Board of Directors to issue some form of dividend, the logical alternative to a stock dividend would have been a cash dividend. In fact, the issuance of a cash dividend is precisely the alternative that OMB recommends that the FHLMC adopt. By issuing a dividend of preferred stock rather than cash, the FHLMC is preserving capital for the expansion of its programs in a manner that is consistent with Representative Gonzalez's statement of the purpose of the provision. If one assumes that the FHLMC decided to issue a dividend of some kind, the issuance of that dividend in the form of preferred stock had essentially the same effect of enhancing the capital position of the FHLMC as would the sale of preferred stock. For these reasons, not only is the legislative history not

inconsistent with the clear language of the statute, but it supports the import of the language that the FHLMC has authority to issue a preferred stock dividend.

Finally, even if the legislative history were clearly contrary to the FHLMC's position, it would not overcome the unambiguous statutory language. As the Supreme Court recently emphasized:

> While we now turn to the legislative history as an additional tool of analysis, we do so with the recognition that only the most extraordinary showing of contrary intentions from these data would justify a limitation on the "plain meaning" of the statutory language. When we find the terms of a statute unambiguous, judicial inquiry is complete, except in "'rare and exceptional circumstances.'"

Garcia v. *United States*, 469 U.S. 70, 75 (1984) (quoting *TVA* v. *Hill*, 437 U.S. 153, 187 n.33 (1978)). The use of legislative history is "only admissible to solve doubt and not to create it." *Railroad Comm'n* v. *Chicago, B. & Q. R.R.*, 257 U.S. 563, 589 (1922). Moreover, the cited legislative history is not even in the form of a committee report, but is the statement of a single legislator on the floor of one House. "The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311 (1979). Thus, the legislative history does not alter our conclusion that the transaction was authorized by the clear language of the statute.

Although OMB does not argue that any other statutory provision expressly prohibits the FHLMC from declaring and paying a preferred stock dividend, OMB contends that the transaction is prohibited by the purpose of the FHLMC Act as derived from other provisions. OMB argues that the FHLMC was prohibited from issuing the preferred stock dividend because the purpose of the stock dividend was primarily to enhance the capital of the member thrift institutions, which OMB regards as inconsistent with the FHLMC's statutory function. OMB argues that the FHLMC is authorized only to provide secondary mortgage market liquidity and not to boost the financial position of member thrift institutions, relying upon 12 U.S.C. § 1454 and *Association of Data Processing Service Organizations* v. *Federal Home Loan Bank Board*, 568 F.2d 478, 486–89 (6th Cir. 1977). Therefore, the argument goes, any action (such as the payment of a preferred stock dividend) that is directed toward the latter purpose is beyond the power of the FHLMC.

In this instance, however, nothing in the statute or in the legislative history restricts the discretion of the Board of Directors in the manner suggested by OMB. The problem with OMB's argument is that the purpose of the issuance of a dividend is to benefit the stockholders. Because OMB concedes the FHLMC's authority to issue dividends, it must also concede the validity of that purpose. Thus, even if the preferred stock dividend were intended to support the balance sheets of member institutions, it would not be improper on that basis alone. Section 1454, which OMB cites as a limitation on the purposes of the FHLMC,

is simply an authorization to engage in the purchase and sale of mortgages, and not a restriction on the purposes for which preferred stock may be issued.[5]

Data Processing Service Organizations is similarly inapposite. In that case, the United States Court of Appeals for the Sixth Circuit held that because of the express statutory restriction against an FHL Bank engaging in outside business, it was improper for an FHL Bank to sell data processing services to savings and loan institutions. In that case, however, not only was there no express statutory authorization to undertake the questioned activity, there was a specific prohibition against the FHL Bank engaging in that business. In the present instance, the FHLMC has authority to issue dividends and has express statutory authority to issue preferred stock on such terms as the Board of Directors prescribes, and utilizing such preferred stock to pay a dividend to the common shareholders is not inconsistent with any of the authorized purposes or responsibilities of the corporation.

OMB also argues that the dividend transaction is an unlawful effort to circumvent the statutory provisions that establish a particular capital structure for the FHLMC. Specifically, OMB contends that the preferred stock is essentially common stock without the express statutory requirements imposed by Congress on FHLMC common stock. *See* 12 U.S.C. § 1453. OMB notes that FHLMC common stock may be issued only to FHL Banks and may be recalled for retirement by the FHLMC, but that no such restrictions apply to the preferred stock. OMB then argues that, because the preferred stock is entitled to receive the first $10 million in dividends declared by the FHLMC and 90 percent of any additional dividends, and because preferred shareholders would receive, in any liquidation of the FHLMC, 90 percent of the remaining assets of the corporation, the preferred stock amounts in essence to common stock issued without compliance with the statutory restrictions that must accompany the FHLMC's common stock. This argument is based upon OMB's understanding that these terms and conditions vest "the principal attribute of common stock — the right to enjoy the unrestricted earnings (and, in liquidation, the unrestricted assets) of the enterprise — on this 'preferred'" stock.

This argument is ill-founded because it simply challenges the discretionary judgment vested in the Board of Directors to establish the terms and conditions under which the FHLMC may issue preferred stock. OMB has not suggested any reason to doubt that the stock issued as a dividend is in fact preferred stock. Moreover, § 1455(f) specifically empowers the FHLMC to issue preferred stock "on such terms and conditions as the Board of Directors shall prescribe," as long as the preferred stock does not affect the status of the capital stock issued under § 1453 as nonvoting common stock. The statute does not require that preferred stock have the same restrictions as common stock.

[5] Section 1454 does not contain any statement of the purpose of the FHLMC. It authorizes the purchase of mortgages, just as § 1455 authorizes the FHLMC to create certain obligations and securities. If OMB were correct in its argument, the FHLMC would also be precluded from paying a cash dividend as well, rather than using the funds to purchase mortgages. OMB concedes, however, that the issuance of a cash dividend is permissible. Moreover, OMB has not questioned whether the issuance of a dividend under the present circumstances is contrary to good business judgment.

In this instance, the terms and conditions established by the Board provide a preference to dividends to the holders of the preferred stock over the holders of common stock, the very essence of a preferred stock issue. *See* 11 M. Wolf, *Fletcher Cyclopedia of the Law of Private Corporations* § 5283, at 526 (1971). The common stock remains unchanged in all other aspects. We are not aware of any evidence that the Board in this transaction has abused the broad discretion vested by this statutory provision with respect to the prescription of the terms and conditions upon which preferred stock will be issued.[6]

Thus, based upon the clear statutory language of § 1455(f), as originally adopted in 1982, the issuance of a preferred stock dividend seems to be fully within the authority of the FHLMC.

2. The 1984 Amendment

Section 1455(f) was amended in 1984 by the addition of the language highlighted below:

> The Corporation may have preferred stock on such terms and conditions as the Board of Directors shall prescribe. Any preferred stock shall not affect the status of the capital stock issued under § 1453 of this title as nonvoting common stock *and shall not be entitled to vote with respect to the election of any member of the Board of Directors. Such preferred stock, or any class thereof, may have such terms as would be required for listing of preferred stock on the New York Stock Exchange, except that this sentence does not apply to any preferred stock, or class thereof, the initial sale of which is made directly or indirectly by the Corporation exclusively to any Federal Home Loan Bank or Banks.*

98 Stat. at 1697.

OMB argues that the last sentence indicates that § 1455(f) "contemplates the *sale* only of preferred stock — a result which expressly proscribes the proposed transaction." In our view, however, the amendment contains no clearly expressed intent to alter the broad authority of the 1982 Act with respect to the issuance of a preferred stock dividend. Because we have concluded that the 1982 Act authorized the FHLMC to issue a preferred stock dividend, it would have been necessary for Congress expressly to eliminate that authorization in the 1984 Act in order to preclude the transaction at issue.[7] We find no such evidence of congressional intent in either the language of the statute or its

[6] We note, in addition, that the terms and conditions of the preferred stock also provide the Board with discretion to issue additional preferred stock, which could be either junior, senior, or equal to the outstanding preferred stock.

[7] It is axiomatic that the views of a subsequent legislature are not probative legislative history with respect to the meaning of a previously adopted statute. *See United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 348–49 (1963). Thus, unless the amendment were actually intended to alter the authority granted in the 1982 Act, it would not prohibit the preferred stock dividend.

legislative history. First, the language of the amendment itself does not even remotely suggest that only the sale of preferred stock is permitted. The word "sale" appears in the amendment only as part of the exception to the provision that FHLMC preferred stock may meet New York Stock Exchange (NYSE) listing standards.[8] This one reference in the amendment is hardly sufficient to impose a significant restriction on the authority granted in 1982.

Moreover, the legislative history of the provision indicates precisely the opposite of OMB's argument. The Senate report on the bill referred to the amendment as "follow-on provisions to authority granted in earlier legislation permitting the FHLMC to issue preferred stock. The earlier legislation failed to prescribe any standards or conditions for issuance of such stock." S. Rep. No. 293, 98th Cong., 1st Sess. 10 (1983). This statement suggests both that Congress recognized that it had authorized the FHLMC to "issue" preferred stock and not simply to sell it, and that the grant of such authority was exceptionally broad and unrestricted. Nothing in the legislative history of the 1984 Act suggests an intent to preclude the issuance of the preferred stock dividends.

B. The Validity of the FHL Bank Dividends

The final question that remains with respect to the preferred stock dividend transaction is whether the individual FHL Banks were statutorily authorized to pass on the FHLMC preferred stock to their stockholders as a dividend. Although OMB has not challenged this aspect of the transaction, we discuss this issue in order to provide a complete response.

This question is governed by 12 U.S.C. § 1436, which sets forth the terms and conditions under which the FHL Banks may pay dividends to their stockholders. This section generally authorizes the FHL Banks to pay dividends to their shareholders, with the following restrictions: (1) all dividends must be approved by the Bank Board; and (2) dividends may be paid only out of net earnings remaining after all reserves and charge-offs required by the statute have been provided for, except that if the Bank Board "determines that severe financial conditions exist threatening the stability of member institutions, the Board may suspend temporarily these requirements and permit each Federal Home Loan Bank to declare and pay dividends out of undivided profits." 12 U.S.C. § 1436(b).

All of these requirements seem to have been fulfilled with respect to the FHL Banks' dividends of FHLMC preferred stock. First, we understand that the

[8] The language of the amendment might be read to *permit* the issuance of preferred stock with terms that would allow listing on the NYSE (NYSE terms) except when the stock is sold to FHL Banks. If that were true, then there might be some question whether the FHLMC was authorized to issue this stock to the FHL Banks with the NYSE terms. The Senate report states, however, that the provision was intended to "require" that preferred stock include the NYSE terms and that the exception was intended to indicate that "[p]referred stock sold by the FHLMC exclusively to any Federal Home Loan Bank or Banks will not be *required* to meet otherwise applicable New York Stock Exchange requirements and can be sold upon whatever terms and conditions [the FHLMC's] Board of Directors chooses to include." S. Rep. No. 293, 98th Cong., 1st Sess. 10 (1983). Thus it seems clear that the inclusion of the NYSE terms was permissible.

Bank Board has expressly approved all of the preferred stock dividends declared by the FHL Banks. Second, we also understand that the Bank Board has determined, by formal resolution, that severe financial conditions exist threatening the stability of member institutions. OMB has not suggested that this finding was in any way improper. Therefore, this finding satisfied the requirements of § 1436 and permitted the FHL Banks to transfer the FHLMC preferred stock as a dividend to their shareholders.

Conclusion

In conclusion, we find that the two preferred stock dividend transactions were authorized under applicable statutes. First, the FHLMC acted pursuant to clear statutory authority in granting a preferred stock dividend to the FHL Banks. Second, the FHL Banks were similarly empowered to transfer that preferred stock as a dividend to their shareholders.

RALPH W. TARR
Acting Assistant Attorney General
Office of Legal Counsel

Constitutionality of Line-Item Veto Proposal

A bill that purports to give the President a line-item veto by providing that each item of appropriation in an appropriation bill be enrolled, although not voted on, as a separate bill raises serious constitutional questions under Article I, § 7, cl. 2 of the Constitution.

February 1, 1985

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This Office has reviewed a copy of S. 43, a bill that seeks to provide the President with effective line-item veto authority by requiring that each item of appropriation in any appropriation bill be enrolled as a separate bill. This procedure would permit the President to veto any of these separate bills and, therefore, give him the power effectively to veto individual items of appropriation. We commented on a similar proposal pending before Congress last fall that was never adopted. At that time, we set forth a number of general objections to the proposal as well as several specific comments concerning the particular language of that draft. The new bill has been revised to answer most of our technical objections, but it is still subject to the general concerns that we noted previously.

The first major concern we noted with respect to this type of proposal is that its constitutionality is a matter of substantial question. Although we have not had the time to develop a detailed constitutional analysis of this issue, we have set forth below the basic outlines of the constitutional question and the arguments that might be developed for and against the constitutionality of the proposal. The most we can say is that it is a close question, the outcome of which cannot be predicted with any reasonable degree of certainty.

The constitutional issue arises from the traditional construction of the provisions in the Constitution governing the veto power of the President. Article I, § 7, cl. 2, states in pertinent part:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal and proceed to reconsider it.

The veto clause seems to give the President only two options: he may either sign the bill or return it with his objections. Thus, on its face, the language of the Constitution does not seem to permit the President to veto individual parts of a bill.

This conclusion is confirmed by the actual practice of Presidents under the veto clause. No President has ever attempted to exercise an item veto. To the contrary, many Presidents have expressly considered the question and concluded that the President is without item veto power. In 1793, George Washington stated that he had signed many bills with which his judgment was at variance, but felt compelled to do so because "from the nature of the Constitution, I must approve all the parts of a Bill, or reject it in toto." 33 *Writings of George Washington* 96 (1940). President Grant, while urging the adoption of a constitutional amendment to authorize an item veto, recognized the absence of such a power under the Constitution. *See* 7 J. Richardson, *Messages and Papers of the President* 242 (1898). William Howard Taft stated simply that the President "has no power to veto parts of the bill and allow the rest to become a law. He must accept it or reject it." W. Taft, *Chief Magistrate* 14 (1916). This Department has consistently taken a similar position with respect to the meaning of the veto clause.

The bill attempts to avoid this constitutional obstacle to the line-item veto by requiring each item of appropriation contained in a single bill passed by both Houses of Congress to be enrolled as a separate bill. The President would then be able to veto any of these individual bills. The argument in favor of the constitutionality of this proposal begins with the proposition that the definition of the term "bill" is not fixed by the Constitution, but rather is subject to legislative definition by Congress. Congress has the authority, under its own rules, to prescribe what may and may not be included in particular types of bills. Similarly, Congress should be able to define that which constitutes a separate bill to be enrolled and presented to the President. This argument could certainly be developed further, and may ultimately prove to be persuasive.

Perhaps the best way to characterize this legislation from a constitutional perspective would be to state that Congress would take a single vote on a package of bills constituting the total appropriation.[1] The single vote would then simply be a convenient method for the adoption of multiple bills. At present, however, S. 43 does not read this way. Rather, it requires a bill to be split into several bills after Congress votes, but before presenting the package to the President. As explained in the following paragraphs, this differential treatment of a "bill" for congressional passage and presentment to the President may be incompatible with the requirements of Article I, § 7, cl. 2, which treats

[1] As far as we know, the current practice in Congress is to adopt each bill that is presented to the President by a separate vote. After a brief investigation, we have been unable to discover any general congressional practice of adopting separate bills together by a single vote. We understand that such a procedure may have taken place once, with respect to the adoption by the House of energy legislation in 1978, but we know of no other instances in which different bills were adopted by a single vote In the limited time available, our research has failed to disclose any reported case involving the question whether Congress may constitutionally take a single vote on a package of several bills and thereafter present the bills separately to the President.

a bill the same with respect to congressional and Presidential action. We would recommend at the very least that the proposal be amended to embody the concept of a single vote on a series of bills.

Even if the bill is redrafted, however, we believe that there are very persuasive arguments that could be made against the constitutionality of the proposal. To the extent that we have been able to identify any policy underlying the "take-it-or-leave-it" principle of the veto clause, it seems to be that under the system of checks and balances established by the Constitution, the President has the right to approve or reject a piece of legislation, but not to rewrite it or change the bargain struck by Congress in adopting a particular bill. The fundamental principle established by the Constitution with respect to the adoption of legislation is that in order to enact a statute it is necessary (in the absence of a congressional override) to have the concurrence of the House, the Senate, and the President with respect to the statute as a whole. If the President were allowed to veto individual parts of legislation, then the bargain struck by Congress in adopting a bill could be altered. Indeed, the bargain might be altered so significantly that it would not receive the approval of a majority of both Houses. Thus, the veto clause ensures that the final compromise that is struck with respect to a particular statute is approved by the President and both Houses of Congress.

The proposed bill could be considered to be inconsistent with this constitutional principle because it permits the President to alter the bargain reached by Congress without the necessity for reapproval by both Houses. Individual items of appropriation would not be voted on separately, but rather would be voted on as a complete package. Therefore, it would be unclear whether each item of appropriation, or any combination thereof, would receive support of a majority of each House outside of the bill in which it was actually contained. Because each House would vote only once on the total package, the only manifestation of agreement expressed by each House would be an agreement with respect to the entire package. If the package is subsequently broken down into separate parts and the President is permitted to eliminate some of those parts from the final law, then the statute will not necessarily reflect the consent of each House of Congress. Thus, under this theory, the bill simply attempts to circumvent the requirements of the veto clause in a manner that is no more consistent with the policies of the veto clause than would be a direct legislative effort to give the President statutory line-item veto authority.

It is not a satisfactory answer to this constitutional argument to respond that Congress would have voluntarily imposed this limitation on itself and that Congress would be aware when it adopted an appropriations bill that the President would be able to veto individual parts of it. Congress made the same argument in the *Chadha* case with respect to the President's approval of legislative veto statutes, but the Supreme Court expressly stated that it was not permissible to alter by legislation the veto provisions of the Constitution. The Court stated: "Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive

in the legislative process. . . . These provisions of Art. I are integral parts of the constitutional design for the separation of powers." *INS* v. *Chadha*, 462 U.S. 919, 945–46 (1983). Thus, under this principle, Congress does not have the authority to alter the constitutionally prescribed method for the adoption of legislation, which requires the concurrence of the House, Senate, and President before a bill becomes law.

In addition to our constitutional concern, we have a concern with respect to the definition of the term "item." Both the old and new bills define an item as "any numbered section and any unnumbered paragraph" of an appropriations bill. The failure of the bill to define the term "item" other than by reference to the form in which an appropriations bill is organized could prove to be terribly cumbersome and might eventually lead to legislative manipulation and drafting techniques designed to subvert the purpose of the item veto legislation. For example, this proposal might well lead to the drafting of statutes without paragraphs or section numbers in order to prevent division of the bill into separate enrolled bills. As we previously noted, however foolish this may sound, we do not doubt that enterprising legislators would resort to any lawful drafting technique to avoid the Presidential authority created by these statutes. In addition, the Congress could dilute the effectiveness of the item veto power granted by the proposal by combining, in a single section, appropriations the President is known to favor with those to which he is opposed. As a practical matter, this type of problem will inhere in any legislation that seeks to require separate enrollment of individual appropriations. Nevertheless, we believe that an effort should be made to remedy this problem by redrafting the current proposal to restrict the definition of the term "item."

In conclusion, arguments can be made both for and against the constitutionality of S. 43. Given the importance of the line-item veto in the President's program, however, we would urge that strong consideration be given to the issue whether the benefits of S. 43 outweigh the substantial constitutional issues it raises and the uncertainty that would attach to any legislation enacted through the mechanism it creates. We are particularly strong in this recommendation given the ease with which the purpose of S. 43 could be subverted on any given appropriations measure. It may also be important to consider whether the President might be faulted for not utilizing effectively the power granted by this statute, when in fact its effectiveness was being undercut by Congress through clever construction of appropriations bills.

RALPH W. TARR
Acting Assistant Attorney General
Office of Legal Counsel

Seventh Amendment Implications of Providing for the Administrative Adjudication of Claims Under Title VIII of the Civil Rights Act of 1968

Congress may, consistent with the Seventh Amendment and Article III of the Constitution, assign adjudication of certain violations of the Fair Housing Act to an administrative agency without a right to a jury trial.

Congress may do so even though the statute alternatively permits such claims to be brought in federal court, where the Seventh Amendment would guarantee the right to a jury trial.

Such a statutory scheme, under which a defendant's right to a jury trial is in large part contingent on procedural choices of other parties to the proceedings, does not violate the Due Process Clause.

February 8, 1985

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION

In response to your request we have reviewed the question whether Congress, without offending the jury trial requirement of the Seventh Amendment, may provide for an administrative adjudication and award of damages to an individual to remedy violations of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601–3619 (Fair Housing Act). Although we find the issue extremely difficult, we are inclined to believe that Congress may, consistent with the Constitution, assign adjudication of fair housing violations to an administrative agency absent a jury trial, even though Congress has provided that the same violations may alternatively be remedied by civil actions in which a jury trial is constitutionally required. *See Curtis* v. *Loether*, 415 U.S. 189 (1974). We are troubled, however, by a congressional enforcement scheme that enables an aggrieved person to obtain substantially similar relief in administrative or court proceedings, yet conditions the jury trial right of the defendant on the forum choice of other parties to the proceeding. Accordingly, we set forth our reasoning in detail below.

I. Background

S. 1220, the Mathias-Kennedy bill to amend Title VIII of the Civil Rights Act of 1968, contains a complex enforcement scheme with two primary en-

forcement options: administrative proceedings and private civil actions. Section 810(a)(1) provides in part that the Secretary of Housing and Urban Development (Secretary) shall make an investigation "whenever an aggrieved person, or the Secretary on the Secretary's own initiative, files a charge alleging a discriminatory housing practice." If, after such an investigation, the Secretary determines that reasonable cause exists to believe the charge is true, the Secretary shall, on behalf of the aggrieved person filing the charge, either file an administrative complaint under § 811 or refer the matter to the Attorney General for the filing of an appropriate civil action under § 813(b). *See* § 810(c)(1).[1]

Section 811(a) provides for an administrative hearing on the record, which may result in an administrative order "providing for such relief as may be appropriate (including compensation for all damages suffered by the aggrieved person as a result of the discriminatory housing practice), and . . . a civil penalty of not to exceed $10,000." The order of the administrative law judge is subject to review on appeal by an appeals panel of the Fair Housing Review Commission. *See* §§ 808(c), 811(a). A final order may be appealed within sixty days to the appropriate court of appeals. *See* § 811(b). Judicial review is conducted pursuant to the general provisions governing the review of orders of certain federal agencies. *See* 28 U.S.C. §§ 2341–2351. Findings of fact are conclusive if supported by substantial evidence in the record as a whole. The Attorney General is authorized to bring a civil action in district court to enforce any final order that is referred for enforcement by the Secretary, or to collect any civil penalty assessed by the administrative law judge under § 811(d)(1) for violation of a final order. *See* § 813(b).

Alternatively, § 812(a)(1) authorizes a private aggrieved individual to commence a civil action in an appropriate federal or state court. In such actions, the court shall award such relief as may be appropriate, including "money damages, equitable and declaratory relief, and punitive damages." § 812(c). This relief is similarly authorized for civil actions brought by the Attorney General under § 813.

If the Secretary has commenced an administrative hearing with respect to a charge made by an individual to the Secretary, that individual may not commence a private civil action. *See* § 812(a)(3). In parallel fashion, if an aggrieved individual has commenced a trial on the merits in a civil action, the Secretary may not commence administrative "proceedings toward the issuance of a remedial order based on such charge." § 812(a)(2).[2]

This scheme of mutually exclusive administrative and judicial enforcement options has an anomalous effect on a party's right to a jury trial. On the one

[1] The Secretary must refer to the Attorney General any "charges involving the legality or validity of any State or local zoning, or other land use law or ordinance, or any novel issue of law or fact or other complicating factor." § 810(c)(2).

[2] The Secretary may also investigate housing practices *sua sponte* to determine whether charges should be brought. *See* § 810(a)(1). The bill does not specify the forum in which such charges would be brought. We assume that it was intended that such charges might proceed administratively, although § 810(c)(1)(A) suggests that the administrative forum is limited solely to charges filed on behalf of aggrieved persons who previously have filed charges with the Secretary.

hand, no jury trial is available in the administrative proceedings. On the other hand, the Supreme Court has held that the Seventh Amendment entitles either party to demand a jury trial in an action for damages in the federal courts under current § 812 of the Civil Rights Act of 1968, which, similar to proposed § 812(a)(1), authorizes private plaintiffs to bring civil actions to redress violations of the fair housing provisions of the Act. *See Curtis* v. *Loether*, 415 U.S. 189 (1974). Consequently, although a defendant would be entitled to a jury if a plaintiff proceeds in federal court, the same defendant would have no right to a jury trial if an aggrieved person files a complaint with the Secretary and the Secretary subsequently files an administrative complaint.[3]

In order to resolve the constitutionality of this multiple enforcement scheme, we must address the following questions:

1. Can Congress constitutionally vest adjudication of housing discrimination claims in an administrative tribunal, in which there would be no right to a jury trial?

2. Given that a defendant would constitutionally be entitled to a jury trial in a damages action brought in federal court under the Fair Housing Act, can Congress simultaneously provide for an essentially similar action before an administrative tribunal, in which there would be no right to a jury trial, without violating the defendant's Seventh Amendment right?

3. Assuming that there are no Seventh Amendment concerns, does the statutory scheme nevertheless deny the defendant due process insofar as the defendant landlord's jury trial right is in large part contingent on the procedural choices of other parties?

III. Analysis

1. *Can Congress constitutionally vest adjudication of housing discrimination claims in an administrative tribunal, in which there would be no right to a jury trial?* Before determining whether administrative adjudication of Fair Housing Act violations would offend an individual's Seventh Amendment right, a threshold question is whether administrative adjudication of the rights created by the Fair Housing Act comports with Article III of the Constitution. If Congress cannot constitutionally vest adjudication of certain housing discrimination claims in a non-Article III tribunal, then we need not reach the narrower Seventh Amendment issue.

Article III of the Constitution provides in part: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art.

[3] The reasoning of *Curtis* v. *Loether* might also apply if the Secretary refers the matter to the Attorney General and the Attorney General brings a civil action in federal court under § 813. Accordingly, a defendant's right to a jury trial might also be affected by the Secretary's determination either to proceed administratively or to refer the matter to the Attorney General for judicial proceedings. Because the Supreme Court has never determined whether the Seventh Amendment is applicable to government-initiated litigation, however, we decline to reach this issue. *See Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 449–50 n.6 (1977).

III, § 1. Moreover, "Judges, both of the supreme and inferior Courts," enjoy tenure "during good Behavior," and receive salaries not subject to diminution during their term of office. *Id.* There is no question that S. 1220 does not extend the Article III protections of life tenure and undiminished salary to the administrative law judges who would hear complaints filed by the Secretary under § 811. We therefore first examine whether Congress may commit adjudication of housing discrimination complaints brought by the Secretary on behalf of an individual, who may obtain relief in the form of compensatory damages, to officers not enjoying life tenure and irreducible compensation.

In creating statutory rights, Congress has considerable discretion to define in what manner and forum such rights may be vindicated. *See Crowell* v. *Benson*, 285 U.S. 22, 50–51 (1932); *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856). Unfortunately, Supreme Court decisions defining the scope of Congress' discretion to vest federal judicial power in non-Article III tribunals involve one of the most confusing and controversial areas of constitutional law, *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 534 (1962) (plurality opinion), and "do not admit of easy synthesis," *Northern Pipeline Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 91 (1982) (Rehnquist, J., concurring in judgment).

In particular, the Court's latest Article III pronouncement in *Northern Pipeline*, which concluded that the broad grant of jurisdiction to non-Article III bankruptcy courts was incompatible with the Constitution, failed to establish a unitary or comprehensive Article III jurisprudence. *Northern Pipeline* raised the question whether a non-Article III bankruptcy court could adjudicate a common law contract claim, brought by a company undergoing Chapter 11 reorganization against its purported debtor. Six Justices agreed that Article III prohibits a non-Article III federal tribunal from adjudicating state common law claims over the objection of a party. *Id.* at 87 (plurality opinion); *id.* at 91 (Rehnquist, J., concurring in judgment). Because only four members of the Court joined in the plurality's elaboration of Article III principles, we must explore the current problem not only in light of the plurality opinion but also with regard to the views of the concurring Justices.

The plurality opinion in *Northern Pipeline* examined two theories pursuant to which Congress may vest judicial power in non-Article III tribunals: the "legislative court" exception and the Article III court "adjunct" theory. According to the plurality, Congress may vest judicial power in legislative courts in "three narrow situations," all of which involve exceptional grants of power to the Executive and Legislative Branches. *Id.* at 64. These legislative court exceptions include "territorial courts," *see American Ins. Co.* v. *Canter*, 26 U.S. (1 Pet.) 511, 546 (1828), "courts-martial," *see Dynes* v. *Hoover*, 61 U.S. (20 How.) 65, 79 (1857), and cases involving "public rights," *see Murray's Lessee*, 59 U.S. (18 How.) at 284. The plurality's "adjunct" theory was based on the recognition that Article III "does not require 'all determinations of fact [to] be made by judges;' with respect to congressionally created rights, some factual determinations may be made by a specialized fact-finding tribunal

designed by Congress, without constitutional bar." *Northern Pipeline*, 458 U.S. at 81 (quoting *Crowell* v. *Benson*, 285 U.S. at 51) (citation omitted). But the functions of the adjunct must be limited so that "the essential attributes" of judicial power are retained in an Article III court. *Id.*

The adjudicatory scheme for housing discrimination claims created by S. 1220 clearly does not fall within the legislative court exception for territorial courts or courts-martial. A persuasive argument can be made, however, that S. 1220 creates a "public right" in establishing a duty not to discriminate in the provision of housing. The "public rights" doctrine was initially articulated in *Murray's Lessee*:

> [W]e do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there 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.

59 U.S. (18 How.) at 284. That is, because Congress may constitutionally commit to nonjudicial executive determination matters that arise between the government and its citizens "in connection with the performance of the constitutional functions of the executive or legislative departments," *Crowell* v. *Benson*, 285 U.S. at 50, Congress is equally free to commit the determination of such matters to legislative courts or administrative agencies. Matters that fall within the public rights doctrine may involve the entire range of Congress' Article I powers: "Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans." *Id.* at 51; *see also Atlas Roofing Co.* v. *Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 456–57 (1977); *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909).[4]

The difficulty, as the Supreme Court has conceded, is that "the distinction between public rights and private rights has not been definitively explained in [the Court's] precedents." *Northern Pipeline*, 458 U.S. at 69 (plurality opinion). A threshold definition of public rights is that they arise "between the government and others." *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929). Private rights, in contrast, involve "the liability of one individual to another under the

[4] The Court has refused to limit Congress' discretion to create public rights and to establish legislative tribunals in which to adjudicate them to particular Article I grants of power that might be deemed "inherently in the exclusive domain of the Federal Government and critical to its very existence — the power over immigration, the importation of goods, and taxation." *Atlas Roofing Co.*, 430 U.S. at 456.

law as defined." *Crowell* v. *Benson*, 285 U.S. at 51. Moreover, "the presence of the United States as a proper party to the proceeding is a necessary but not sufficient means of distinguishing 'private rights' from 'public rights.'" *Northern Pipeline*, 458 U.S. at 69 n.23 (plurality opinion).

In the administrative scheme established by S. 1220, the Secretary files a complaint "on behalf of the aggrieved person." § 810(c)(1)(A). The aggrieved person has the right to intervene in the proceedings. § 811(a). Although the administrative official has discretion to provide compensatory damages relief for the aggrieved person, the bill does not authorize the administrative award of punitive damages (which are available in individual court actions brought under § 812). Further, a civil penalty not to exceed $10,000 is available to the government. In these latter two respects — the exclusion, in the administrative proceeding, of punitive damages for the individual and the availability of a civil penalty for the government — S. 1220 differs from an earlier housing discrimination bill that this Office concluded was constitutionally vulnerable. *See* "Fair Housing — Civil Rights Act," 2 Op. O.L.C. 16 (1978). The earlier bill authorized administrative officials to award punitive damages to individuals and did not provide for a civil penalty for the government.

We believe it is a close question whether the government has simply stepped into the individual's shoes in this administrative proceeding, and is suing in a representative capacity, or whether S. 1220 in fact creates a public right that, consistent with Article III, may be adjudicated in an administrative tribunal. *Cf. EEOC* v. *Corry Jamestown Corp.*, 719 F.2d 1219, 1225 (3d Cir. 1983) (EEOC has right to jury trial in court action under Age Discrimination in Employment Act in order to avoid "inequitable and anomalous result" of individual losing his Seventh Amendment right whenever EEOC sues on his behalf). This determination is complicated because S. 1220 concurrently provides for an essentially similar individual damages action in court, an action that resembles the current damages action under the Fair Housing Act. The Supreme Court has declared that existing actions under § 812 are actions "to enforce 'legal rights' within the meaning of our Seventh Amendment decisions," *Curtis* v. *Loether*, 415 U.S. at 195, and are "analogous to a number of tort actions recognized at common law," *id.* Significantly, there are only minimal differences between the relief available in the administrative forum (in which a civil penalty for the government replaces punitive damages for the individual) and the judicial forum.

Nonetheless, there are clearly precedents for administrative bodies both enforcing public policy and providing incidental relief, including monetary relief, to private citizens. As courts have recently noted in the context of administratively determined reparations awards under the Commodity Exchange Act, the fact that new statutory rights are enforceable in favor of a private party does not preclude administrative adjudication of such rights. *Myron* v. *Hauser*, 673 F.2d 994, 1005 (8th Cir. 1982) (citing *Atlas Roofing Co.*, 430 U.S. at 452–55); *Rosenthal & Co.* v. *Bagley*, 581 F. 2d 1258, 1261 (7th Cir. 1978) (same). In *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), for

example, the Court upheld an administrative award of both reinstatement and back pay for an employee. Somewhat similarly, in *Block* v. *Hirsh*, 256 U.S. 135 (1921), the Court rejected a constitutional challenge to a statute that temporarily suspended the legal remedy of ejectment and established an administrative tribunal to determine fair rents while tenants held over notwithstanding the expiration of their leases. Just as the *Northern Pipeline* plurality distinguished between the restructuring of debtor-creditor relations, which "may well be a 'public right,'" 458 U.S. at 71, and the adjudication of state-created private rights, a distinction exists between the government-prosecuted administrative proceeding in S. 1220 and the individual damages action in federal court.

Unquestionably, the determination that S. 1220 creates a public right would be considerably simplified if no compensatory relief were available to the individual in the administrative proceeding. We believe, however, that the courts would conclude that insofar as S. 1220 creates a right (1) in an area of important public concern, *cf. Bob Jones Univ.* v. *United States*, 461 U.S. 574, 594–96 (1983) (identifying a firm national policy against racial discrimination), (2) that is enforceable by the government in an administrative action, (3) provides a civil penalty for the government, and (4) does not to provide the aggrieved individual the punitive damages typically available at common law, *see Richerson* v. *Jones*, 551 F.2d 918, 926–28 (3d Cir. 1977), it probably is to be characterized as a public right.

This determination is consistent with case law that has rejected Article III and Seventh Amendment challenges to the reparations procedure of the Commodity Exchange Act (CEA), 7 U.S.C. § 18 (1976), under which an individual may obtain a monetary award from an administrative tribunal. The 1974 amendments to the CEA established a reparations procedure, "analogous to the operation of a small claims court," S. Rep. No. 850, 95th Cong., 2d Sess. 16 (1978), in which a customer, often representing himself *pro se*, could obtain damages from registered commodities brokers and certain other professionals for violations of the CEA or any Commodity Futures Trading Commission (CFTC) regulations, rules, or orders. *Myron* v. *Hauser*, 673 F.2d at 1001; *Rosenthal & Co.* v. *Bagley*, 581 F.2d at 1259. Under the 1974 amendments, an individual could file a complaint with the CFTC, which was authorized to investigate the complaint. 7 U.S.C. § 18(a), (b) (1976). If the CFTC determined that the "facts warranted such action," the CFTC notified the accused commodity professional and afforded a hearing before an administrative official. *Id.* § 18(b).[5] Thus, although the CFTC provided a forum for resolution of these

[5] The 1983 amendments simplified the statutory procedural requirements, but did not alter the administrative scheme in any significant manner. The CEA now provides that any person complaining of a violation of the CEA by any registered person may "apply to the Commission for an order awarding actual damages proximately caused by such violation." 7 U.S.C. § 18(a). The 1983 amendments eliminated the specific provisions empowering the CFTC to investigate any complaint, and requiring the CFTC to forward the complaint, if warranted, to the respondent for an answer. The CFTC now has general discretion to "promulgate such rules, regulations, and orders as it deems necessary or appropriate for the efficient and expeditious administration of this section." *Id.* § 18(b).

claims, it did not directly assume a prosecutorial role. Rather, complainants could retain private counsel or represent themselves before the administrative law judge. *Myron* v. *Hauser*, 673 F.2d at 1001.

The *Bagley* court summarily dismissed an Article III objection to this congressionally-mandated scheme for administrative adjudication of reparations claims as "not even arguable." 581 F.2d at 1261. The court in *Myron* v. *Hauser*, however, explained why it did not think that purely private rights were involved in the administrative proceedings. Although conceding that "the present case is not one 'in which the Government *sues* in its sovereign capacity to enforce public rights,'" the court nevertheless believed that the case was "one in which 'the Government [was] *involved* in its sovereign capacity under an otherwise valid statute creating enforceable public rights.'" 673 F.2d at 1005 (emphasis added; citations omitted). Because Congress, acting under the Commerce Clause, had regulated commodity options transactions, the court regarded the case "in a functional sense [as] one between the government and the commodity options broker, the party subject to government regulation." *Id.*

Under S. 1220, Congress would not simply be regulating the nondiscriminatory provision of housing; the government would also be prosecuting alleged violations of the Fair Housing Act in administrative proceedings. If the *Myron* court concluded that the CEA created a public right that could be adjudicated in an administrative tribunal, even though the statute was enforceable by, and in favor of, private parties, then it certainly would conclude that S. 1220, which is enforceable by the government, creates a public right, the benefits of which also redound in part to aggrieved individuals.

Alternatively, the use of administrative tribunals to adjudicate the right to nondiscriminatory housing created by S. 1220 might be validated by the "adjunct" theory articulated by the plurality in *Northern Pipeline.* The plurality regarded *Crowell* v. *Benson* and *United States* v. *Raddatz*, 447 U.S. 667 (1980), as establishing two principles that define the extent to which Congress may constitutionally vest judicial functions in non-Article III adjuncts. First, "when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated including the assignment to an adjunct of some functions historically performed by judges." *Northern Pipeline*, 458 U.S. at 80 (plurality opinion). Second, "the functions of the adjunct must be limited in such a way that 'the essential attributes' of judicial power are retained in the Art. III court." *Id.* at 81.

In *Crowell*, the Supreme Court upheld an administrative agency's power to make factual determinations concerning the nature and extent of employee injuries, pursuant to a federal statute requiring employers to compensate their employees for work-related injuries occurring upon the navigable waters of the United States. In *Raddatz*, the Court upheld the Federal Magistrates Act, which permits magistrates to adjudicate, subject to *de novo* review by the district court, certain pretrial motions involving constitutional claims. Because *Crowell*, like S. 1220, involved congressionally created rights (in contrast to common law or constitutional claims), with respect to which Congress possesses rela-

tively broad discretion to assign fact-finding to adjuncts, it is the more relevant touchstone for the present analysis.[6]

In *Crowell*, the administrative agency performed an admittedly narrower function than would the agency under S. 1220. The federal statute at issue there provided for compensation of injured employees "irrespective of fault" and prescribed a fixed schedule of compensation. 285 U.S. at 38. In view of these limitations on the agency's functions and powers, the Court found that the agency's determinations were "closely analogous to findings of the amount of damages that are made, according to familiar practice, by commissioners or assessors." *Id.* at 54. Although S. 1220 does not impose such narrow limitations on the housing discrimination agency's fact-finding powers, neither does the bill create adjuncts with powers as broad as those possessed by the bankruptcy courts at issue in *Northern Pipeline*.

The Bankruptcy Act of 1978 vested bankruptcy judges with all the powers of a court of equity, law, and admiralty, including the power to preside over jury trials, to issue writs of habeas corpus, and to issue any order or judgment appropriate for the enforcement of the provisions of Title 11. *Northern Pipeline*, 458 U.S. at 85 (plurality opinion).[7] In contrast, the administrative tribunal in S. 1220, similar to the agency considered in *Crowell*, lacks many of these powers, and specifically has no power to enforce its orders. Moreover, the subject matter jurisdiction of the agency created under S. 1220 is limited to congressionally-created claims of housing discrimination, whereas the jurisdiction of the bankruptcy courts under the 1978 Bankruptcy Act encompassed not only traditional matters of bankruptcy, but also all civil proceedings arising under or *related to* cases under Title 11. *See* 28 U.S.C. § 1471(b) (Supp. IV 1980) (emphasis added).

According to both the *Northern Pipeline* plurality and the Court in *Crowell*, the most significant aspect of the adjunct scheme challenged in *Crowell* was that "'the reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function in this class of cases.'" *Northern Pipeline*, 458 U.S. at 81 (quoting *Crowell* v. *Benson*, 285 U.S. at 54). S. 1220 provides that the factual findings of the agency are conclusive if supported by substantial evidence, but the reviewing judicial court retains greater authority with respect to matters of law.[8] Because S. 1220

[6] The *Northern Pipeline* plurality emphasized that Congress does not possess the same degree of discretion to assign "traditionally judicial power to adjuncts engaged in the adjudication of rights *not* created by Congress," 458 U.S. at 81–82, and noted that "Congress' assignment of adjunct functions under the Federal Magistrates Act [under which constitutional, as opposed to solely congressionally-created, rights could be adjudicated] was substantially narrower than under the statute challenged in *Crowell*," *id.* at 82.

[7] The only exception to these wide-ranging powers was that bankruptcy courts could "not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment." 28 U.S.C. § 1481 (Supp. IV. 1980) (*quoted in Northern Pipeline*, 458 U.S. at 55 (plurality opinion)).

[8] *See* 28 U.S.C. § 2347; *Florida E. Coast Ry.* v. *United States*, 242 F. Supp 490, 491 (M.D. Fla.) (statute providing for judicial review of agency action requires that primary function of reviewing court is to determine whether there is substantial evidence on the record as a whole to support findings of agency, and whether agency applied proper legal standards in conduct of proceedings before it and in conclusions that it

Continued

involves a congressionally-created right, in distinction to the state common law claim at issue in *Northern Pipeline*, we do not believe that the assignment of initial adjudicatory functions to an adjunct administrative tribunal is necessarily incompatible with Article III. *Cf. Schor* v. *CFTC*, 740 F.2d 1262 (D.C. Cir. 1984) (holding that *Northern Pipeline* principles concerning congressional discretion to assign judicial power to adjuncts were not satisfied in case involving agency jurisdiction over common law claim). Because this determination is a close and questionable one, however, we prefer to base our conclusion — that S. 1220 does not violate Article III by vesting administrative officials with power to adjudicate fair housing claims — on the "public rights" theory.

The concurrence in *Northern Pipeline* offers little to either support or detract from the above conclusions regarding S. 1220. The concurrence limited its holding to the case before it, concluding that the Bankruptcy Act of 1978 violated Article III to the extent that it permitted a non-Article III tribunal to adjudicate a state common law claim. 458 U.S. at 91. But "sensible interpretation of judicial opinions avoids converting a carefully crafted limitation on a holding into its *ratio decidendi*." *Schor* v. *CFTC*, 740 F.2d at 1275. Quite simply, the concurrence provides scant insight concerning whether S. 1220 creates either a public right or a constitutionally acceptable adjunct system. Because the Article III principles supporting the concurring opinion are in any event no stricter than the plurality's Article III principles, we believe that to the extent S. 1220 passes muster under the plurality's "public rights" theory, it would probably be endorsed by a majority of the Court.

B. *Given that a defendant would constitutionally be entitled to a jury trial in a damages action brought in federal court under the Fair Housing Act, can Congress simultaneously provide for an essentially similar action before an administrative tribunal, in which there would be no right to jury trial, without violating the defendant's Seventh Amendment right?* Assuming that S. 1220 creates a public right, there is no question that Congress has discretion to assign the adjudication thereof to an administrative agency free from the strictures of the Seventh Amendment: "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.'" *Atlas Roofing Co.*, 430 U.S. at 455; *see also NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. at 48–49. S. 1220, however, does not simply assign adjudication of a

[8] (. . . continued)
reached), *aff'd*, 382 U.S. 161 (1965); *see also Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951) Such a standard of review does not permit the reviewing court to substitute its own views for the agency's judgment, if that judgment has support in the record and applicable law, *see American Textile Mfrs Inst.* v. *Donovan*, 452 U.S. 490, 523 (1981); *New York* v. *United States*, 299 F. Supp. 989, 997 (N.D.N.Y. 1969), *aff'd*, 396 U.S. 281 (1970), but it does leave questions of law to the court's determination, *NLRB* v. *Yeshiva University*, 444 U.S. 672, 691 (1980); *Florida Power & Light Co.* v. *Electrical Workers*, 417 U.S. 790, 803 (1974); *cf. NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974); *NLRB* v. *Hearst Publications, Inc*., 322 U.S. 111, 130–31 (1944).

public right to an administrative tribunal. It simultaneously establishes a statutory cause of action (to remedy the same underlying housing discrimination claim) that an individual may bring in state or federal court.

This individual damages action is virtually identical to the cause of action at issue in *Curtis* v. *Loether*.[9] In that case, the Court held that parties to such an action in federal court are entitled to a jury trial on demand. 415 U.S. at 195–97. The Court explained that the right to jury trial extends beyond the common law forms of action recognized in 1791, and that the Court has often found the Seventh Amendment applicable to causes of action based on statutes. *Id.* at 193. In general, "when Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law." *Id.* at 195. Because a damages action under the Fair Housing Act "is analogous to a number of tort actions recognized at common law," the Court concluded that it "is an action to enforce 'legal rights' within the meaning of our Seventh Amendment decisions." *Id.* Consequently, to the extent S. 1220 provides for enforcement in federal court of a statutory action involving legal rights and remedies that the Court has deemed analogous to certain common law actions, a jury trial is constitutionally required upon demand. *Id.* at 195; *Pernell* v. *Southall Realty*, 416 U.S. 363, 383 (1974).

The critical question posed by S. 1220 is whether a statutory right to be free from discrimination in the sale, rental, or financing of housing can be both a right enforceable in an administrative action absent a jury trial and a right enforceable in federal court with a jury upon demand.

The Court has long recognized that Congress has discretion to vest the determination of public rights in judicial or administrative tribunals. Thus, Congress:

> in exercising the powers confided to it, may establish "legislative" courts . . . to serve 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 of it." But "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."

Crowell v. *Benson*, 285 U.S. at 50 (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929)). Similarly, the plurality in *Northern Pipeline* acknowledged that:

> when Congress creates a statutory right, it clearly has the discretion, in defining that right, to create presumptions, or assign

[9] The only difference is that the current Fair Housing Act provision, which was addressed in *Curtis* v. *Loether*, limits the individual's punitive damages to $1,000. *See* 42 U.S.C. § 3612. S. 1220 places no limit on the punitive damages available to an individual in a civil court action. *See* § 812(c).

> burdens of proof, or prescribe remedies; it may also provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right. Such provisions do, in a sense, affect the exercise of judicial power, but they are also incidental to Congress' power to define the right that it has created.

458 U.S. at 83 (footnote omitted).

In light of Congress' substantial discretion to prescribe the manner in which "public" or statutorily created rights may be adjudicated, we cannot conclude that Congress deprives itself of the power to vest a statutorily created right to nondiscriminatory housing in an administrative agency simply because it also has provided for the enforcement of the same statutory housing right in the federal courts in which a jury trial must be available. That is, we believe that Congress may create a statutory right that, depending on its mode of enforcement, the forum in which it is to be resolved, or the nature of the remedy available, could be viewed either as a public or a private right. *Cf. Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 384–88 (1982) (holding that implied private cause of action in court is available under Commodity Exchange Act, although Act also expressly provides for administrative reparations procedure and arbitration procedure).

Prior cases consistently indicate that the Seventh Amendment does not prohibit Congress from assigning the adjudication of statutory rights to an administrative forum, even if a jury would have been required constitutionally had Congress assigned adjudication of those same rights to a federal court instead. *Atlas Roofing Co.*, 430 U.S. at 455 (discussing *Pernell* v. *Southall Realty*, *NLRB* v. *Jones & Laughlin Steel Corp.*, and *Block* v. *Hirsh*). In *Pernell* v. *Southall Realty*, the Court held that because Congress provided that statutory actions for repossession of property — which resembled common law actions to recover land — be brought as civil actions in court, the Seventh Amendment required preservation of the right to jury trial. 416 U.S. at 384. The Court carefully noted, however, that "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 [and therefore analogous to a common law action], to an administrative agency." *Id.*

Similarly, in *Atlas Roofing Co.*, in which the petitioners strenuously argued that the statutory civil penalty proceeding in issue there was a suit at common law within the meaning of the Seventh Amendment, the Court concluded that "even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned to a federal court of law," 430 U.S. at 455, the Amendment did not prevent Congress from assigning adjudication of such civil penalties to an administrative agency with which a jury trial would be incompatible. *Id.* at 455, 461.

Finally, in *Block* v. *Hirsh*, 256 U.S. 135 (1921), the Court upheld Congress' power to transfer temporarily to an administrative commission jurisdiction

over an entire range of landlord-tenant disputes that previously had been adjudicated in court with a jury trial right. If Congress by statute could wholly, albeit temporarily, remove a set of common law actions from the courts and subject the regulation and adjudication of the same underlying property rights to an administrative agency, then the Seventh Amendment would not appear to bar the less drastic action of providing simultaneously for the adjudication of a statutory right in individual judicial actions and in administrative proceedings prosecuted by the government.[10] As the Court explained in *Atlas Roofing*, Congress cannot utterly destroy the right to a jury trial by providing for administrative rather than judicial resolution of the vast range of wholly private tort, contract, and property cases that now arise in the courts. 430 U.S. at 457–58. But "where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights," *id.* at 458, then the right to a jury trial may well be affected by the identity of the forum to which Congress chooses to submit a dispute, *id.* at 457–58. *See also Myron* v. *Hauser*, 673 F.2d at 1004 ("right to a jury trial turns not solely on the nature of the issue to be resolved but also on the forum in which it is to be resolved"); *Rosenthal & Co.* v. *Bagley*, 581 F.2d at 1261 (same).

Although we are unaware of statutory schemes in which the individual's jury trial right is contingent on whether the government enforcement official chooses to proceed in an administrative forum or an individual proceeds in court, we find nothing in the Seventh Amendment that would prohibit such a congressionally devised system.[11] The Supreme Court has stated that "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." *Atlas Roofing Co.*, 430 U.S. at 455. Nor do we find anything inherently impermissible in Congress making a jury trial available in certain instances but not in others in the enforcement of the same right. In *Ross* v. *Bernhard*, 396 U.S. 531 (1970), the Court acknowledged that prior to the adoption of the Federal Rules of Civil Procedure in 1938, which merged the law and equity functions of the federal courts, a defendant would not be entitled to a jury trial in a stockholder's derivative suit, even though the defendant

[10] We also note that Congress has the power to avoid the strictures of the Seventh Amendment to the extent it can control the jurisdiction of the inferior federal courts, *see* U.S. Const. art. III, § 1; *Sheldon* v. *Sill*, 49 U.S. (8 How.) 441, 449 (1850), and thereby transfer judicial business to the state courts, in which the Seventh Amendment is inapplicable. *See Alexander* v. *Virginia*, 413 U.S. 836 (1973). This does not, of course, resolve whether Congress, while continuing to exercise federal power to decide disputes, may eliminate the right of trial by jury simply by changing the *federal* forum. But it illustrates Congress' considerable discretion either to make jury trials available or to exempt adjudication from any Seventh Amendment claims.

[11] The Commodity Exchange Act (CEA) appears to establish an enforcement structure most analogous to S. 1220. Under the CEA, an individual may proceed with a private damages action in court, in which a jury trial would be available, or the individual may file a complaint seeking an administrative award of damages. Although the complaining individual, as opposed to a CFTC official, prosecutes the administrative claim, the administrative reparations procedure will go forward only if the CFTC determines that the complaint warrants administrative action. 17 C.F.R. § 12.15. However, the reparations procedure is not available against the commodities exchanges, nor is it suited for the adjudication of all other claims under the CEA. *See Merrill Lynch*, 456 U.S. at 384–85.

would have had a right to a jury trial had the corporation itself sued on the same underlying claim. *Id.* at 536–37, 540.[12]

Significantly, in *Merrill Lynch*, the Court recently sanctioned the availability of both an individual court action, in which a jury trial presumably would be available upon demand, *see Miller* v. *New York Produce Exch.*, 550 F.2d 762 (2d Cir.), *cert. denied*, 434 U.S. 825 (1977), and administrative proceedings, in which an injured individual could obtain damages from another private party absent a jury trial. The Court there held that Congress intended to preserve a private judicial remedy as a supplement to the express enforcement provisions — an administrative reparations procedure, an arbitration procedure provided by every contract market, and state *parens patriae* actions — under the CEA. Although the Court found that the informal arbitration and reparations procedures were designed to supplement the private judicial remedy, and that Congress apparently intended complainants "to be put to the choice between informal and judicial actions," 456 U.S. at 385, there was no question that damages could be obtained from a futures commission merchant or other registered person in either administrative reparations proceedings absent a jury trial or in a private judicial action, *id.* at 366, 385–87.[13] Nevertheless, the Court expressed no concern that the Seventh Amendment might prohibit an interpretation of the statute authorizing the award of damages in favor of a private complainant in either an administrative proceeding absent a jury trial or in a judicial proceeding with a jury available on demand.

Consequently, assuming that S. 1220 involves a public or statutorily created right that Congress may, compatible with Article III, assign to an adjunct for adjudication, we do not believe that the Seventh Amendment places any independent constraint on Congress' discretion to provide for both administrative and judicial enforcement if it determines that alternative mechanisms are necessary to remedy a particular problem. *Cf. Atlas Roofing Co.*, 430 U.S. at 444–45 (finding that Congress enacted OSHA because it found existing state statutory and common law remedies inadequate to protect employees from unsafe working conditions). Insofar as the administrative proceeding provides a remedy for a congressionally created right, Congress has latitude to alter the scope of the jury trial right as a reasonably necessary incident to other procedural and substantive objectives, because doing so, by definition, does not withdraw the jury trial in an area where historically it was firmly established.

C. *Assuming there are no Seventh Amendment concerns, does the statutory scheme nevertheless violate due process insofar as the defendant's jury trial*

[12] Similarly, because the Seventh Amendment does not apply in actions against the federal government, persons seeking relief from the federal government on causes of action in which they would have had a jury trial right were the action brought against a non-federal party will often have no jury trial right. *See Lehman* v. *Nakshian*, 453 U.S. 156 (1981) (holding that although jury trial was generally available in Age Discrimination in Employment Act suits, Congress did not create a jury trial in suits against the federal government).

[13] Moreover, because the CFTC under the CEA, similar to the Secretary under S. 1220, determines whether a complaint warrants further administrative action, *see* 17 C.F.R. § 12.15, both schemes ultimately vest a government official with some authority to determine whether a defendant will appear in an administrative forum or a judicial forum.

right is in large part contingent on the procedural choices of other parties? Generally, statutory schemes do not give the government discretion to enforce the same underlying charge by pursuing somewhat similar remedies either administratively without a jury or in court with a jury. Nor is it customary for statutes to provide a choice between individual court actions with jury trials and government-initiated proceedings in administrative forums. Most statutes that create dual enforcement mechanisms authorizing government suits as well as private actions either provide for jury trials in court actions regardless who enforces the statutory right,[14] or do not make jury trials available, irrespective of whether the government or a private person is the enforcing party.[15]

These congruences do not exist, however, if statutory provisions provide different remedies to enforce the same underlying claim in a judicial forum. For example, § 17 of the Fair Labor Standards Act (FLSA) authorizes the Secretary of Labor to seek injunctive relief, including the restitutionary restraint of any withholding of wages found due, in court without a jury trial, while § 16 of the FLSA grants the Secretary and private parties authority to seek legal relief in court with a jury trial. *Wirtz* v. *Jones*, 340 F.2d 901 (5th Cir. 1965). The Age Discrimination in Employment Act (ADEA) similarly authorizes the Equal Employment Opportunity Commission (EEOC) to seek an injunctive remedy in court, for which no jury trial is available, to enforce the statutory prohibition against age discrimination, whereas an individual employee may proceed with a damages actions under the ADEA in which a jury trial would be required upon demand. *See* 29 U.S.C. § 626(b) (providing that the ADEA is to be enforced in accordance with powers, remedies, and procedures of FLSA). Significantly, under both the FLSA and the ADEA, the individual's right to bring a private action terminates upon the filing of a complaint by the Secretary or the EEOC, respectively. *See id.* § 216(b) (FLSA); *id.* § 626(c)(1) (ADEA); *Donovan* v. *University of Tex.*, 643 F.2d 1201, 1207 (5th Cir. 1981). Should the Secretary seek equitable rather than legal relief, the parties would have no right to a jury trial even though a jury trial would have been available had an individual brought a damages action. *See Wirtz* v. *Jones*, 340 F.2d at 904. Thus, simply because a party may have a right to a jury trial in certain instances when a particular right is being enforced against him, it does not follow that a jury trial is always available for that party in the enforcement of that right.

In this context, it is significant that S. 1220 provides for somewhat different remedies in jury and non-jury proceedings. Punitive damages for the individual are available in judicial actions under S. 1220; compensatory damages for the

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[14] *See EEOC* v. *Brown & Root, Inc*, 725 F.2d 348 (5th Cir. 1984) (jury trial available whether government sues under § 7(b) or private party sues under § 7(c) of Age Discrimination in Employment Act); *EEOC* v. *Corry Jamestown Corp.*, 719 F.2d 1219 (3d Cir. 1983) (same); *Wirtz* v. *Jones*, 340 F.2d 901, 904 (5th Cir. 1965) (§ 16 actions under Fair Labor Standards Act brought by either an employee or the Secretary are triable before a jury).

[15] *See Slack* v. *Havens*, 522 F.2d 1091, 1094 (9th Cir. 1975) (no jury trial right in Title VII suits); *cf. Great Am. Fed. Savs. & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 375 (1979) (noting that courts of appeals have held that no jury trial right exists in Title VII actions because all relief is equitable in nature).

individual and a civil penalty for the government are available in the administrative proceedings. Because the Supreme Court has never held it unfair or arbitrary to have juries available some of the time but not all of the time, depending on the nature of the right, the remedy and the forum in which the right is enforced, we find nothing in the Due Process Clause that precludes Congress from providing for the enforcement of the statutory right to nondiscriminatory housing in either an administrative forum without a jury or a judicial forum with a jury. *Cf. Anniston Mfg. Co.* v. *Davis*, 301 U.S. 337 (1937) (holding that Congress may abrogate judicial proceedings if the substituted administrative proceedings afford a fair and adequate remedy). Indeed, it would be anomalous to conclude that the Due Process Clause places a more severe constraint on Congress' discretion to vest adjudication of congressionally created rights in administrative forums than do the more specific commands of the Seventh Amendment or Article III.

Conclusion

Because we believe that the courts would characterize the statutory right to nondiscriminatory housing created by S. 1220 as a public right, Congress may, consistent with Article III, vest the adjudication of housing discrimination claims in an administrative tribunal. Moreover, we conclude that the Seventh Amendment does not prohibit Congress from vesting the adjudication of this congressionally created right both in federal court, in which a jury trial would be available upon demand, and in an administrative tribunal, in which there would be no right to a jury trial. Finally, we believe that a statutory scheme in which a defendant's jury trial right is in large part contingent on the procedural choices of other parties to the proceeding does not offend the Due Process Clause. We accordingly conclude that although the question is novel and the available judicial precedents provide uncertain guidance, Congress constitutionally may provide for an administrative award of compensatory damages to an individual, even though such damages are also statutorily authorized in judicial actions in which either party is entitled to a jury trial on demand.

RALPH W. TARR
Acting Assistant Attorney General
Office of Legal Counsel

Inter-Departmental Disclosure of Information Submitted Under the Shipping Act of 1984

The Federal Maritime Commission is not prohibited by § 6(j) of the Shipping Act of 1984 (Act) from disclosing to other Executive Branch departments or agencies information concerning carriage agreements filed pursuant to the Act, although the Act does prohibit disclosure of such information to the public.

Section 6(j) of the Act is patterned after § 7A(h) of the Clayton Act, and the legislative history of the latter provision provides some indication that it might prohibit inter-departmental disclosure of premerger information obtained by the Justice Department under the Hart-Scott-Rodino Act. Nonetheless, in the absence of evidence of legislative intent specifically to prohibit non-public disclosure of Shipping Act information, it should not be inferred that Congress intended to override the general presumption that information obtained by one federal government agency may be freely shared among federal government agencies.

February 8, 1985

MEMORANDUM OPINION FOR THE GENERAL COUNSEL,
FEDERAL MARITIME COMMISSION

This responds to your inquiry whether § 6(j) of the Shipping Act of 1984 (Act), 46 U.S.C. app. § 1705(j), prohibits disclosure by the Federal Maritime Commission (Commission) of information and documentary material filed with the Commission under §§ 5 or 6 of the Act to other federal agencies or Executive Branch departments. Your request for an interpretation of § 6(j) arises in the context of certain international water carriage agreements filed or to be filed with the Commission that involve shipping routes with countries that have entered into bilateral agreements with the United States. The Commission may wish to disclose the information filed with those agreements to the Departments of State and Transportation when the bilateral agreements are renegotiated. Assuming that § 6(j) does not create an absolute prohibition against disclosure, your letter also inquires whether § 6(j) prohibits the Commission from disclosing such information to other federal agencies or Executive Branch departments where there is a showing that the information is necessary for the development of United States foreign policy objectives with respect to international shipping.

In this memorandum, we consider the language and legislative history of § 6(j). We also consider § 7A of the Clayton Act, 15 U.S.C. § 18a, upon which the Shipping Act is expressly modeled. For the reasons discussed below, we do

not believe § 6(j) prohibits disclosure of Shipping Act information to other federal government agencies in general or, in particular, disclosure in furtherance of the development of the Executive's foreign policy objectives in international shipping.

I. Section 6(j) of the Shipping Act of 1984

The Shipping Act of 1984 authorizes the Commission to receive for filing certain agreements that, if not declared unlawful by the Commission or the courts, are exempt from the antitrust laws. 46 U.S.C. app. §§ 1703–1706. The Act also authorizes the Commission to describe the form and manner in which an agreement is to be filed and, under § 6(d), to require the submission of such information and documents as may be necessary to evaluate the agreement under the substantive standard set forth in § 6(g).[1] 46 U.S.C. app. §§ 1704–1705.

Section 6(j) of the Act provides:

> *Nondisclosure of submitted material*
>
> Except for an agreement filed under [§ 5], information and documentary material filed with the Commission under [§ 5] is exempt from disclosure under section 552 of Title 5 [the Freedom of Information Act] and may not be made public except as may be relevant to an administrative or judicial action or proceeding. This section does not prevent disclosure to either body of Congress or to a duly authorized committee or subcommittee of Congress.

The Commission has promulgated regulations to implement the Act. *See* 49 Fed. Reg. 22296 (1984); 49 Fed. Reg. 24697 (1984) (codified at 46 C.F.R. Part 572). The regulations also provide for the confidential treatment of submitted material:

> (a) Except for an agreement filed under section 5 of the Act, all information submitted to the Commission by the filing party will be exempt from disclosure under 5 U.S.C. 552. Included in this disclosure exemption is information provided in the Information Form, voluntary submissions of additional information, reasons for noncompliance, and replies to requests for additional information.

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[1] Section 6(g) provides:

> *Substantially anticompetitive agreements*
>
> If, at any time after the filing or effective date of an agreement, the Commission determines that the agreement is likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost, it may, after notice to the person filing the agreement, seek appropriate injunctive relief under subsection (h) of this section.

46 U.S.C. app. § 1705(g).

> (b) Information which is confidential pursuant to paragraph (a) of this section may be disclosed, however, to the extent: (1) It is relevant to an administrative or judicial action or proceeding; or (2) It is in response to a request from either body of Congress or to a duly authorized committee or subcommittee of Congress.

46 C.F.R. § 572.608.[2]

On its face, § 6(j) merely prohibits public disclosure of information and materials filed with agreements under the Act.[3] Because the Commission proposes to disclose Shipping Act information to other federal government agencies, the relevant question here is whether § 6(j) also prohibits non-public disclosure of such information.

The legislative history of the Act is not helpful in answering this question. The report of the Senate and House conferees on S. 47, the bill which became the Shipping Act, merely states that "subsection (j) provides for confidential treatment of any information submitted under this section." H.R. Conf. Rep. No. 600, 98th Cong., 2d Sess. 30 (1984), *reprinted in* 1984 U.S.C.C.A.N. 283, 286. The House Report to accompany H.R. 1878, which was not enacted, explains that the provision for confidential treatment in that bill grants an exemption under the Freedom of Information Act for all information and documentary materials, other than the agreement itself, that have been submitted to the Commission pursuant to §§ 4 and 5. H.R. Rep. No. 53 (II), 98th Cong., 1st Sess. 31 (1983), *reprinted in* 1984 U.S.C.C.A.N. 167, 251. The original bill, S. 47, contained no comparable section providing for confidential treatment of submitted materials. No Senate Report was submitted with this legislation. The legislative history otherwise appears to be silent with regard to the confidentiality provision.

Thus, nothing in the language or the legislative history of § 6(j) expressly prohibits the type of non-public disclosure contemplated here of confidential information submitted under the Shipping Act.

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[2] The Federal Register contains supplementary information explaining the Shipping Act regulations. The description of Subpart F of the Rules, covering Action on Agreements, states that § 6 "preserves the confidentiality of information submitted with agreements." 49 Fed. Reg. at 22302. It further states, in reference to 46 C.F.R. § 572.608, that "[s]ection 6(j) of the Act provides that all information submitted by a filing party other than the agreement itself shall be exempt from disclosure under the Freedom of Information Act [5 U.S.C. § 552]. This section of the rules implements the Act's confidentiality provision " 49 Fed. Reg. at 22303.

[3] Section 6(j) of the Act qualifies as an exemption (b)(3) statute under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(3). FOIA "does not apply to matters that are specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters are withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." *Id.* The Office of Legal Policy, Office of Information and Privacy, does not interpret exemption (b)(3) statutes, in general, to prohibit inter-agency disclosures of information.

II. Section 7A of the Clayton Act, 15 U.S.C. § 18a

The agreement review procedure established under § 6 of the Shipping Act is modeled expressly on the procedures governing premerger clearance of proposed acquisitions and mergers under § 7A of the Clayton Act, as added by the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act). *See* H.R. Conf. Rep. No. 600, at 30, *reprinted in* 1984 U.S.C.C.A.N. at 286; *see also* 49 Fed. Reg. at 22301. Section 7A(h) of the Clayton Act provides for confidential treatment of premerger information relevant to a proposed acquisition submitted for approval to the Federal Trade Commission. The relevant language of § 7A(h) is identical to § 6(j) of the Shipping Act.

The legislative history of the HSR Act concerning premerger information provides little more elucidation on the scope of the prohibition against public disclosure than the legislative history of § 6(j) of the Shipping Act. The House Report to accompany H.R. 14580, Title II of the HSR Act, merely states that "premerger information submitted under this section is confidential, and may not be disclosed, except in judicial or administrative proceedings." H.R. Rep. No. 1373, 94th Cong., 2d Sess. 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2572, 2638. However, Chairman Rodino's remarks comparing the confidentiality provision in Title II of the HSR Act to a confidentiality provision in Title I of that Act shed some light on the meaning of the provision in Title I.

Title I amended the Antitrust Civil Process Act of 1962 by broadening the availability of civil investigative demands (CID) to investigate antitrust violations, *see generally* H.R. Rep. No. 1343, 94th Cong., 2d Sess. 1–4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2596, 2596–98, but retained the prohibition that no information produced in response to a CID "shall be available for examination, without the consent of the person who produced such [information] . . . by any individual other than a duly authorized official, employee, or agent of the Department of Justice." 15 U.S.C. § 1313(c)(3). Title I also provided that information produced in response to a CID is exempt from disclosure under the Freedom of Information Act. *Id.* § 1314(g).

Against this background, Chairman Rodino explained:

> The House applied the *same two confidentiality safeguards to premerger data that both the House and Senate bills applied to CID files compiled pursuant to title I* of the compromise bill. These two safeguards provide that, first, the premerger data is exempt from the Freedom of Information Act, so that the Government cannot be forced to disclose it to the public, and second, *the Government agencies themselves cannot discretionarily release premerger data to anyone*, but can disclose it only in "judicial or administrative proceedings." In contrast, the Senate bill made the premerger data "subject" to the Freedom of Information Act not exempt from it. The compromise bill adopts the House provisions because premerger data compiled pursuant to

title II of the compromise bill will, in essence, contain the same kind of information as a CID file compiled in a premerger investigation pursuant to title I of the compromise bill. The House conferees see no reason why this data should be exempt from the Freedom of Information Act in the one case, and subject to the Act in the other.

122 Cong. Rec. 30877 (1976) (emphasis added).

We acknowledge that this statement by Chairman Rodino, one of the sponsors of the legislation, may support the argument that the confidentiality provision in Title II, § 7A(h) of the Clayton Act, when read in conjunction with the comparable provision in Title I, prohibits disclosure of premerger information to anyone outside the Department of Justice. Indeed, based upon this reading of the legislative history, the Department's Antitrust Division has interpreted § 7A(h) of the Clayton Act to prohibit even non-public disclosure of premerger information except within the Department.[4]

The Antitrust Division's interpretation as applied to disclosure to state officials was recently upheld in a case involving requests by state attorneys general for premerger information submitted by private companies under the HSR Act. *Mattox* v. *FTC*, 752 F.2d 116 (5th Cir. 1985). The court determined that disclosure to state law enforcement agencies is a "public" disclosure within the meaning of § 7A(h). Relying on the legislative history of the HSR Act discussed above and the plain language of the statute, the court concluded that disclosure of premerger information obtained under the HSR Act is strictly prohibited except as provided by § 7A(h), regardless of any assurance of confidentiality.[5] Although the court did not expressly consider whether § 7A(h) also prohibits inter-agency transfers of premerger information obtained under the HSR Act, such a result may be implicit in its holding.

We do not view the Fifth Circuit's interpretation of § 7A(h) of the Clayton Act to preclude a different interpretation of § 6(j) of the Shipping Act, however. Nor do we view the mere fact that § 6(j) is modeled on § 7A(h) as dispositive of the scope of the prohibition in § 6(j), at least insofar as that prohibition relates to disclosure of information among federal agencies. Rather, without more definitive evidence of a legislative intent to prohibit non-public disclosure of Shipping Act information specifically, we would not infer a legislative intent to overturn the general presumption that information obtained

[4] *See* Antitrust Division Manual (VII-15). In keeping with its narrow reading of this section, the Antitrust Division also has interpreted § 7A(h) to limit disclosure of premerger information in administrative or judicial proceedings to those proceedings to which either the Antitrust Division or the Federal Trade Commission is a party. Even in those instances, disclosure remains discretionary. *See* Antitrust Division Manual (III-21).

[5] The State of Texas had argued, *inter alia*, that § 7A(h) should be construed in light of § 6(f) of the FTC Act, 15 U.S.C. § 46(f), which authorizes the FTC to release, at its discretion, commercial or financial information, including premerger information obtained under the FTC Act, to federal or state law enforcement agencies upon prior certification "that such information will be maintained in confidence and will be used only for official law enforcement purposes." In another case, the district court found this argument persuasive and rejected the Antitrust Division's interpretation of § 7A(h) of the Clayton Act. *See Lieberman* v. *FTC*, 598 F. Supp. 669 (D. Conn. 1984).

by one federal government agency is to be freely shared among federal government agencies.[6]

It is axiomatic that all information and documents in the possession of Executive Branch agencies are within the control of the President as the head of the Executive Branch. Just as the President exercises supervisory control over the execution of the laws by his subordinates, U.S. Const. art. II, § 3, the President ensures that information within the Executive Branch is protected from disclosure that would, in his judgment, adversely affect the public interest. *See* Memorandum to Heads of Executive Branch Departments and Agencies from President Reagan (Nov. 4, 1982).

We believe it follows from these general constitutional principles that a decision by Congress to restrict the flow of information among federal agencies when such information relates to the performance of the official duties of these agencies must be executed by legislation that leaves no doubt as to Congress' intent. Particularly regarding the development by the President of his foreign policy, it would be untenable to read into the statute at issue here an implied intent to deny to those subordinates of the President charged with the formulation of foreign policy those documents and information deemed relevant to that formulation.

We would add that the President's authority to control the flow of information within and without the Executive Branch carries with it the power to limit distribution of such information within the Executive Branch. Thus, unless and until revised by higher authority, we have no doubt about the validity and enforceability of the present policy of the Antitrust Division of this Department to refuse to transmit certain information gathered by it beyond this Department. We believe the Commission is free, as a matter of law, to adopt a policy of providing the information at issue here to other federal departments and agencies that have a need for it in connection with carrying out their official responsibilities.

Conclusion

Section 6(j) of the Shipping Act prohibits only "public" disclosure of information obtained under that Act. Interpreting the language of that statute and its

[6] We also have considered whether the Privacy Act, 5 U S.C § 552a, prohibits disclosure of Shipping Act information to other federal government agencies. That act governs the circumstances under which information contained in records maintained on individuals may be disclosed to the public or to other government agencies. The Privacy Act defines the term "individual" as "a citizen of the United States or an alien lawfully admitted for permanent residence." *Id.* § 552a(a)(2). The Act defines the term "record" as

> any item, collection, or grouping of information about an *individual* that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as finger or voice print or a photograph.

Id. § 552a(a)(4) (emphasis added) Your Office has informed us that companies or conferences of companies, and not individuals, file information and documentary material under the Shipping Act. Therefore, such material would not qualify as a "record" covered by the Privacy Act and the Privacy Act would not independently prohibit disclosure of information filed under §§ 5 or 6 of the Shipping Act.

sparse legislative history in light of the President's constitutional responsibilities regarding the control of information within the Executive Branch, we have no difficulty concluding that information and documentary material filed with the Commission under §§ 5 or 6 of the Shipping Act may be disclosed to other federal agencies or Executive Branch departments without violating § 6(j).

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

Applicability of Post-Employment Restrictions on Dealing with Government to Former Employees of the Government Printing Office

The Government Printing Office (GPO) is neither a part of the Executive Branch nor an independent agency of the United States for purposes of restrictions on post-employment activities of certain government officers and employees set forth in 18 U.S.C. § 207. Rather, GPO is a unit of the Legislative Branch. Accordingly, officers and employees of GPO are not subject to the post-employment restrictions of 18 U.S.C. § 207.

Special employees of the GPO are also excluded from coverage of the post-employment restrictions, although special employees of the Executive Branch would be covered. Because restrictions of § 207 do not apply to regular officers and employees of the Legislative Branch, it is extremely doubtful that Congress intended them to apply to special employees of that branch.

February 26, 1985

MEMORANDUM OPINION FOR THE INSPECTOR GENERAL, GOVERNMENT PRINTING OFFICE

This responds to your request for our opinion whether 18 U.S.C. § 207, which restricts the post-employment activities of government officers and employees within its coverage, applies to former employees of the Government Printing Office (GPO).[1] Specifically, you asked us to consider whether the GPO is an "independent agency of the United States" for purposes of 18 U.S.C. §§ 207 and 208.[2] In an informal letter to the General Counsel of GPO, the Office of Government Ethics (OGE) addressed this same question in 1982. OGE concluded that § 207 does not apply to former GPO employees because the GPO is a part of the Legislative Branch and the Legislative Branch is not subject to § 207. After reviewing the legislative history and the laws governing the GPO, we conclude that GPO is not an "independent agency of the United States" for purposes of §§ 207 and 208. Therefore, for the reasons discussed below, we agree with OGE that 18 U.S.C. § 207 does not apply to employees of the GPO.

[1] Section 207 is the criminal conflict of interest statute governing post-employment activities of government employees. In broad terms, it prohibits former employees from undertaking representational activities before federal agencies, on behalf of someone other than the government, with respect to matters in which the former employee participated personally and substantially while in government service (a lifetime ban) or that fell under the employee's official responsibility in the last year of government service (a two-year ban). For certain senior-level employees, § 207 also establishes a one-year ban on representational activities before the employee's former agency or certain components of that agency. Section 207 is supplemented by extensive regulations issued by the Office of Government Ethics. *See* 5 C.F.R. Part 737.

[2] 18 U.S.C. § 209 also applies to officers and employees of an "independent agency of the United States."

By its terms, § 207 applies to any person who has 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." In contrast, other conflict of interest provisions expressly apply to officers and employees in the Executive, Legislative and Judicial Branches. *See, e.g.*, 18 U.S.C. §§ 203, 205. We are not aware of any discussion in the legislative history of the revision of the conflict of interest laws in 1962 or the amendments made to § 207 by the Ethics in Government Act of 1978, Pub. L. No. 95–521, 92 Stat. 1864, regarding the specific application of § 207 or the other conflict of interest laws to the GPO.[3] However, the legislative history of Title V of the Ethics in Government Act indicates unequivocally that Congress intended § 207 to restrict the post-employment activities of officers and employees of the Executive Branch (as well as the District of Columbia and the independent agencies), *see* S. Rep. No. 170, 95th Cong., 1st Sess. 31, 47, 151 (1977), *reprinted in* 1978 U.S.C.C.A.N. 4216, 4247, 4263, 4367; H.R. Conf. Rep. No. 1756, 95th Cong., 2d Sess. 73 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4381, 4389, but not the post-employment activities of employees of the Legislative or Judicial Branches, *see* S. Rep. No. 170 at 151, 1978 U.S.C.C.A.N. at 4367 ("Officers and employees of the Legislative and Judicial Branch of the Government are not covered by this Title.").

Moreover, this Office previously has interpreted the post-employment prohibitions in § 207 to apply solely to officers and employees in the Executive Branch. *See* Memorandum to Honorable William E. Casselman II, Legal Counsel to the Vice President, from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel (June 13, 1974) (18 U.S.C. §§ 207–209 apply solely to employees in the Executive Branch); Letter to Charles E. Blake from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel (Apr. 8, 1974) (§ 207 applies only to Executive Branch officers and employees and does not restrict post-employment activities of former legislative employees); *cf.* "Conflict of Interest — 18 U.S.C. § 207 — Applicability to the General Accounting Office," 3 Op. O.L.C. 433 (1979) (§ 207 applies to General Accounting Office because of the unique statutory definitions regarding the GAO). Accordingly, we examine whether the GPO is an independent agency or part of the Legislative Branch for purposes of § 207.

The GPO was created in 1860, J. Res. of June 23, 1860, 12 Stat. 117, after extensive debate over the relative merits of a contract system of public printing versus the establishment of a GPO. At that time, the government employed a tariff system, or fixed price schedule. The contract system had been tried in the past but had been rejected because it was fraught with partisan abuses, particu-

[3] The introductory phrase in § 207(a) (as amended by Title V of the Ethics in Government Act), which describes the former officers and employees to whom § 207 applies, is identical to the introductory phrase in § 207 as first enacted in 1962. The House report on the 1962 law describes § 207(a) (and §§ 208 and 209) as applying to officers and employees of the "executive branch" or an "independent agency," without further elaboration. *See, e.g.*, H.R. Rep. No. 748, 87th Cong., 1st Sess. 11, 12, 13, 23, 24 (1961). The Senate report describes §§ 207, 208 and 209 as applying to present and former government employees only in very general terms. *See* S. Rep. No. 2213, 87th Cong., 2d Sess. (1962), *reprinted in* 1962 U.S.C.C.A.N. 3852.

larly with regard to the printing for the executive departments. Congress saw the ability to have its own materials printed more expeditiously and less expensively as a primary advantage of a Government Printing Office. *See generally* H.R. Rep. No. 249, 36th Cong., 1st Sess. (1860); Cong. Globe, 36th Cong., 1st Sess. 2478, 2482–87, 2489, 2500–05, 2507, 2511–13 (1860) (House debate); *id.* at 3057–62 (1860) (Senate debate).

Courts have described the GPO as a "legislative unit performing a support function for Congress." *Lewis* v. *Sawyer*, 698 F.2d 1261, 1262 n.2 (D.C. Cir. 1983) (Wald, J., concurring). Its "prime function is to support Congress by publishing for distribution legislative journals, bills, resolutions, laws, reports, and numerous other documents; this type of 'informative' activity, 'operating merely in aid of congressional authority to legislate,' fits a 'category of powers' that the Supreme Court considered within Congress' dominion." *Id.* at 1262 (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 137–43 (1976) (per curiam)); *see also Thompson* v. *Sawyer*, 678 F.2d 257, 264 (D.C. Cir. 1982); *Hentoff* v. *Ichord*, 318 F. Supp. 1175, 1180 n.3 (D.D.C. 1970); *United States* v. *Allison*, 91 U.S. 303, 307 (1875). The Comptroller General has also recognized that, as a general matter, the GPO is within the Legislative Branch of government. 36 Comp. Gen. 163, 165 (1956); 29 Comp. Gen. 388, 390 (1950).

The Congressional Joint Committee on Printing (JCP) retains supervisory control over a host of GPO's functions. *See, e.g.*, 44 U.S.C. § 103 (power to remedy neglect, delay, duplication, and waste); *id.* § 305 (approval of GPO employees' pay);[4] *id.* § 309 (revolving fund available for expenses authorized in writing by the JCP); *id.* § 312 (requisitioning of materials and machinery with approval of the JCP); *id.* § 313 (examining board consisting of GPO personnel and a person designated by the JCP); *id.* § 502 (approval of contract work); *id.* § 505 (regulation of sale of duplicate plates); *id.* §§ 509–517 (approval of paper contracts); *id.* § 1914 (approval of measures taken by the Public Printer to implement the depository library program); *see also Lewis* v. *Sawyer*, 698 F.2d at 1263. This relationship to Congress appears to preclude a conclusion, either in fact or as a constitutional matter, *see INS* v. *Chadha*, 462 U.S. 919 (1983), that the GPO is not an arm of Congress.

The appointment of the Public Printer by the President with the advice and consent of the Senate, *see* 44 U.S.C. § 301, is not inconsistent with a conclusion that the GPO is a Legislative Branch unit. The President's appointment power under Article II of the Constitution is not limited to the Executive Branch. For example, the President appoints federal judges and also a number of legislative officers, such as the Comptroller General, the Librarian of Congress, and the Architect of the Capitol.

In a 1979 opinion, this Office concluded that the General Accounting Office (GAO) is an "independent agency" within the meaning of 18 U.S.C. § 6 and is therefore subject to § 207, even though it is generally considered to be part of the Legislative Branch. *See* 3 Op. O.L.C. 433 (1979). This conclusion resulted

[4] Although GPO employees hold positions in the competitive service, they are not covered by the civil service classification scheme. *See* 5 U.S.C. § 5102(c)(9); *Thompson*, 678 F.2d at 264.

from the unique statutory definitions regarding the GAO. The term "agency" as used in § 207 includes "any department, *independent establishment*, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense. 18 U.S.C. § 6 (emphasis added).[5] Significantly, unlike the GPO, the GAO is specifically defined as an "independent establishment" for purposes of Title V of the Ethics in Government Act. *See* 5 U.S.C. § 104.

Other language in our 1979 opinion concerning the GAO suggests that a determination that an entity is in the "Legislative" Branch is not dispositive of whether or not its officers and employees are subject to the conflict of interest provisions set forth at 18 U.S.C. §§ 207, 208 and 209. *See* 3 Op. O.L.C. at 435–36. When read in context, however, that language serves merely as a gloss on our conclusion that the GAO is an "independent agency" under § 207 by statutory definition, a conclusion we are unable to reach with respect to the GPO.[6]

In your request, you note that the definition of "special Government employee" in 18 U.S.C. § 202, for purposes of §§ 203, 205, 207, 208, and 209, includes officers and employees of the Legislative Branch. The legislative history of the conflict of interest laws reveals that Congress intended to create a category of special government employees for whom the restraints upon regular government employees would be relaxed. This category would permit the government, primarily the Executive Branch, to bring in part-time or intermittent advisers and consultants with less difficulty. *See* H.R. Rep. No. 748, 87th Cong., 1st Sess. 4–5 (1961); S. Rep. No. 2213, 87th Cong., 2d Sess. (1962), *reprinted in* 1962 U.S.C.C.A.N. 3852, 3854–56, 3864 (views of Sen. John A. Carroll). The House bill did not make employees of the Legislative Branch eligible for classification as special government employees. *See* H.R. Rep. No. 748, 87th Cong., 1st Sess. 13–14 (1961). The Senate saw no reason for omitting them and amended the definition of special government employee accordingly. *See* S. Rep. No. 2213, 87th Cong., 2d Sess. (1962), *reprinted in* 1962 U.S.C.C.A.N. 3852, 3857.

As you have pointed out, § 207 does apply to special government employees. We believe, however, that it would be inconsistent with the legislative purpose of minimizing the obstacles faced by an agency requiring the part-time or temporary services of advisers and consultants to construe § 207(a) and (b) as applying to special government employees in the Legislative Branch, given that that section does not apply to regular Legislative Branch employees. We

[5] Although this expansive definition would appear to include all governmental entities, the legislative history of § 207 makes clear that for purposes of that section, the statutory definition of "agency" does not include Legislative Branch agencies such as the GPO.

[6] The Government Printing Office Standards of Conduct, which are not published in the *Code of Federal Regulations*, state (at Part 6) that 18 U.S.C. §§ 207–209 relate to the ethical conduct of GPO employees. Government Printing Office, Instruction 655.3 (Feb. 23, 1973). We have not been asked and do not reach the question whether those provisions of the GPO Standards of Conduct are invalid in light of our conclusion that §§ 207–209 do not apply to the GPO.

doubt that Congress could have intended such an incongruous result. Rather, we construe the definition of "special Government employee" in 18 U.S.C. § 202 as not changing the scope of coverage of any of the substantive sections. Therefore, we believe that those conflict of interest provisions that apply to special government employees apply only to those special government employees in the branch or branches of government within the coverage of the particular substantive section. *Compare* 18 U.S.C. §§ 203, 205 *with id.* §§ 207–209.

For the reasons set forth above, we conclude that 18 U.S.C. § 207 does not apply to officers and employees of the GPO, an entity within the Legislative Branch of government.

RALPH W. TARR
Acting Assistant Attorney General
Office of Legal Counsel

Scope of Congressional Oversight and Investigative Power With Respect to the Executive Branch

Congressional power to conduct inquiries and to exercise oversight respecting the Executive Branch is broad and well-established. This power is not unlimited, however. Its use must be confined to inquiries concerning the administration of existing laws or the determination of whether new or additional laws are needed.

Congress may not conduct investigative or oversight inquiries for the purpose of managing Executive Branch agencies or for directing the manner in which the Executive Branch interprets and executes the laws.

The Supreme Court's decisions in *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), and *INS* v. *Chadha*, 462 U.S. 919 (1983), establish an area of executive authority in the interpretation and implementation of statutes. Congress may not take action, including action in furtherance of its inquiry and oversight powers, that interferes with that executive authority, except through the enactment of legislation in full compliance with constitutional requirements.

March 22, 1985

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This responds to your request for a brief discussion of the proper scope of Congress' power of inquiry and oversight with respect to the Executive Branch.

It is beyond dispute that Congress may conduct investigations in order to obtain facts pertinent to possible legislation and in order to evaluate the effectiveness of current laws.[1] This power to obtain information has long been viewed as an essential attribute of the power to legislate, and was so treated in the British Parliament and in the colonial legislatures in this country. *See McGrain* v. *Daugherty*, 273 U.S. 135, 161, 174–77 (1927); *see generally* Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153 (1926). Although the Constitution does not explicitly grant any power of inquiry to Congress, Congress asserted such a right shortly after the adoption of the Constitution. In 1792, the House of Represen-

[1] In exercising its oversight function, Congress may also adopt by plenary legislation "report and wait" provisions requiring the Executive to report to Congress in advance of taking certain actions. *See, e.g., INS* v. *Chadha*, 462 U.S. 919, 935 n.9 (1983). Congress' power in this area is not unlimited. Legislation purporting to render inoperative the Executive's inherent constitutional powers, such as those related to the President's role as Commander-in-Chief, for a fixed period of time would raise issues decidedly different and more difficult to resolve than situations in which Congress legislates "waiting" periods with regard to the exercise of statutory power by the Executive. *See generally Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 636–38 (1952) (Jackson, J. concurring).

tatives appointed a committee to investigate a military disaster and authorized that committee to send for necessary witnesses and documents. 3 Annals of Cong. 490–94 (1792). It is now settled that Congress' power to obtain information necessary to legislate is broad.

Thus, for example, in *Watkins* v. *United States*, 354 U.S. 178, 187 (1957), the Supreme Court stated:

> We start with several basic premises on which there is general agreement. The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.

As the Court's statement in *Watkins* suggests, Congress' power of inquiry regarding possible legislation extends to investigations of how well current laws are being administered by the Executive Branch. In *McGrain* v. *Daugherty*, 273 U.S. at 161, the Court affirmed the power of a Senate committee charged with investigating the administration of the Department of Justice under a former Attorney General to compel the appearance of a witness.[2] Finding that the subject matter of the investigation was sufficiently related to the legislative function of lawmaking to make the investigation proper, the Court stated:

> Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit. This becomes manifest when it is reflected that the functions of the Department of Justice, the powers and duties of the Attorney General and the duties of his assistants, are all subject to regulation by congressional legislation and that the department is maintained and its activities are carried on under such appropriations as in the judgment of Congress are needed from year to year.

Id. at 178.

Broad as it is, however, Congress' power of oversight and inquiry "is not unlimited." *Watkins* v. *United States*, 354 U.S. at 187. As the quotation from

[2] This investigation was prompted by allegations of misfeasance and nonfeasance in the Department of Justice under Harry M. Daugherty, who served as Attorney General from March 1921 until March 1924. The Senate appointed a committee of five senators charged with investigating, *inter alia*: (1) the Attorney General's alleged failure to "prosecute properly violators of the Sherman Antitrust Act and the Clayton Act;" (2) the Attorney General's alleged failure to arrest and prosecute certain named individuals "and their co-conspirators in defrauding the Government;" and (3) the activities of the Attorney General and his assistants "which could in any manner tend to impair their efficiency or influence as representatives of the Government of the United States." 273 U.S. at 152–53. As part of this investigation, the Committee subpoenaed Attorney General Daugherty's brother, who was the president of a certain bank.

McGrain v. *Daugherty* suggests, the power of inquiry must be exercised "in aid of the legislative function." 273 U.S. at 135. In this regard, the Supreme Court has explicitly recognized that congressional inquiries may not be used to arrogate to Congress functions allocated by the Constitution to another branch of government.[3]

In *Kilbourn* v. *Thompson*, 103 U.S. 168 (1881), a House committee was investigating the circumstances surrounding the bankruptcy of a company in which the United States had deposited funds, focusing particular attention on a private real estate pool that was a part of the financial structure. The Supreme Court found that the House had exceeded the limits of its authority in this investigation because the subject matter was in its nature clearly judicial and therefore one in respect to which no valid legislation could be enacted. *See also Watkins* v. *United States*, 354 U.S. at 187. Accordingly, "[l]acking the judicial power given to the Judiciary, [Congress] cannot inquire into matters that are exclusively the concern of the Judiciary. Neither can it supplant the Executive in what exclusively belongs to the Executive." *Barenblatt* v. *United States*, 360 U.S. 109, 112 (1927).[4]

In determining what functions fall within the Executive's exclusive domain, one must, of course, be sensitive to the Supreme Court's admonition that the Constitution does not contemplate "a complete division of authority between the three branches." *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977). Rather, the Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). Accordingly, there is undoubtedly a gray area in which the President's responsibility for managing the Executive Branch and Congress' power of oversight conflict, and where the respective rights and obligations of the President and Congress are unclear. Nonetheless, Congress' power of inquiry must not be permitted to negate the President's constitutional responsibility for managing and controlling affairs committed to the Executive Branch. *See Myers* v. *United States*, 272 U.S. 52, 135 (1926). Thus, although Congress constitutionally can investigate the manner in which the Executive Branch has executed existing law in order to determine whether further legislation is necessary, it cannot conduct such investigations for the purpose of facilitating an ability to exercise day-to-day control over the management of Executive Branch agencies, or otherwise to direct the manner in which existing laws are interpreted and executed.

Two recent Supreme Court decisions establish certain clear limits on Congress' power to involve itself in the administration of the Nation's laws. In *Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976) (per curiam), the Court ruled that all

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[3] The constitutionally based doctrine of executive privilege also limits Congress' ability to obtain information from the Executive Branch. *See, e.g., United States* v. *Nixon*, 418 U.S. 683 (1974).

[4] *Barenblatt* did not involve a dispute between Congress and the Executive. The *Barenblatt* Court upheld, against statutory and constitutional objections, the contempt conviction of a witness who refused to answer questions concerning his alleged associations with the Communist Party posed by a subcommittee of the House Committee on Un-American Activities, which was then investigating alleged Communist infiltration into education.

officials who "exercise significant authority pursuant to the laws of the United States" are "Officers of the United States," who must be appointed in accordance with the Appointments Clause, U.S. Const. art. II, § 2, cl. 2. The Court specifically held that the interpretation and implementation of a statute "represents the performance of a significant governmental duty exercised pursuant to a public law," and can be performed only by an "officer of the United States." *Id.* at 141. This principle underlies Justice White's observation:

> I know of no authority for the congressional appointment of its own agents to make binding rules and regulations necessary to or advisable for the administration and enforcement of a major statute where the President has participated either in the appointment of each of the administrators or in the fashioning of the rules and regulations which they propound.

Buckley v. *Valeo*, 424 U.S. at 281 (White, J., concurring in part and dissenting in part). *Buckley* recognizes that the Constitution precludes Congress from participating in Executive Branch functions through appointment of the persons who execute the laws.

In *INS* v. *Chadha*, the Court held that a related principle of the separation of powers doctrine establishes that when Congress has authorized executive departments to perform certain tasks, the rights and duties created by that authorization or by its execution may not be altered by the actions of a congressional committee or other agent or arm of Congress. Any measure that alters those rights and duties must be approved by each House of Congress and presented to the President. 462 U.S. at 951. Together, the principles of *Buckley* and *Chadha* establish an area of executive authority interpreting and implementing duly enacted statutes that cannot be displaced by the actions of Congress except through the legislative process of enacting legislation subject to the President's veto.

Thus, the oversight functions of a congressional committee must be evaluated in relation to the President's longstanding and pervasive responsibility over the management and control of affairs committed to the Executive Branch. *See Myers* v. *United States*, 272 U.S. at 135. The prerogatives and responsibilities of the President to exercise and protect his control over the Executive Branch are based on the fundamental principle that the President's performance of his constitutional duties must be free of certain types of interference from the coordinate branches of government. The "executive Power" is vested in the President, U.S. Const. art II, § 1, cl. 1, and he must "take Care that the Laws be faithfully executed," *id.* § 3. In order faithfully to fulfill these responsibilities, the President must be able to delegate the management and control of executive departments to subordinate officials in the knowledge that they will remain faithful to his commands. To the extent that a committee of Congress attempts to interfere with the President's right to make policy decisions and to manage the Executive Branch pursuant to statutory authorization, the Legislative Branch limits the ability of the President to perform his constitutional

function. Congress may do so, of course, but only in the manner authorized by the Constitution: plenary legislation presented to the President and subject to his veto power. It may not vest in its committees or its officers the power to supplant the President's executive functions, and may not do so under the guise of its investigative authority.

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Operation of the Twenty-Fifth Amendment Respecting Presidential Succession

The Twenty-Fifth Amendment to the Constitution provides the mechanism for Presidential succession by the Vice President in the event the Office of the President becomes vacant or the President becomes unable to perform the duties of his office.

Upon the death, resignation, or removal of the President, the Vice President immediately and automatically assumes the Office of President and relinquishes the office of Vice President. The taking of the oath of office is not a necessary precondition to assuming the office of the President under these circumstances, but is an obligation which should be promptly discharged.

For purposes of declarations that the President is unable to discharge the powers and duties of his office under § 4 of the Twenty-Fifth Amendment, "the principal officers of the executive departments" are the heads of the departments listed in 5 U.S.C. § 101.

The written declarations of Presidential inability triggering succession procedures under § 4 of the Twenty-Fifth Amendment need not necessarily be personally signed by the Vice President and a majority of the principal officers of the executive departments. The only requirements are that their assent to the declaration be established in a reliable fashion and that they direct that their names to be added to the document.

June 14, 1985

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

The purpose of this memorandum is to provide you with background information on the requirements and operation of Presidential succession under the Twenty-Fifth Amendment to the Constitution. The Twenty-Fifth Amendment provides a mechanism for Presidential succession by the Vice President in the event that the office of President is vacant or the President becomes unable to perform his Presidential duties, and a mechanism for filling the office of Vice President when the Vice President dies, resigns, or is removed from office. In this memorandum, we incorporate and expand upon analysis done by this Office in April 1981, in the wake of the assassination attempt on President Reagan. *See* "Presidential Succession and Delegation in Case of Disability," 5 Op. O.L.C. 91 (1981). Although we cannot predict in advance every question that might arise in a situation that triggers the Twenty-Fifth Amendment, we outline the operation of the Amendment and discuss the major procedural issues that might arise.

I. Summary of Provisions

With respect to succession to the Presidency, the Twenty-Fifth Amendment is intended to govern two situations: (1) when the office of President is vacant, because of the death, resignation, or removal from office of the President; and (2) when the President becomes unable to perform his constitutional duties. In addition, the Amendment provides a means for filling the office of Vice President when that office is vacant. It does not, however, include any provision for assumption of the powers and duties of the Vice President if the Vice President becomes unable to discharge his duties, but remains in office.

A. Sections 1 and 2

Sections 1 and 2 of the Twenty-Fifth Amendment deal with vacancies in the office of President or Vice President. Section 1 provides that the Vice President "shall become President" if the President is removed from office, dies, or resigns. U.S. Const. amend. XXV, § 1. Pursuant to § 2, the President "shall nominate a Vice President" whenever a vacancy occurs in the office of Vice President; the nominee takes office upon confirmation by a majority vote of both Houses of Congress. *Id.* § 2.

B. Sections 3 and 4

Sections 3 and 4 provide for Presidential succession when the President remains in office, but is unable to discharge his constitutional duties. Succession may occur in two ways. First, under § 3, the President, if he is able and willing to do so, may provide for the temporary assumption of the powers and duties of his office by the Vice President by "transmit[ting] to the President pro tempore of the Senate and the Speaker of the House his written declaration that he is unable to discharge the powers or duties of the President." *Id.* § 3. When the President transmits such a declaration, the powers and duties of the President devolve upon the Vice President as Acting President until the President transmits an additional written declaration stating that he has become able to perform his responsibilities.

Second, under § 4, if the President is unable or unwilling to transmit a declaration of his inability to perform his duties, the Vice President will become Acting President if he and a majority of the "principal officers of the executive departments" transmit to the President *pro tempore* of the Senate and the Speaker of the House a written declaration that the President is unable to discharge the powers and duties of his office. *Id.* § 4. The President may subsequently transmit a declaration to the President *pro tempore* and the Speaker of the House that he is able to discharge his duties, whereupon he may resume the powers of his office, unless, within four days, the Vice President and a majority of the principal officers of the executive departments transmit an additional written declaration stating that the President is unable to discharge

his powers and duties. At that point, Congress must decide the issue within specified time limits. The Vice President would remain Acting President until the congressional vote. If, within the required time period, Congress votes by a two-thirds majority that the President is unable to discharge the powers and duties of his office, the Vice President would continue to serve as Acting President; otherwise, the President would resume the powers and duties of his office. *Id.*

II. Procedural Requirements

We focus on the procedures that would be used under the Twenty-Fifth Amendment for assumption by the Vice President of the powers and duties of the President, either because of a vacancy in the office under § 1, or because of a Presidential disability under §§ 3 or 4.[1]

A. Succession by the Vice President Under § 1

Section 1 imposes no specific procedural requirements on a Vice President who assumes the Presidency because of the death, resignation, or removal from office of the President. Under the clear and simple terms of that section, the Vice President "shall become" President upon creation of a vacancy in the office of President. The Vice President thereupon relinquishes all duties and responsibilities as Vice President, and there is a vacancy in the office of Vice President that triggers the mechanism in § 2 for nomination and confirmation of a new Vice President.

To our knowledge, all Vice Presidents who have succeeded to the Presidency, whether pursuant to Article II, § 1, cl. 6 of the Constitution or pursuant to the Twenty-Fifth Amendment, have taken the Presidential oath of office as one of their first actions, although the taking of the oath is not, strictly speaking, a prerequisite to assumption of the powers and duties of the Presidency.[2] Although Article II, § 1, cl. 8, which sets forth the Presidential oath, is not entirely clear on the effect of taking the oath, the weight of history and authority suggests that taking the oath is not a necessary step prior to the assumption of the office of President and is not an independent source of Presidential power. It is, nonetheless, an obligation imposed on the President by the Constitution, and should be one of the first acts performed by the new President. *See* R. Silva, *Presidential Succession* 37–38 (1951); E. Corwin, *The President: Office and Powers* 72 (1948); E. Corwin, *The Constitution and What It Means Today* 155–56 (14th ed. 1978).

The text of the Presidential oath is set forth in Article II, § 1, cl. 8: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President

[1] We do not address in this memorandum the specific procedural requirements that would be imposed for nomination and confirmation of a new Vice President under § 2 of the Twenty-Fifth Amendment.

[2] With respect to succession by the Vice President, Article II, § 1, cl. 6 states: "In Cases of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Power and Duties of the said Office, the Same shall devolve on the Vice President."

of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States." Several categories of persons are empowered to administer the Presidential oath of office.[3] Such an oath may be administered by any person who is authorized to administer oaths by the laws of the locality where the oath is taken. 5 U.S.C. § 2903(c)(2). This would include, for example, justices of the peace, state judges, and other officials authorized to administer oaths under the laws of the particular state.

In addition, the head of any executive agency or military department may designate in writing any employee of that agency or department to administer oaths, including the Presidential oath. *See* 5 U.S.C. § 2903(b)(2). For this purpose, the term "executive agency" is broader than the traditional Cabinet departments and includes all the independent agencies and the quasi-governmental corporations whose stock is owned by the government. Thus, virtually any federal employee may administer the oath of office if the agency head has previously prepared the proper written designation.[4]

Finally, the Vice President may administer any oath required by the laws of the United States. 5 U.S.C. § 2903(c)(1). This authority would appear to be of little use in swearing in a new President, however, because a Vice President would, if able to act at all, be taking the oath, not giving it.

B. Succession by the Vice President Under §§ 3 and 4

The procedure for a Presidential declaration of his own disability under § 3 is fairly straightforward: the President makes a written declaration of his disability, which is transmitted to the President *pro tempore* of the Senate and the Speaker of the House, and the Vice President thereupon becomes Acting President until the President transmits a second written declaration stating that he is once again able to discharge the powers and duties of his office. We believe that a written declaration pursuant to § 3 could be prepared by the President in anticipation of an expected temporary disability, for example, if the President were scheduled to undergo surgery that would require general anesthetic and would result in the President's being unconscious for a significant length of time.

The most difficult procedural questions are presented by the mechanism in § 4 for determining a Presidential disability when the President does not or cannot make his own declaration of disability. The first question is, who are the "principal officers of the executive departments" who must participate with the Vice President in the determination of disability?

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[3] There is no requirement that the presidential oath be sworn on a Bible. Use of the Bible is a tradition begun by George Washington and observed by Presidents-elect since that time as a symbol of the solemn and sincere nature of the obligations they were undertaking. We do not know whether all Presidents have used the Bible when they were sworn in.

[4] The authority given to agency heads by 5 U.S.C. § 2903(b)(2) may be delegated to lower-ranking officials. In the Department of Justice, for example, general authority to designate officers or employees to administer oaths pursuant to § 2903(b)(2) has been delegated to the Assistant Attorney General, Justice Management Division. *See* 28 C.F.R. § 0.151.

We believe that the "principal officers of the executive departments" for the purposes of the Twenty-Fifth Amendment are the heads of the departments listed in 5 U.S.C. § 101, presently the Secretary of State, Secretary of the Treasury, Secretary of Defense, Attorney General, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor, Secretary of Health and Human Services, Secretary of Housing and Urban Development, Secretary of Transportation, Secretary of Energy, and Secretary of Education. This view is supported by the legislative history of the Amendment. *See* H.R. Rep. No. 203, 89th Cong., 1st Sess. 3 (1965); 111 Cong. Rec. 7938 (1965) (Rep. Waggoner); *id.* at 7941 (Rep. Poff); *id.* at 7944–45 (Rep. Webster); *id.* at 7952, 7954 (Rep. Gilbert); *id.* at 3282–83 (Sen. Hart and Sen. Bayh).

At present, this list is identical to the list of statutory Presidential successors under 3 U.S.C. § 19, except that it does not include the Speaker of the House of Representatives or the President *pro tempore* of the Senate. Furthermore, although the acting heads of departments and recess appointees are not Presidential successors, *see* 3 U.S.C. § 19(e), the legislative history of the Twenty-Fifth Amendment suggests that, in the event of a vacancy in office or the absence or disability of a department head, the acting department head, at least at the level of undersecretary, principal deputy, or recess appointee might be entitled to participate in determinations of Presidential disability. *See* H.R. Rep. No. 203 at 3; 111 Cong. Rec. 15380 (1965) (Sen. Kennedy — acting heads); *id.* at 3284 (Sen. Hart and Sen. Bayh — interim appointees). *But see id.* at 3284 (Sen. Bayh — acting heads not entitled to participate). As a practical matter, and in order to avoid any doubt regarding the sufficiency of any given declaration, it would be desirable to obtain the assent of a sufficient number of officials to satisfy any definition of the term "principal officers of the executive departments."

A second issue that is not clear from the language of § 4 is the form that the "written declaration" should take. We believe that there is no requirement that the requisite written declaration of disability called for by § 4 be personally signed by the Vice President and a majority of the principal officers of the executive departments. The only requirements are that their assent to the declaration be established in a reliable fashion and that they direct their names to be added to the document. Moreover, the Vice President and the Cabinet heads may send separate declarations if necessary. *See Hearings on Presidential Inability and Vice Presidential Vacancy Before the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 79–80 (1965) (1965 House Hearings).

Third, we believe that under both §§ 3 and 4 of the Amendment, the transfer of authority to the Vice President takes effect "immediately" when the declaration is transmitted or sent, and is not delayed until receipt of the document by the President *pro tempore* of the Senate and the Speaker of the House. Although the question is not free from doubt, the language and the history of the Amendment tend to support this conclusion. *See* S. Rep. No. 66, 89th Cong., 1st Sess. 12 (1965); H.R. Rep. No. 203, 89th Cong., 1st Sess. 3 (1965). *But see* H.R. Rep. No. 564, 89th Cong., 1st Sess. 3 (1965) (statement of Managers on the Part of the House to the effect that "after *receipt* of the President's written

declaration of his inability . . . such powers and duties would then be discharged by the Vice President as Acting President") (emphasis added). The better construction would allow the devolution of powers "immediately" (the word used in § 4 of the Amendment) upon transmittal. No meaningful purpose would be served by awaiting the arrival of the document. The alternative construction allows a more rapid transition of Presidential power when the national interest requires it.

Finally, neither § 3 nor § 4 states expressly whether the Vice President can or must take the Presidential oath of office when he becomes Acting President. If the Vice President is serving as Acting President pursuant to the disability provisions of the Twenty-Fifth Amendment because of a temporary inability on the part of the President, however, the legislative history of the Twenty-Fifth Amendment suggests that the Vice President would not have to take the Presidential oath. *See* 1965 House Hearings at 87; *Hearings on Presidential Inability and Vacancies in the Office of Vice President Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess, 215, 232 (1964). Congress reasoned that in those circumstances the Vice President would only be acting temporarily as President, and that his original oath as Vice President would be sufficient to give legitimacy to actions taken on behalf of the disabled President.

The Twenty-Fifth Amendment does not require a Vice President to relinquish the office of Vice President when he becomes Acting President because of a temporary Presidential disability; in fact, the Amendment and its legislative history clearly contemplate that the Vice President will continue to serve as Vice President during and subsequent to the Presidential disability. *See* 1965 House Hearings at 87; S. Rep. No. 1382, 88th Cong., 2d Sess. 11–12 (1964). The Vice President would, however, lose his title as President of the Senate. *See* 111 Cong. Rec. 3270 (remarks of Sen. Saltonstall); J. Ferrick, *The Twenty-Fifth Amendment* 199 (1965).

This outline of the operation of §§ 1, 3, and 4 of the Twenty-Fifth Amendment is intended only as an overview of the mechanisms provided by those sections for succession to the responsibilities of the President by a Vice President.

RALPH W. TARR
Acting Assistant Attorney General
Office of Legal Counsel

State Bar Disciplinary Rules As Applied to Federal Government Attorneys

The purported imposition of exclusive disciplinary jurisdiction by state courts upon federal lawyers acting in the scope of their federal authority is subject to the overriding requirements of the Supremacy Clause. Rules promulgated by state courts or bar associations that are inconsistent with the requirements or exigencies of federal service may violate the Supremacy Clause.

Although Department of Justice authorization statutes have implicitly recognized that federal attorneys may be subject to reasonable conditions of state bar membership and to state ethical rules of general application, the imposition of state rules of conduct which penalize or interfere with the performance of authorized federal responsibilities is not recognized or approved by such statutes.

To the extent that a proposed state bar rule asserting "exclusive" disciplinary jurisdiction implies an exclusive right to judge the conduct of federal attorneys by state ethical standards, to impose state sanctions, or to displace any federal forum, it would raise serious issues under the Supremacy Clause.

August 2, 1985

MEMORANDUM OPINION FOR THE DIRECTOR,
EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

This responds to your request that we review the proposed amendments to the Code of Professional Responsibility and Rules of Disciplinary Enforcement of the Alabama State Bar.

Paragraph 4 of the proposed amendments states:

> Any attorney admitted to practice law in this state, including District Attorneys, Assistant District Attorneys, United States Attorneys, Assistant United States Attorneys, the Attorney General, Assistant Attorneys General, and any attorney specially admitted by any court in this state for a particular proceeding is subject to the exclusive disciplinary jurisdiction of the Supreme Court of Alabama and the Disciplinary Board of the Alabama State Bar, hereafter established.

You have indicated that the language of paragraph 4 of the proposed amendments is ambiguous in its application to Assistant Attorneys General within the Department. For purposes of this discussion, we have assumed that the proposed amendment is intended to apply to those individuals, as well as to the Attorney General of the United States.

The imposition of exclusive disciplinary jurisdiction by a state court upon federal lawyers acting in the scope of their federal authority must be assessed in light of the Supremacy Clause.[1] In a prior memorandum entitled "Disqualification of Prosecutor Because of Former Representation," 9 Op. O.L.C. 1 (1985), we advised you that the Department of Justice has regularly maintained that rules promulgated by state courts or bar associations that are inconsistent with the requirements or exigencies of federal service may offend the Supremacy Clause of the Constitution. *See Sperry* v. *Florida*, 373 U.S. 379 (1963) (where Congress and the Executive had authorized nonlawyers to practice before the United States Patent Office, the State of Florida could not prohibit such conduct as the unauthorized practice of law). In this regard, this Office has concluded that a Department attorney, acting under Departmental authority in an undercover operation, cannot be guilty of violating state ethical rules "if his acts are authorized by federal law, including the Department's regulations prescribing ethical standards," just as a federal employee, under appropriate circumstances, may perform authorized federal functions without regard to the limits of state criminal law. *See* Memorandum for Thomas P. Sullivan, United States Attorney for the Northern District of Illinois from Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal Counsel 14 (Aug. 1, 1978) (citing *In re Neagle*, 135 U.S. 1, 75 (1890)).

The activities of the federal government are presumptively free from state regulation, unless Congress has clearly authorized state regulation in a specific area. *See Hancock* v. *Train*, 426 U.S. 167, 178–79 (1976). State laws or court rules regulating the conduct of employees of the United States in the performance of their official duties constitute regulation of the activities of the federal government itself and are therefore also presumptively invalid under this rule. In the area of professional conduct, however, Congress has directed that Justice Department attorneys must be licensed and authorized to practice under the laws of a state, territory, or the District of Columbia.[2]

In prior interpretations of that requirement, the Department has been willing to assume that Congress "intended that the attorneys would be subject to reasonable conditions of continued bar membership where those conditions are not inconsistent with the requirements or exigencies of federal employment," and that Congress could reasonably have intended federal employees to be subject to "reasonable and established ethical rules for the bar generally." Memorandum of the Department of Justice, "In the Matter of the Petition of the Board of Governors of the District of Columbia Bar" 5 (Sept. 11, 1979). On the

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[1] U.S. Const. art. VI, cl. 2 provides: "This Constitution, and Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[2] Department of Justice authorization and appropriations statutes routinely provide that the Department's funds may not be used to pay the compensation of any person employed as an attorney unless that person is duly licensed and authorized to practice as an attorney under the laws of a state, territory, or the District of Columbia. *See, e.g.*, Pub. L. No. 96–132, § 3(a), 93 Stat. 1040, 1044 (1979); Pub. L. No. 95–624, § 3(a), 92 Stat. 3459, 3462 (1978); Pub. L. No. 95–86, § 202, 91 Stat. 419, 428 (1977); *see also* Pub L. No. 98–411, § 203(a), 98 Stat. 1545, 1558–59 (1984) (continuing the requirement of § 3(a) of Pub. L. No. 96–132).

other hand, we do not believe that Congress' mandate to state and local bar associations extends to the imposition of rules of conduct that penalize or otherwise interfere with the performance of authorized federal responsibilities. Nor do we believe that Congress could have intended to allow the fifty states, the territories, or the District of Columbia to develop special rules for Federal attorneys. *See, e.g., id.* at 5–6; Memorandum of the Department of Justice, Re: "Report of the New Jersey Supreme Court Committee on the Model Rules of Professional Conduct" (Nov. 8, 1983). Thus, pursuant to the Supremacy Clause, the Department has opposed attempts by state bars to impose special obligations or disabilities on federal attorneys.

The Department has consistently reserved the prerogative to determine the appropriate course of conduct for federal attorneys faced with a conflict between their official duties and state regulation. The decision to authorize a Department attorney to take action inconsistent with a relevant state bar standard, which may subject that attorney to state disciplinary proceedings, will be made only after careful consideration of the surrounding circumstances. The Department's standard of conduct is not automatically given preference over any state bar standard without regard to the relative importance of the conflicting standards. Rather, we generally reserve reliance on the Supremacy Clause for those occasions when a state bar standard impedes the authorized functions of the Attorney General and the Department of Justice, so that the Department cannot adequately carry out its functions if it adheres to the state standard.

Thus, in view of the above discussion, whether or not the Alabama rule offends the Supremacy Clause could depend on the facts of particular cases involving federal lawyers and whether state or federal standards are applied in the state disciplinary proceeding. We are not certain, however, what is meant by "exclusive" disciplinary jurisdiction. To the extent that state jurisdiction may be asserted in a manner that does not impede the functions of the Department, we cannot say that this proposed amendment absolutely violates the Constitution. Yet, if the assertion of "exclusive" disciplinary jurisdiction is intended to imply an exclusive legal right to judge the conduct of federal attorneys by state ethical standards, to impose appropriate state sanctions, and to displace any federal forum, the proposed amendment raises a serious issue under the Supremacy Clause.

RALPH W. TARR
Acting Assistant Attorney General
Office of Legal Counsel

Federal Agencies Use of Volunteer Services Provided by Individuals and Organizations Under Proposed Legislation

Proposed legislation authorizing federal agencies to accept voluntary services from individuals and non-profit organizations would present potential conflicts with statutory requirements that certain activities must be conducted by government employees authorized to act on behalf of the United States.

The performance of services for federal agencies by volunteers raises especially significant concerns in terms of federal conflict of interest laws. Although voluntary service legislation may exempt volunteers from the coverage of those laws, the use of volunteers to perform government services could raise the very opportunities for self-dealing and abuse of position that the conflict of interest laws are intended to prevent.

August 23, 1985

MEMORANDUM OPINION FOR THE ACTING ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL POLICY

This memorandum provides the comments of the Office of Legal Counsel on H.R. 1993, the "Volunteering in Government Act of 1985." This proposed legislation would authorize federal agencies to accept the volunteer services of individuals and non-profit organizations to carry out certain activities of such agencies, notwithstanding the Anti-Deficiency Act, 31 U.S.C. § 1342. H.R. 1993, § 4(a)(1).[1] Use of unpaid volunteers would be without regard to the provisions of title 5, United States Code, governing appointments in the competitive service. *Id.*[2] The bill further provides that volunteers shall not be considered officers or employees of the federal government nor subjected to any provision of law relating to federal employment, except that volunteers shall be considered federal employees for purposes of tort claims and workers' compensation. *Id.*, § 4(b)(1), (2).

This Office supports the concept of voluntary government service. However, we believe that several legal questions must be resolved before we can recommend that the Administration endorse this proposed legislation. In our view,

[1] The Anti-Deficiency Act provides: "An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property." 31 U.S.C. § 1342. This prohibition has been interpreted to permit the acceptance of volunteers under certain circumstances. *See* 30 Op. Att'y Gen. 51, 52 (1938).

[2] H.R. 1993 apparently would also override the principle that individuals may not waive a salary for which Congress has set a minimum. *See, e.g., Glavey* v *United States*, 182 U.S. 595 (1901) Most federal positions are covered by the General Salary Schedule. *See* 5 U.S.C. §§ 5101–5115. Although this fixed salary schedule actually exempts persons who serve "without compensation," *id.* § 5102(c)(13), the policy underlying the schedules has been read to counsel against the use of volunteers to accomplish tasks that would ordinarily be performed by employees covered by the schedule.

certain government activities may not be suitable or lawful for volunteers to perform. In addition, H.R. 1993 appears to exempt volunteers from the federal conflict of interest statutes. As we discuss below, such an exemption could frustrate the purpose of those statutes in many instances.

First, there are numerous activities that must be conducted by government employees authorized to act on behalf of the United States. We doubt, for example, as a constitutional matter, whether an individual who is not a government employee could undertake a federal criminal prosecution, sign a contract on behalf of the United States government, or take personnel actions regarding other federal employees. *See generally Buckley* v. *Valeo*, 424 U.S. 1, 118–43 (1976) (per curiam). In addition, there are various statutory restrictions. For example, access to agency records by non-employees would be restricted by the Privacy Act. *See* 5 U.S.C. § 552a(b)(1) (permitting disclosure of certain agency records to "officers and employees" having a need for the record in the performance of their duties). The government employment status of volunteers is a significant factor in their ability to participate in government matters.

Second, we are particularly concerned about the application of the conflict of interest provisions of Title 18 to volunteers under this bill. Section 4 of the bill provides that volunteers shall not be deemed to be federal employees except for purposes of tort liability and workers' compensation. One effect of § 4 would be to exempt volunteers from the criminal laws and existing agency regulations dealing with employee conduct, in particular the conflict of interest laws.[3] The use of non-employee volunteers, however, could raise precisely the sort of opportunity for self-dealing and abuse of governmental position that the federal conflict of interest laws are intended to prevent.

We believe that Congress should expressly limit the use of volunteers to positions regarding which employee conduct rules have less significance or provide for adherence to conflict of interest principles. We would urge that the application of conflict of interest provisions be made explicit. In addition, Congress should address the extent to which volunteers from non-profit organizations, *see* H.R. 1993, § 4(a)(2), must conform to conflict of interest laws, and whether H.R. 1993 prohibits an agency from imposing its own restrictions on the use of volunteers or from making them subject to the agency's own standards of conduct.[4] Congress should clarify H.R. 1993 in these and other respects before the Administration takes a position in support of this legislation.

RALPH W. TARR
Acting Assistant Attorney General
Office of Legal Counsel

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[3] Currently, volunteers who perform government functions generally are considered to be "employees" of the government for purposes of the conflict of interest laws. *See* Federal Personnel Manual, Appendix C; Memorandum from J. Jackson Walter, Director, Office of Government Ethics, to Heads of Departments and Agencies of the Executive Branch, Re: "Members of Federal Advisory Committees and the Conflict of Interest Statutes" (July 19, 1982). This bill appears specifically crafted to change this view of volunteers.

[4] As the bill is now drafted, we would not interpret it to prohibit an agency from imposing its own restrictions on the use of volunteers or from making them subject to the agency's own standards of conduct.

Limitations on Presidential Power to Create a New Executive Branch Entity to Receive and Administer Funds Under Foreign Aid Legislation

The President lacks constitutional and statutory authority to create a new entity within the Executive Branch to receive and administer funds appropriated under the International Security and Development Act of 1985 (ISDA).

The Appointments Clause in the Constitution requires that "offices" of the United States be established "by Law." Any agency created to receive and administer funds appropriated under the ISDA would have to be headed by an officer of the United States, who would occupy an "office" of the United States. Such new offices of the United States must be created or authorized by Congress through enactment of legislation.

Presidential creation of the United States Sinai Support Mission under Executive Order No. 11896 does not provide persuasive precedent for Presidential creation of a new agency to administer funds under the ISDA. In that situation, the President was able to rely upon authorization provided by § 631 of the Foreign Assistance Act of 1961, which gave the President power to establish "missions" abroad.

August 23, 1985

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

As you know, § 722(g) of the recently enacted International Security and Development Act of 1985 (ISDA) authorizes $27 million to be appropriated "for humanitarian assistance to the Nicaraguan democratic resistance." That section provides, in part:

> Effective upon the date of enactment of this Act, there are authorized to be appropriated $27,000,000 for humanitarian assistance to the Nicaraguan democratic resistance. Such assistance shall be provided to such department or agency of the United States as the President shall designate, except the Central Intelligence Agency or the Department of Defense.

131 Cong. Rec. 21248 (1985). The President has not yet designated an agency or department to receive the assistance authorized by the ISDA. Certainly, this legislation authorizes the President to designate an existing agency or department of the United States, such as the State Department, the Agency for International Development, or the Executive Office of the President, to receive

and thereupon to disburse the assistance. This designation could be accomplished in several ways, from a formal executive order to an oral directive from the President.

A more difficult question is whether the President could create a new entity within the Executive Branch, independent of existing agencies and departments, to receive the assistance and administer the program. We conclude that in these circumstances the President lacks constitutional and statutory authority to do so.

Our conclusion is based on the language in the Appointments Clause of the Constitution, which appears to vest responsibility for creating offices of the United States in Congress:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, *and all other Officers of the United States*, whose Appointments are not herein otherwise provided for, and *which shall be established by Law* . . . .

U.S. Const. art. II, § 2, cl. 2 (emphasis added). To our knowledge the question has never been definitively adjudicated, but the language of the Appointments Clause and the historic practice of the Executive and Legislative Branches suggests strongly that offices of the United States must be created by Congress. Professor Corwin has noted, for example:

> The Constitution . . . by the "necessary and proper" clause assigns the power to *create* offices to Congress, while it deals with the *appointing power* in the . . . words of Article II, section 2, paragraph 2 . . . . An appointment is, therefore, ordinarily to an *existing* office, and one which owes its existence to an act of Congress.

Corwin, *The President: Offices and Powers* 83 (1948). *See also The Constitution of the United States of America, Analysis and Interpretation*, 92d Cong., 2d Sess. 523 (1973):

> That the Constitution distinguishes between the creation of an office and appointment thereto for the generality of national offices has never been questioned. The former is *by law* and takes place by virtue of Congress's power to pass all laws necessary and proper for carrying into execution the powers which the Constitution confers upon the government of the United States and its departments and officers.

This dichotomy between creation of the office and appointment to the office is consistent with the historic view of the Executive and Legislative Branches as respects the proper division of constitutional responsibility. Congress has provided by statute for the establishment of Executive Branch agencies and

particular positions within those agencies, and the President or heads of those agencies select individuals to fill those positions. Except as specifically provided by law, the President assigns responsibilities to those agencies and positions to carry out the laws. This understanding has also generally been reflected in the Executive Branch's acquiescence in the need for reorganization legislation in order to restructure or consolidate agencies within the Executive Branch.

We believe that any agency created by the President to implement § 722(g) would, of necessity, have to be directed by an officer of the United States within the meaning of *Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976) (per curiam), who would occupy an "office" of the United States. Because that office would be created independent of any other agencies or departments of the Executive Branch, that office would clearly be a new office. Therefore we do not believe that, absent statutory authorization, the President would have authority to create such an office.[1]

We have not found adequate statutory authority either in the ISDA or in the Foreign Assistance Act of 1961, 22 U.S.C. §§ 2151–2429a, to allow the President to create a new office to implement the humanitarian assistance program. Under the ISDA, the President "shall designate" "such agency or department of the United States" as he deems appropriate to administer the program. On its face, that language appears to contemplate that the assistance will go to an existing agency or department. At least in the absence of some legislative history suggesting that Congress understood that the program would be administered through a new agency (which we have not found), we cannot read that language affirmatively to authorize the President to create an entity outside of existing agencies or departments. In similar language, the Foreign Assistance Act provides authority to the President to delegate functions "to such agency or officer of the United States Government as he shall direct." 22 U.S.C. § 2381. Again, there is nothing in that language to suggest that Congress intended or contemplated that the President could create a wholly new administrative entity, outside structures within the Executive Branch, to fulfill those statutory responsibilities. Therefore, we do not believe that the President could create a new agency outside of existing Executive Branch agencies and departments and designate that agency to receive the appropriated funds and implement the program of humanitarian assistance.

[1] We do not mean to suggest that the President does not have some residuum of inherent constitutional authority to create offices or agencies, based on the direction in Article II, § 1, that the "executive Power" shall be vested in the President, and the mandate in Article II, § 3 that he "take Care that the Laws be faithfully executed." Such authority seems to be contemplated by 31 U.S.C. § 1347, which provides that "[a]n agency in existence for more than one year may not use amounts otherwise available for obligation to pay its expenses without a specific appropriation or specific authorization by law," and specifically refers to agencies "established by executive order." Section 1347 obviously cannot be read as an affirmative grant of authority to the President to create agencies by executive order, and we therefore do not believe that we can rely on that language here to overcome the express language of the Appointments Clause. There may be cases, however — in a national emergency, for example — in which we would conclude that the President may, in effect, create an office in order to carry out constitutional responsibilities that otherwise could not be fulfilled.

We are aware of one entity that has been advanced as precedent for Presidential creation of such an agency. In Executive Order No. 11896 (Jan. 13, 1976), *reprinted in* 41 Fed. Reg. 2067 (1976), the President created the United States Sinai Support Mission to assist in the implementation of the "United States Proposal for the Early Warning System in Sinai." The letter prepared by the Office of Management and Budget to the Attorney General supporting the executive order recited that the mission was intended to be a "separate, independent mission, outside of the Department of State."

We do not believe that Executive Order No. 11896 is a clear precedent for creation of an independent agency to implement the Nicaraguan humanitarian aid program. As the OMB letter notes, the President was able in that instance to rely on the specific congressional authorization provided by § 631 of the Foreign Assistance Act of 1961, 22 U.S.C. § 2391, which gives the President the power to establish "missions" abroad. This specific authority would not appear to be available here. Second, the circumstances surrounding the adoption of the Joint Resolution of October 13, 1975, Pub. L. No. 94–110, 89 Stat. 572 (1975), by which Congress authorized the establishment of a monitoring force to implement the "United States Proposal for the Early Warning System in Sinai," provide some evidence that Congress contemplated the creation of a new agency to fulfill the objective of the Resolution. Congress was specifically aware that a force of two hundred civilians was needed to monitor the system. As there were few precedents for such a civilian monitoring force and no agency with obvious expertise in providing such services, it is not unreasonable to infer that Congress contemplated that the President, pursuant to his broad authorization to implement the monitoring proposal, might create a new agency to serve as the monitoring force.

As set forth above, § 722(g) of the ISDA, however, does not provide similar support for an inference that Congress intended to empower the President to create a new agency. Furthermore, the Sinai Support Mission received its allocation of funds from the Secretary of State rather than the President, *see* Exec. Order No. 11896, § 5, and the Secretary of State was ordered to exercise "continuous supervision and general direction" of the activities of the Mission, *id.* at § 1(b). The vesting of the combined power to supervise and allocate funds in the Secretary raises a serious question as to the formal independence of the Mission and suggests that the Mission should, as a technical matter, probably be considered to have been within the Department of State. Thus, we do not view the creation of the Sinai Mission as particularly useful precedent here.

In conclusion, we believe that the assistance authorized for Nicaraguan humanitarian relief must be channeled through an existing department or agency of the United States. We believe that creation of a new agency to administer the program outside of the confines of existing agencies and departments would raise substantial constitutional questions, and we therefore could not approve a Presidential directive purporting to establish such an agency. The question of which agency or department should be designated to provide the assistance authorized by § 722(g) is one of policy; aside from the prohibition

against use of the Central Intelligence Agency or the Department of Defense, the ISDA gives no guidance and places no limitations on the choice of agency or department.

RALPH W. TARR
Acting Assistant Attorney General
Office of Legal Counsel

Reimbursement of the Department of Justice for Providing Legal Assistance to the Department of Health and Human Services

The Department of Justice may be legally reimbursed by the Department of Health and Human Services (HHS) for attorney services provided pursuant to the Economy Act, through the employment of additional attorneys in the Office of the United States Attorney, to assist in the defense of HHS against claims filed under the Social Security Act in federal district court.

Attorneys employed in that capacity using HHS funds may not "conduct" litigation, but may only "assist" in litigation, because the Justice Department has the exclusive obligation and authority to conduct litigation on behalf of the United States and HHS has no independent litigation authority.

In order to justify the foregoing arrangements under the Economy Act, HHS must demonstrate that it is more economical or efficient to purchase such services from the Department of Justice than to provide the services itself.

September 3, 1985

MEMORANDUM OPINION FOR THE DIRECTOR,
EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

I. Background and Summary

This memorandum responds to your request for our opinion whether the Executive Office for United States Attorneys (EOUSA) has authority to accept reimbursement from the Department of Health and Human Services (HHS) for funds used to employ attorneys in the Office of the United States Attorney for the District of New Jersey to defend Social Security disability claims. As we understand the facts set out in your request, a recently promulgated local rule in the United States District Court for the District of New Jersey regarding procedures to be followed in resolving Social Security disability claims has imposed additional burdens on those who defend against such claims on behalf of the United States Government. HHS has funds available to meet this additional workload but, because of a workyear ceiling, is unable to hire additional employees to aid in the defense of these claims. On the other hand, the United States Attorney for the District of New Jersey has unfunded workyears for attorneys and support positions, but is not in a position to fund the positions. Therefore it is proposed that the EOUSA enter into an agreement with HHS, pursuant to 31 U.S.C. § 1535 (the Economy Act), to furnish HHS attorney and

support personnel. HHS would in turn reimburse EOUSA for the personnel service provided.

Our conclusions as to the legality of this arrangement can be summarized as follows. It is proper for the Department to receive payment from HHS pursuant to the Economy Act for attorney services and to use such funds to employ additional attorneys for Social Security disability litigation so long as certain conditions are met. First, HHS must have available funds that HHS itself could use to perform legal work in Social Security disability litigation. Second, the attorneys hired with HHS funds cannot ordinarily "conduct" litigation but only assist in the conduct of litigation, because the Justice Department has the exclusive obligation and authority to conduct litigation on behalf of the United States and HHS has no independent litigation authority. Accordingly, the tasks of the attorneys hired with HHS funds must be limited to those that HHS attorneys could ordinarily perform. Third, HHS must demonstrate that it is more economical or efficient to purchase such personnel services from the Department of Justice than to provide the services itself.

III. Analysis

A. Requirement that HHS Have Funds Available

The Economy Act provides:

> The head of an agency or major organizational unit within an agency may place an order with a major organizational unit within the same agency or another agency for goods or services if (1) amounts are available; (2) the head of the ordering agency or unit decides the order is in the best interest of the United States Government; (3) the agency or unit to fill the order is able to provide the ordered goods or services; and (4) the head of the agency decides ordered goods or services cannot be provided as conveniently or cheaply by a commercial enterprise.

31 U.S.C. § 1535(a). The agency ordering the services must reimburse the agency providing the services. *Id.* § 1535(c).

The first requisite of the Economy Act is that the agency purchasing the service have "amounts ... available" for their purchase. In this case, the requirement means that HHS must have funds that it could use to perform legal work in Social Security disability litigation. We state this requirement as a condition because we have not been informed whether HHS has funds which it could use specifically for the legal work in Social Security disability litigation, although we have been informed that HHS generally has funds available. A close review of HHS's appropriation should be undertaken to ascertain the precise limits on the funds with which it proposes to purchase legal personnel services from the Department of Justice.

B. Restrictions on Attorneys Hired with HHS Funds

The attorneys hired with HHS funds must not perform tasks that are statutorily reserved to the Department of Justice. This limitation is a direct consequence of a longstanding interpretation of the Economy Act. As the Comptroller General recently reiterated: "The Economy Act does not authorize a Federal agency to reimburse another agency for services which the latter is required by law to provide." 61 Comp. Gen. 419, 421 (1982). The interpretation is required in order to prevent agencies from agreeing to reallocate funds between themselves in circumvention of the appropriations process.[1] Therefore, the attorneys hired with HHS funds cannot ordinarily provide services which the Department of Justice is obligated by law to provide.

The Department's exclusive litigation authority is codified 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 an officer thereof is a party . . . 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 litigation in which the United States, an agency, or employee thereof is a party . . . but shall refer the matter to the Department of Justice." HHS seems to have no countervailing grant of authority that would permit it to conduct Social Security disability litigation itself.

Despite the Department's exclusive authority to conduct litigation, substantial assistance is received as a matter of course from the attorneys of an agency involved in a lawsuit. As an opinion of this Office previously recognized: "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 trials and court proceedings." "Department of Justice — Transfer of Funds from Another Agency — Payment for Attorney Services — Economy Act (31 U.S.C. § 686)," 2 Op. O.L.C. 302, 303 (1978) (footnote omitted). The Department of Justice has officially taken the position that so long as this Department retains control over the conduct of litigation, such cooperation is consistent with 28 U.S.C. § 516 and 5 U.S.C. § 3106. *Id.* Because HHS attorneys are permitted to assist the Department of Justice in the defense of Social Security disability claims, HHS can, pursuant to the Economy Act, provide funds to the Department of Justice to hire attorneys to assist in the defense if HHS has funds available for such legal work. Because the Depart-

[1] As the Comptroller General has stated:

> A contrary interpretation would compromise the basic integrity of the appropriations process itself. Under the doctrine of separation of powers, Congress, and Congress alone has the "power of the purse." When Congress makes an appropriation, it also establishes an authorized program level. To permit an agency to operate beyond the level that it can finance under its appropriation with funds derived from another source would be a usurpation of the congressional prerogative.

Id.

ment of Justice has the exclusive obligation to conduct litigation, the attorneys hired with HHS funds must refrain from exercising operational control over the defense of Social Security disability claims.

We realize that the line between conducting litigation and assisting in the conduct of litigation will be difficult to draw precisely. As a practical matter, the range of assistance that attorneys hired with HHS funds can provide is quite broad. They may draft pleadings, briefs, and other papers, and in conjunction with attorneys hired by the Department of Justice, take part in court proceedings. Attorneys hired with HHS funds, however, may not make final decisions as to the contents of briefs or oral argument. They must be at all times under the supervision of attorneys hired with funds from the appropriation for the Department of Justice. Final responsibility for litigation decisions, both strategic and tactical, must rest with these latter attorneys.

EOUSA has requested that no limitations be imposed on the activities or authority of attorneys hired with HHS funds. In support of this request, EOUSA has submitted certain materials that suggest that HHS attorneys have been exercising *de facto* control over the conduct of Social Security disabilities claims.[2] The Department of Justice, however, has consistently required an explicit congressional authorization or appropriation before it will infer that its exclusive authority has been derogated.[3] None of these materials constitutes such an explicit authorization or appropriation.[4] Therefore, in order to prevent both the circumvention of Congress' power of appropriation and the erosion of this Department's exclusive authority to conduct litigation on behalf of the United States, we continue to maintain that attorneys hired with HHS funds must ordinarily assist rather than actually conduct Social Security disability litigation.

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[2] EOUSA has provided us with memoranda that suggest that over the years the Department of Justice has conferred increasing authority on HHS attorneys in Social Security disability cases. In addition, EOUSA notes that HHS's budget request for FY 1984 sought appropriations for an additional nine positions to meet increased litigation workloads, including an increase in the number of cases. The increased case workload resulted from several sources, including the Social Security Disability Amendments of 1980.

We have not been asked and we do not opine on the legality of any *de facto* delegation to HHS of litigation authority in Social Security disability cases. We note, however, that in the past it has been the position of the Department of Justice that the law requires attorneys not employed by the Department, including those employed by other agencies in the Executive Branch, to be appointed as special attorneys in the Department before they may conduct litigation for which the Department is responsible. *See generally* 28 U.S.C. §§ 515(a), 543 (authorizing the Attorney General to appoint special attorneys)

[3] *See* Memorandum for Glen E. Pommerening, Assistant Attorney General for Administration from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel 4 (Mar. 15, 1976) ("[T]he Department has consistently interpreted [28 U.S.C. § 516 and 5 U.S.C. § 3106] as *requiring the conferral of litigation* authority upon an agency other than the Department or the appropriation of funds to contract for such litigation to be specific and explicit.") (footnote omitted).

[4] Even if the Department of Justice memoranda could be construed to suggest that the Department has systematically delegated HHS *de facto* authority over litigation, such informal delegation, unratified by Congress, does not limit the Department's statutory mandate. Even if it were possible to infer from HHS's FY 1984 budget request that HHS was asking for an appropriation to control the defense of Social Security disability cases, HHS's request does not represent the explicit congressional authorization or appropriation that the Department of Justice itself has required before it will yield its exclusive authority and obligation to conduct litigation on behalf of the Unite States. We have been unable to find any legislative history suggesting that Congress viewed its FY 1984 appropriation to HHS as changing the traditional relationship of the Department to other agencies in litigation matters.

C. Requirement that HHS Make Efficient Use of Funds

The purpose of the Economy Act is to promote efficiency and economy in government. Therefore, in order to justify invocation of the Act, it must be demonstrated that HHS's use of its funds to hire Department of Justice attorneys to assist in the defense of Social Security claims is more efficient than HHS's use of the funds to provide such services itself.

As we understand the facts, HHS has reached its employment ceiling. Accordingly, HHS is unable to hire more attorneys to assist in Social Security disability litigation. Assuming that the addition of attorneys is seen as the most efficient use of HHS's resources in response to the new rules governing Social Security disability cases in the United States District Court for the District of New Jersey, the hiring of Department of Justice attorneys seems justified as HHS's most efficient course of action in view of HHS's employment ceiling.[5] Thus, on the basis of the facts related to us, we believe that HHS's use of funds to hire Department of Justice attorneys to provide litigation assistance does comport with the purposes of the Economy Act.

We conclude that so long as HHS has funds available for legal work on Social Security disability litigation, HHS may use these funds to reimburse the Department of Justice for hiring additional attorneys to assist in the conduct of Social Security disability litigation, subject to the other considerations and requirements discussed in this memorandum.

RALPH W. TARR
Acting Assistant Attorney General
Office of Legal Counsel

[5] We assume in this analysis that the employment ceiling preventing HHS from hiring additional attorneys has been established by the Office of Management and Budget. *See* OMB Circular No. A-64 (1980). If the employment ceiling was set by Congress, it is possible that the arrangement between HHS and EOUSA could be seen to contravene Congress' intent in establishing that ceiling.

Legislation Providing for Court-Ordered Disclosure of Grand Jury Materials to Congressional Committees

Proposed legislation authorizing personnel of committees of Congress to obtain court-ordered release of matters occurring before a grand jury would violate separation of powers principles by encroaching upon the Executive's control of prosecutorial matters and would entail a major departure from longstanding practices and traditions of grand jury secrecy.

Because the Executive alone is entrusted with the power to enforce the laws, the Executive alone should make the day-to-day decisions as to whether the release of law enforcement materials to Congress would interfere with its prosecutorial discretion.

Independent access by Congress to grand jury materials without the consent of the Department of Justice would seriously endanger grand jury secrecy and thereby weaken the grand jury as an institution.

Access to grand jury materials by other Executive Branch agencies should be limited to cases where access is needed for law enforcement purposes and should require the approval of the Justice Department.

September 24, 1985

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

You have requested the comments of this office on S. 1562, introduced by Senator Grassley, which would amend the False Claims Act. The portion of the bill of interest to this office is § 5, which would amend Rule 6(e) of the Federal Rules of Criminal Procedure. First, the amendment would permit automatic disclosure of "matters occurring before a grand jury" to Justice Department attorneys for civil purposes without a court order.[1] Second, the amendment would expand the types of proceedings for which other executive departments and agencies may gain access to Rule 6(e) material to include not only "judicial proceedings," but also other matters within their jurisdiction, such as adjudicative and administrative proceedings. Significantly, the bill would allow these departments and agencies to seek disclosure without the approval of the Department of Justice. Finally, the bill would also allow personnel of any committee of Congress directly to obtain court-authorized release of "matters occurring before the grand jury" upon a showing of "substantial need."[2] At present, Congress has no independent ability to petition the judiciary for release of "matters occurring before the grand jury."

[1] The phrase "matters occurring before a grand jury" has been broadly defined by the courts to include not only materials presented to a grand jury but also large categories of law enforcement files that may relate to a grand jury. *See infra* Part III. In this memorandum we will sometimes refer to "matters occurring before a grand jury" as "Rule 6(e) material."

[2] The Administration's proposed amendments to Rule 6(e) would allow federal agencies *with the consent of* the Department of Justice to obtain court-authorized release of "matters occurring before the grand jury" upon a showing of "substantial need." The Administration's amendment makes no mention of independent congressional access to Rule 6(e) material.

The Office of Legal Counsel strongly opposes any provision that would permit Congress independently to petition the courts for Rule 6(e) material. By giving Congress an independent right of access to large portions of law enforcement files through the judiciary, the amendment would codify legislative encroachment into the Executive's exclusive authority to enforce the law. Because it is the fundamental premise of the separation of powers that the Executive alone is entrusted with the enforcement of the laws, the Executive alone should make the day-to-day decisions as to whether the release of law enforcement materials to Congress, a branch of government constitutionally forbidden to prosecute individual cases, would interfere with the Executive's prosecutorial discretion.

Moreover, this amendment would represent a radical departure from the long tradition of grand jury secrecy. This secrecy has evolved to protect the proper functioning of the grand jury and has aided the Executive Branch in the fair execution of the laws. Independent access to grand jury materials by Congress without the consent of the Department of Justice would seriously endanger the secrecy on which participants in the grand jury process have come to rely, and therefore be extremely injurious to the grand jury as an institution.

The amendment would also have a serious impact on both the frequency and the method of resolution of disputes over Executive privilege. By arguably providing Congress with the standing to obtain a ready judicial forum for these disputes, the proposed amendment undoubtedly would multiply the number of confrontations over executive privilege and encourage judicial resolution of political disputes that have in the past been handled by compromise and negotiation. As a consequence, the President would be handing over his privilege, the scope of which he has largely determined for himself, to the judiciary for its review. The nature and scope of executive privilege might thereby be profoundly changed.

Finally, with respect to access to grand jury materials by other executive departments and agencies, we believe that access should be limited to law enforcement purposes and that such access must be obtained with the approval and representation of this Department so that the integrity of the Department's criminal investigations and prosecutions can be protected from untimely disclosure.

I. The Proposed Amendment is Inconsistent with the Separation of Powers

In our view, the Executive Branch must be able to control congressional access to law enforcement documents to prevent legislative pressures from impermissibly influencing its prosecutorial decisions. The Executive Branch's duty to protect its prosecutorial discretion from congressional interference derives ultimately from Article II, which places the power to enforce the laws squarely in the Executive Branch of the federal government. *See Buckley* v. *Valeo*, 424 U.S. 1, 119–20 (1976) (per curiam). The Executive therefore has the exclusive authority to enforce the laws adopted by Congress, and neither the Judicial nor Legislative Branches may directly interfere with the prosecutorial

discretion of the Executive by directing the Executive to prosecute particular individuals. *United States* v. *Nixon*, 418 U.S. 683, 693 (1974); *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457 (1869).

Indeed one of the fundamental rationales for the "separation of powers" is that the power to enact laws and the power to execute laws must be separated to forestall tyranny. As James Madison stated in *The Federalist* No. 47:

> The reasons on which Montesquieu grounds his maxim [that the legislative, executive and judicial departments should be separate and distinct] are a further demonstration of his meaning. "When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner."

The Federalist No. 47, at 303 (J. Madison) (C. Rossiter ed. 1961). For this reason, the Constitution specifically excludes Congress from the decision whether to prosecute particular cases. U.S. Const. art. I, § 9, cl. 3. A legislative effort to require prosecution of specific individuals would seem to be inconsistent with many of the policies upon which the Constitution's prohibition against bills of attainder was based. *See Selective Serv. Sys.* v. *Minnesota Public Interest Research Group*, 468 U.S. 841, 854–55 (1984); *United States* v. *Brown*, 381 U.S. 437, 447 (1965); *United States* v. *Lovett*, 328 U.S. 303, 315 (1946). The constitutional role of Congress is to adopt general legislation that will be applied and implemented by the Executive Branch: "It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments." *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 136 (1810). The Framers intended that Congress not be involved in such prosecutorial decisions or in questions regarding the criminal liability of specific individuals. As the Supreme Court stated in *Lovett*: "Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons, because the legislature thinks them guilty of conduct which deserves punishment." 328 U.S. at 317.[3]

Moreover, the Department of Justice has an obligation flowing from the Due Process Clause to ensure that the fairness of the decisionmaking with respect to its prosecutorial function is not compromised by excessive congressional pressures, and that the due process rights of those under investigation are not violated. *See Pillsbury* v. *FTC*, 354 F.2d 952 (5th Cir. 1966). Just as an agency's ability to fulfill its statutory obligation may be impermissibly strained by pressure from the Legislative Branch during the administrative decisionmaking process, *D.C. Fed'n of Civic Ass'ns* v. *Volpe*, 459 F.2d 1231, 1246–47 (D.C. Cir.), *cert. denied*, 405 U.S. 1030 (1972), excessive interference with the

[3] Article II's specific grant of exclusive authority to the Executive to enforce the laws and Article I's specific prohibition against legislative prosecution provide a principled basis for allowing administrative agencies, which are part of the Executive Branch, to obtain court-authorized release of Rule 6(e) material for law enforcement purposes, while prohibiting Congress from doing so.

exercise of prosecutorial discretion can substantially prejudice the rights of persons under investigation. Persons who ultimately are not prosecuted may be subjected to prejudicial publicity without being given an opportunity to cleanse themselves of the stain of unfounded allegations. Moreover, the injection of impermissible factors, such as political pressures, into the decision whether to initiate prosecution not only endangers the rights of the accused, but also impairs the professional obligation of government attorneys to the integrity of the judicial process and, ultimately, the obligation of the Executive faithfully to execute the laws.

In addition, potential targets of enforcement actions are entitled to protection from widespread premature disclosure of investigative information. Because Congress and the Department of Justice are both part of the United States Government that prosecutes a criminal defendant, there is "no difference between prejudicial publicity instigated by the United States through its executive arm and prejudicial publicity instigated by the United States through its legislative arm." *Delaney* v. *United States*, 199 F.2d 107, 114 (1st Cir. 1952). Therefore, pretrial publicity originating in Congress can be attributed to the government as a whole and can result in postponement, modification, or even termination of the prosecution on due process grounds. *Id.* The discretion of prosecutive officials to conduct their investigations and trials in the manner they deem to be the most efficient and constructive can be infringed by precipitous disclosures which prompt a court to impose remedial procedural obligations upon the Government. To be sure, these separation of powers and due process concerns are present to a greater degree when Congress is seeking files of an open investigation than when Congress is seeking information about an investigation that is closed. It has been the traditional position of this Department that intolerable practical restraints on discretion may result and the effectiveness and fairness of investigations may be impaired if Congress becomes, in a sense, a partner in an ongoing investigation. If a congressional committee is fully apprised of all details of an investigation as it proceeds, there is a substantial chance that congressional pressures will influence the course of the investigation.

Separation of powers and due process concerns are also present, however, when Congress is seeking investigative files of closed investigations. Indeed, because one of the reasons Congress sometimes seeks files of closed investigations is to put pressure on the Executive to reopen an investigation, the same concerns outlined above may often attend requests for closed files. Moreover, the possibility that persons who ultimately are not prosecuted may be subjected to prejudicial publicity is as great from congressional inquiry into closed as into open investigations. For these reasons, the Office of Legal Counsel opposes any compromise with Congress on an amendment to Rule 6(e) whereby Congress would be given access to Rule 6(e) material from closed investigations, especially if that access is independent of executive control. Because the Executive is uniquely charged with enforcing the law, it should retain the power in the first instance to decide what law enforcement materials to release to Congress after its independent evaluation of the separation of powers and

due process concerns described above. In our view, it would be a great mistake to codify the rather artificial distinction between closed and open investigations, when both kinds of investigations implicate concerns of constitutional magnitude that are best evaluated on a case-by-case basis.

III. The Amendment Breaches Grand Jury Secrecy and Thus Impairs Proper Enforcement of the Law by the Executive

Due process concerns were at the heart of the historical origin of the grand jury. Indeed, the concept of grand jury secrecy originated as a means of preventing the government from bringing undue pressure on the grand jury's decision. In the celebrated trial of the Earl of Shaftesbury in 1681, the grand jurors insisted on hearing the witnesses to the charge of treason in secret despite the demands of the Crown that they be heard in public.

Grand jury secrecy is still justified by the need to protect the witnesses and grand jurors from undue pressures. Today, however, it is not disclosure to the prosecution but disclosure to the public that is seen as destructive of the effective functioning of the grand jury. Indeed, secrecy is now thought to be of importance to the Executive in obtaining indictments, because jurors may be apprehensive that their votes to indict may be disclosed. *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 219 (1979). Secrecy is also important to the Executive for preparation of its case, because it facilitates free and open discussion by witnesses and complainants. *Id.* Moreover, secrecy facilitates the capture of an accused who is in fact indicted and prevents the accused from obtaining collusive testimony in the hope of blocking the indictment. *Id.* Finally, secrecy protects the accused who is charged by the complaint before the grand jury but is exonerated by the grand jury's refusal to indict. *Id.*

Independent access by Congress, or even by other agencies, to grand jury material without the concurrence of the prosecution would obviously endanger the cloak of secrecy that has historically been seen as essential to the functioning of the grand jury and therefore to the effective enforcement of the criminal law. Because the Department of Justice is charged with preparing federal criminal cases, it is in a far better position than Congress, other executive agencies, or even the judiciary to determine how essential secrecy is to the preparation of a particular case. Moreover, the Department of Justice has the preeminent institutional interest in preserving secrecy because the confidence of future participants in the grand jury process in the secrecy of the proceedings is necessary for continued proper execution of the laws. Therefore, this Office opposes the proposed amendment's grant of independent access, not only to Congress but also to other agencies, which cannot be presumed to have the perspective or the institutional interest to give proper weight to the need for grand jury secrecy. Even other Executive agencies should gain access to Rule 6(e) material only with the consent of the Department of Justice.

III. The Amendment Will Lead to More Disputes Over Executive Privilege and Will Change the Method of Resolving These Disputes

The policy of the Executive Branch throughout this Nation's history has been generally to decline to provide committees of Congress with access to, or copies of, law enforcement files except in extraordinary circumstances.[4] Attorney General Robert Jackson articulated this position over forty years ago:

> It is the position of this Department, restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to "take care that the laws be faithfully executed," and that congressional or public access to them would not be in the public interest.
>
> Disclosure of the reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or prospective defendant, could have no greater help than to know how much or how little information the Government has, and what witnesses or sources of information it can rely upon. This is exactly what these reports are intended to contain.

40 Op. Att'y Gen. 45, 46 (1941). This policy with respect to Executive Branch investigations was first expressed by President Washington and has been reaffirmed by or on behalf of most of our Presidents, including Presidents Jefferson, Jackson, Lincoln, Theodore Roosevelt, Franklin Roosevelt, and Eisenhower. No President to our knowledge has departed from this position affirming the confidentiality of law enforcement files.[5]

The proposed amendment is likely to multiply the number of disputes over executive privilege with respect to law enforcement files and radically change their method of resolution. Although it has been argued that the issues of executive privilege may be separated from the issue of congressional access to Rule 6(e) material, the proposed amendment, as presently drafted, is unlikely to permit such separation. The term "matters occurring before a grand jury" has been interpreted broadly to include any documents that reveal any matter occurring before a grand jury. Therefore, it is generally recognized that the

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[4] The justifications for invoking executive privilege with respect to investigative files are rooted in the principles of separation of powers and due process outlined in Part I above. An additional reason for withholding investigative files is that effective and candid deliberations among the numerous advisers who participate in a case in various roles and at various stages of a prosecution would be rendered impossible if the confidential deliberative communications were held open to public scrutiny. *Cf. United States* v. *Nixon*, 418 U.S. 683, 708 (1974). The deliberative memoranda that constitute a significant portion of investigative files are an intrinsic part of the prosecutorial process. Employees of the Department would be reluctant to express their personal, unofficial views if those views could be obtained by congressional request. This justification for withholding may apply to files of both open and closed investigations

[5] Some withholding of Executive Branch files has been accomplished through the President's formal invocation of executive privilege. More often negotiations have been undertaken by executive officers to protect the integrity of their files through communication of their concerns to Congress before resorting to a formal Presidential assertion of the privilege.

phrase includes any material that would reveal the strategy or direction of the grand jury investigation, the nature of the evidence produced before the grand jury, or the views of the grand jury's deliberations expressed by its members. *See, e.g., Fund for Constitutional Gov't* v. *National Archives*, 656 F.2d 856, 870 (D.C. Cir. 1981); *United States* v. *Hughes*, 429 F.2d 1243, 1294 (10th Cir. 1970). The broad definition means that Rule 6(e) material will substantially overlap with the kind of law enforcement files that the Executive has traditionally attempted to withhold.

As the amendment is currently drafted, Congress may obtain a court order directing the release of all Rule 6(e) material. There is no provision that excepts material over which the Executive has a claim of privilege from the potential scope of the order. Nor is there any provision that even requires that the Executive be provided with notice that Congress is seeking such release. Assuming that a notice provision were added to the amendment, the Executive would no doubt have the opportunity to assert executive privilege in court in order to prevent Congress from obtaining sensitive documents. Although the possibility of asserting executive privilege would be thereby preserved, the method of resolving disputes over its assertion would be transformed. Instead of arguing and negotiating with Congress on a case-by-case basis on the scope of the privilege, the President and his officers would in effect be handing over his privilege to the courts for their frequent adjudication.

The effects of this change should not be underestimated. As a practical matter, the provision of a ready judicial forum for resolution of disputes over executive privilege would undoubtedly multiply the number of potential confrontations. In the past, Congress has had to engage in long and hard negotiations for access to documents over which there was a potential claim of executive privilege. Such negotiations have entailed both the expenditure of time and political capital. Because access to the judicial forum provided for in the amendment would furnish a relatively painless and rapid means of resolving these disputes, it would likely lead to more congressional challenges to the withholding of investigative documents on executive privilege grounds.

Moreover, the nature of executive privilege itself may be transformed by changing the forum in which disputes over executive privilege are resolved. The President would in effect be sharing his privilege with the judiciary.[6] The judicial forum would give the judiciary the opportunity to frame principles to govern the President's assertion of executive privilege against a congressional demand for information.[7] In our view, constant judicial oversight is certain

[6] Because disputes over executive privilege between Congress and the Executive have been resolved in an ad hoc fashion in the past, courts have left the permissible scope of such assertions almost totally undefined. In only one case has a court clearly adjudicated the legitimacy of the assertion of executive privilege against a congressional demand for information. *See Senate Select Comm. on Presidential Campaign Activities* v. *Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (en banc).

[7] Assuming that a dispute over executive privilege between the Executive and Congress were properly before a court, it seems unlikely that the court would decline to hear it on the grounds that it was a nonjusticiable political question. In *Senate Select Committee*, the court declined to rule that the dispute between the Watergate Committee and President Nixon was a nonjusticiable political question. Moreover, it

Continued

eventually to erode the President's control over his privilege. Nor does such an expanded judicial role comport well with the functioning of democratic government as a whole. The assertion of executive privilege has always been a practical undertaking that is not governed by fixed rules but by considerations of prudence that take into account political factors such as public reaction. In this, as in other areas of dispute between the Legislature and the Executive, more can be constructively accomplished by accommodation between the elected branches of government than by declarations of principle from a judiciary that is necessarily remote from the political exigencies of the situation.

Because the President holds his power of executive privilege as a trustee for his successors, we believe that it would be a violation of that trust to approve a provision that would have the effect of making the judiciary a frequent partner in determination of the scope of the privilege, even if under present political circumstances such a partnership would seem advantageous. For this reason, the Office of Legal Counsel is constrained to oppose any provision that purports to provide Congress with standing to obtain Rule 6(e) material and thereby enjoy the opportunity to gain ready judicial resolution of executive privilege questions. We would therefore oppose a compromise that would permit committees of Congress directly to obtain court-authorized release of "matters occurring before the grand jury" upon a showing of "particularized need." The higher showing does not in our view rectify the proposed amendment's inconsistency with the separation of powers or its potential to expand the power of the judiciary over the exercise of executive privilege.

Conclusion

For the foregoing reasons, the Office of Legal Counsel urges the Department to oppose strongly the provisions of S. 1562 that afford Congress a mechanism for obtaining access to grand jury materials. We believe that support for these provisions, even if revised to limit access to closed cases, would adversely affect fundamental notions of the separation of powers.

CHARLES J. COOPER
Acting Assistant Attorney General
Office of Legal Counsel

[7] (*. . . continued*)
is also unlikely that a court would at present conclude that Congress lacked standing to bring an action based on a dispute with the Executive over its request for law enforcement documents. The issue of whether Congress has standing to bring suit to protect its governmental powers is sharply disputed at present. *Compare Barnes* v. *Kline*, 759 F.2d 21, 26 (D.C. Cir. 1985) (holding that both houses of Congress and individual members of Congress had standing to challenge a pocket veto on the grounds that the veto improperly nullified their votes) *with id.* at 41 (Bork, J., dissenting) (stating that neither the Houses of Congress nor individual members of Congress have standing to challenge the pocket veto). Nevertheless, a court might well hold that the case for congressional standing is strengthened by the enactment of this amendment. *See Sierra Club* v. *Morton*, 405 U.S. 727, 732 n.3 (1972) ("The question whether the litigant is a proper party to request adjudication . . . is within the power of Congress to determine.").

Delegation of Authority to Approve DEA Undercover Operations

The general rule with respect to delegations is that any statutorily conferred authority is delegable, at least in the absence of any indication of congressional intent that the official named must personally exercise the authority conferred upon him.

The Attorney General and the Administrator of the Drug Enforcement Administration may delegate their respective authority to approve DEA undercover operations pursuant to § 203(b)(1) of Pub. L. No. 98–411, 98 Stat. 1545, 1559–60 (1984). Nothing in the language, purpose, or legislative history of the statute demonstrates an intent to preclude delegation. Rather, the statute reflects the common legislative practice of conferring general authority upon the head of a department or agency.

November 20, 1985

MEMORANDUM OPINION FOR THE CHIEF COUNSEL, DRUG ENFORCEMENT ADMINISTRATION

This responds to your request for advice from this Office concerning whether the statutory authority to approve Drug Enforcement Administration (DEA) operations may be delegated. The DEA's authority to employ certain undercover techniques was expressly conferred by § 203(b)(1) of Pub. L. No. 98–411, 98 Stat. 1545, 1559–60 (1984), the Department of Justice appropriations act for fiscal year 1985. The legislation was requested because of the perceived legal impediments to, or uncertainties surrounding, the DEA's use of these undercover techniques in the absence of express statutory exemption from general prohibitions in the law. In brief, § 203 authorizes the DEA, in the course of its undercover operations, to use appropriated funds to purchase buildings or lease space, to establish or acquire proprietary corporations, and to make bank deposits; and to use the proceeds of an undercover operation to offset the expenses of that operation (sometimes referred to as "proprietary operations"), all without regard to certain identified general statutory restrictions that might otherwise apply to such activities.[1]

[1] The FBI obtained authorization to engage in proprietary operations in the Department's appropriations authorization act for fiscal year 1979, Pub. L. No 95–624, § 18(a), 92 Stat. 3459, 3465–66 (1978). The authority to establish or acquire corporations in undercover operations was granted to the FBI the following year in the Department's appropriations authorization act for fiscal year 1980, Pub. L. No. 96–132, § 7(a), 93 Stat. 1040, 1045–46 (1979). Except for one brief period, the FBI has had this authority continuously since that time.

The DEA's authority to engage in some of these techniques has been the subject of legal opinions of this Office. This Office has previously opined, for example, that the DEA had inherent authority to make bank deposits, on certain conditions, notwithstanding the general statutory prohibition on the deposit in banks of public moneys.[2] This Office has also previously concluded, however, that the DEA did not have the implied authority to engage in proprietary operations.

Under § 203, the DEA is expressly authorized, for the first time, to use the four undercover techniques previously authorized for the FBI. Section 203 provides that these techniques are available upon the written certification of the Administrator of the DEA and the Attorney General. You have asked whether the authority of each of these officials to certify the necessity for the use of the undercover techniques is delegable.[3]

The general rule is that any statutorily conferred authority is delegable, at least in the absence of any indication of congressional intent that the official named must personally exercise the authority conferred upon him. *See United States* v. *Giordano*, 416 U.S. 505, 514 (1974).[4]

In *Giordano*, the government argued that "merely vesting a duty in the Attorney General . . . evinces no intention whatsoever to preclude delegation to other officers in the Department of Justice, including those on the Attorney General's own staff." *Id.* at 513. The Supreme Court noted that "as a general proposition, the argument is unexceptional." *Id.* at 514. The Court found, however, that in this case, "the matter of delegation is expressly addressed . . . , and the power of the Attorney General in this respect is specifically limited to delegating his authority to [those mentioned in the statute]. Despite [28 U.S.C.]

[2] Memorandum for Robert T. Richardson, Acting Chief Counsel, Drug Enforcement Administration from Larry L. Simms, Acting Assistant Attorney General, Office of Legal Counsel (Oct. 2, 1981).

[3] The original legislation relating to the FBI conferred the authority to engage in the three specific undercover techniques "only upon the written certification that the particular undercover technique was necessary for the conduct of the undercover operation by the Director of the [FBI] and the Attorney General (or, if designated by the Attorney General, the Deputy Attorney General)." 92 Stat at 3466. In 1979, when this section was reenacted and amended expressly to authorize the use of corporations in undercover operations, the certification authority was also amended If so authorized by the Director, the Associate Director of the FBI also was specifically authorized to certify the necessity for the use of undercover techniques. 93 Stat. at 1045–46. At that time, it does not appear that the certification requirement was imposed on the use of corporations.

In 1983, when this section was reenacted as § 205(b)(1) of the Department's appropriations act for fiscal year 1984, Pub. L No. 98-166, 97 Stat. 1071, 1086–88 (1983), the certification requirement was changed again to require certification of the necessity for the use of corporations and also to allow certification by:

> the Director of the [FBI] (or, if designated by the Director, a member of the Undercover Operations Review Committee established by the Attorney General's Guidelines on FBI Undercover Operations, as in effect on July 1, 1983) and the Attorney General (or, if designated by the Attorney General, a member of such Review Committee).

The Department's fiscal year 1985 appropriations act continued these provisions 98 Stat. at 1559.

[4] *Giordano* involved the authorization requirement of the federal wiretap statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2516(1), which empowers the "Attorney General, or any Assistant Attorney General specially designated by the Attorney General" to authorize an application to a federal judge for an order authorizing or approving a wiretap. The Supreme Court held that this provision did not authorize approval by the Executive Assistant to the Attorney General. The Court also rejected, on the facts of the case, the Attorney General's general authority over the Department of Justice, *see* 28 U S.C § 509, and his general authority to delegate, *see id.* § 510, as bases for the authority to delegate.

§ 510, Congress does not contemplate that the duties assigned to the Attorney General may be freely delegated." *Id.*

According to the Court in *Giordano*, precise language forbidding delegation is not required. The Court held that the language of 28 U.S.C. § 2516(1) was intended to limit the power to authorize wiretaps applications to the Attorney General himself and to those identified in the statute. The Court also examined the purpose and the legislative history of the wiretap statute and concluded that they supported this interpretation.

Applying these principles to your question of delegation, we conclude that both the Attorney General and the Administrator of the DEA may delegate their respective authority under § 203 to certify the necessity for the use of undercover techniques. We reach that conclusion as follows.

As its plain language indicates, and as interpreted by the Court in *Giordano*, in the absence of a contrary congressional intent, 28 U.S.C. § 510 generally authorizes the Attorney General to delegate the authority vested in him.[5] Specifically, with regard to DEA functions, § 6 of Reorganization Plan No. 2 of 1973, *reprinted in* 28 U.S.C. § 509 note, provides that the Attorney General may "make such provisions as he shall deem appropriate authorizing the performance of [drug enforcement] functions by any officer, employee, or agency of the Department of Justice." The same principles apply to the Administrator, who is designated as the head of the agency, *see id.* § 5, and charged with performing the functions vested in the Attorney General by the Reorganization Plan as well as other drug control laws, *see* 28 C.F.R. §§ 0.100, 0.101. Thus, the Administrator is authorized "to redelegate any of the powers and functions vested in him by [the regulations]." *Id.* § 0.104.

Nothing in the language of § 203 discloses a congressional intent to preclude delegation. There is, of course, no express preclusion of delegation, nor is there any language comparable to the wiretap provision construed in *Giordano* specifically identifying the persons to whom the authority conferred may be delegated. Rather, § 203 on its face appears to reflect the common legislative practice of conferring general authority upon the head of a department or agency at the time that Congress specifically confers a new power by statute or creates a statutory duty, with the common practice thereafter being delegation within that department or agency of the authority conferred or duty imposed upon its head.[6]

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

[6] It is not necessary to determine here whether the language regarding delegation in the FBI's authorization would preclude further, or different, delegation. We note, however, that with regard to the FBI, we find nothing to indicate a congressional intent to preclude any other delegation. As we understand it, the language that Congress adopted was proposed by the FBI when it was first enacted and on both occasions when it was changed, and it is reasonable to conclude that Congress intended solely to authorize what the Department asked for and did not intend to preclude or limit delegation. Moreover, we have found nothing in the purpose or legislative history of the certification requirement applicable to the FBI to compel the conclusion that delegation of the certification authority was intended to be limited to only the persons specifically mentioned.

Continued

Nor have we discerned anything regarding the purpose of § 203 that supports, much less compels, the conclusion that Congress intended to preclude delegation by the Administrator or the Attorney General. Unlike Title III, which was enacted specifically to impose stringent limitations on the Department's prior practices regarding warrantless wiretaps, specific procedures to obtain authorization for a wiretap, and vigorous penalties for violation of those procedures, § 203 was enacted to exempt the DEA from limitations imposed by general statutory provisions that might otherwise be thought to preclude the use of the four undercover techniques. In other words, the purpose of § 203 was to expand the agency's authority, not to restrict it. It is therefore not necessary to construe the legislation as imposing the same type of restrictions on the exercise of that authority as the Court felt to be required in *Giordano*.

Finally, we have examined the legislative history of § 203 as it relates to the DEA and have discovered no statements of congressional intent to preclude delegation. As we understand it, in its legislative proposal within the Department, the DEA requested the authority to employ the undercover techniques, and the Department's draft bill as introduced in the Senate authorized certification by the Administrator "or by a person designated to act for the Administrator in his absence." S. 1191, 98th Cong., 1st Sess. § 600(a)(4), 129 Cong. Rec. 10616, 10620 (1983). No further action was taken on this bill, however, and the undercover authorities and the certification requirement in Pub. L. No. 98-411 applicable to the DEA were added by the House Committee on Appropriations.[7] There are thus no express indications in the legislative history why the Committee chose the language that it chose.[8] Similarly, we have discovered no

[6] (... continued)

In this regard, we have examined the legislative history of the fiscal year 1979 appropriations authorization act, which first conferred the authority on the FBI to engage in undercover techniques, *see* S. Rep. No. 911, 95th Cong., 2d Sess. (1979); H.R. Conf. Rep. No. 1777, 95th Cong., 2d Sess. (1979), the legislative history of the fiscal year 1980 act, which expressly authorized the Director of the FBI to designate the Associate Director to certify the necessity for the use of undercover techniques, *see* S. Rep. No. 173, 96th Cong., 1st Sess. 30-31 (1979), *reprinted in* 1979 U.S.C.C.A.N. 2003, 2032-33, H.R. Conf. Rep. No. 628, 96th Cong., 1st Sess. 3 (1979), *reprinted in* 1979 U.S.C.C.A.N. 2044, 2047, and the legislative history of the fiscal year 1984 act, which changed the express delegatee for both the Attorney General and the Director to a member of the Undercover Operations Review Committee, *see* H.R. Conf. Rep. 478, 98th Cong., 1st Sess. 28 (1983). *See generally supra* notes 1 & 3.

In none of these reports have we discovered any express indication that Congress intended to preclude or limit delegation, to require the Director, the Attorney General, or the delegatee specifically mentioned personally to exercise the authority conferred, or to require the certification to be made "at the highest level" or words to that effect.

[7] The provision does not appear in the bill as reported by the subcommittee to the full Committee on May 9, 1984, but it does appear in the bill as reported by the Committee to the full House on May 23, 1984. The Committee's report on the bill, H.R. Rep. No. 802, 98th Cong., 2d Sess. (1984), does not discuss the provision as to the DEA.

[8] The comparable provision relating to the FBI has appeared in three different statutes, but none of them use exactly the language adopted in § 203 applicable to the DEA. It is clear that the structure for delegation envisioned by the language enacted with regard to the DEA could not have been made precisely parallel to that of the FBI because the DEA does not utilize an undercover operations review committee. To the extent that the House Appropriations Committee had in mind the history of the FBI's authority, several different conclusions are possible.

Continued

statements applicable either to the FBI, in the legislative history of the various authorization and appropriations acts since 1979, or to the DEA, in the legislative history of § 203, that disclose a congressional intent to preclude delegation or to require the exercise of the authority personally by the officials named. *See supra* note 6.

We therefore conclude that both the Administrator of the DEA and the Attorney General may delegate the authority to certify the necessity for the use of undercover techniques conferred upon each of them by § 203 of Pub. L. No. 98–411.

RALPH W. TARR
Deputy Assistant Attorney General
Office of Legal Counsel

[8] (. . . continued)
In the absence of a request by the DEA for specific mention in the authorization of officials to whom the authority could be delegated, the Committee could have specifically intended to choose language that would leave the Administrator of the DEA and the Attorney General the most free to delegate their authority. Alternatively, knowing that the provision relating to the FBI had been amended twice as the FBI gained experience in administering the certification requirement, the Committee could have assumed that the inclusion in the FBI's authority of specific, named officials did no more than reflect the current practice at the FBI; there was no such practice at the DEA to reflect in the language of § 203. Other conclusions are no doubt also possible. Given the variety of possibilities, any attempt to draw a firm conclusion regarding delegation by the Administrator and the Attorney General by comparison to the comparable FBI provision seems futile.

Ability of the Environmental Protection Agency to Sue Another Government Agency

Before a lawsuit is justiciable under Article III of the Constitution, there must be a genuine controversy appropriate for judicial resolution. There must be a concrete adversity of interest between the opposing parties, because an Article III court may not decide a collusive suit or render an advisory opinion. Accordingly, courts must insist that the real party in interest challenging the Executive Branch's position not itself be an agency of the Executive Branch. In this way, courts will avoid hearing potentially collusive lawsuits and performing functions committed by the Constitution to the President.

There are no cases in which disputes between two agencies, both of whose heads serve at the pleasure of the President, have been found to be justiciable. In two recent Superfund enforcement actions initiated by the Environmental Protection Agency, the defendants attempted to join other federal agencies as co-defendants. In both cases, the courts rebuffed the attempts on the ground that the United States may not sue itself. Accordingly, a suit brought by the EPA against the Department of Energy, or any other Executive Branch agency whose head serves as the pleasure of the President, would be nonjusticiable.

December 4, 1985

LETTER FOR THE CHAIRMAN, SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMMITTEE ON ENERGY AND COMMERCE

The Environmental Protection Agency (EPA) has referred the first question in your letter of October 21, 1985 to this Department for response. You request a legal analysis of the question whether a suit by one Executive Branch agency against another presents a "justiciable controversy" that an Article III court may decide. Specifically, you ask for our comments on the conclusion in an August 3, 1983 memorandum from Region IV, EPA, that "failure by [the Department of Energy (DOE)] to comply with applicable RCRA [Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 *et seq.*] requirements would create a constitutionally 'justiciable controversy' so that EPA could bring suit in federal district court to enforce such requirements."

The Region IV memorandum states that it "could find no case in which a court had declined to hear a case based on an intra-branch dispute because of lack of a 'case or controversy' under the Constitution."[1] It then cites a number

[1] The author of the memorandum was apparently not aware of *Defense Supplies Corp* v *United States Lines Co.*, 148 F.2d 311 (2d Cir.), *cert. denied*, 326 U.S. 746 (1945), in which the court of appeals affirmed dismissal of a cargo libel brought against the United States by a corporation whose stock was wholly owned by the Reconstruction Finance Corporation, on grounds that "this [is] nothing more than an action by the United States against the United States." *Id.* at 312. In this regard, see also *United States* v. *Easement & Right of Way*, 204 F. Supp. 837 (E.D. Tenn. 1962), in which the district court refused the Tennessee Valley Authority's attempt to join the Farmers Home Administration as a party defendant in a condemnation suit, holding that "any differences between these agencies would at most be inter-agency disputes which are not subject to settlement by adjudication." *Id.* at 839.

of cases to support its conclusion that there is no constitutional barrier to a court's adjudication of an enforcement action brought by EPA against DOE. None of these cases is directly on point, however, because none of them involved a suit initiated by one Executive Branch agency against another. More importantly, as we will show below, none of them provides any support for the conclusion that a court may adjudicate enforcement action under RCRA or the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.* (CERCLA), brought by EPA against DOE (or indeed against any other Executive Branch agency whose head serves at the pleasure of the President).

It may be helpful at the outset briefly to review the constitutional concerns underlying the justiciability question in this context. In order to find that a controversy is "justiciable" so as to permit the exercise of Article III jurisdiction, a court must satisfy itself that there is a genuine controversy between the parties to a lawsuit, and that the controversy is appropriate for judicial resolution. There must be a concrete adversity of interest between the opposing parties; an Article III court may not decide a collusive suit or render an advisory opinion. Where government agencies appear on both sides of a suit, a court must therefore assure itself that it is not being asked to decide a question that is properly addressed to the branch of government to which those agencies belong. Where two Executive Branch agencies appear on opposing sides of a lawsuit, and where the issue in litigation involves both agencies' obligation to execute the law, the principle of separation of powers makes these inquiries particularly sensitive. Accordingly, the courts must insist that the "real party in interest" challenging the Executive's position in court not itself be an agency of the Executive. If it is, the court is not only faced with a potentially collusive lawsuit, it is also being asked to perform a function committed by the Constitution to the President.

The cases cited by the Region IV memorandum in support of its conclusion that EPA may sue DOE fall generally into three categories. One category consists of suits brought by or against one of the so-called "independent regulatory agencies." *E.g., Udall* v. *Federal Power Comm'n*, 387 U.S. 428 (1967); *Secretary of Agriculture* v. *United States*, 347 U.S. 645 (1954) (ICC); *United States* v. *ICC*, 337 U.S. 426 (1949); *ICC* v. *Jersey City*, 322 U.S. 503 (1944); *Mitchell* v. *United States*, 313 U.S. 80 (1941) (ICC). The second category consists of two suits in which the Comptroller of the Currency intervened on the side of the defendant in antitrust actions brought by the Justice Department. *United States* v. *Marine Bancorporation*, 418 U.S. 602 (1974); *United States* v. *Connecticut National Bank*, 418 U.S. 656 (1974). In the third category are two suits between the government and an individual officer of the government. *Powell* v. *McCormack*, 395 U.S. 486 (1969); *United States* v. *Nixon*, 418 U.S. 683 (1975).

In every one of these cases, the Supreme Court found, implicitly or explicitly, sufficient adversity of interest between the parties to make the controversy a justiciable one. In none was the Court asked to decide, nor did it decide, a

legal controversy between two agencies both of whose heads serve at the pleasure of the President, as do the heads of EPA and DOE. Even where an independent regulatory agency appears in opposition to an Executive Branch agency represented by the Department of Justice, the Court finds it important to emphasize that the interests at issue in the suit are such as to ensure the constitutionally necessary adversity between the parties. For example, in *United States* v. *ICC*, the Court held the suit justiciable because certain railroads, not the ICC, were the "real parties in interest" opposing the government. 337 U.S. at 432. And in *Secretary of Agriculture* v. *United States*, the Court was at pains to point out that the Secretary of Agriculture was appearing in the litigation in opposition to the Interstate Commerce Commission "on behalf of the affected agricultural interests," pursuant to specific statutory authorization. 347 U.S. at 645.

In the two antitrust suits in which the Comptroller of the Currency participated on the defendant's side against the Justice Department, *Marine Bancorporation* and *Connecticut National Bank*, it does not appear that the two governmental entities involved were true adversaries in the judicial process. There was a real party in interest, namely the bank defendant, in each of the two cases; the Comptroller, having approved a proposed merger under the Bank Merger Act pursuant to statutory authority, intervened on the bank's side to enable the courts to have the benefit of its reasoning.

The two cases in the third category, *Powell* v. *McCormack* and *United States* v. *Nixon*, both involved unique situations in which personal rather than governmental interests were at stake for one of the parties. In *Powell*, an elected officer of the Legislative Branch challenged the House of Representative's refusal to seat him. In the *Nixon* case, the Court appears to have been persuaded that the President's personal interest in the matter precluded his acting to resolve the matter at issue within the branch of government that he headed.[2]

In addition, there have been some recent developments in the case law of which the 1983 Region IV memorandum could not have been aware. The justiciability issue has recently arisen in two EPA Superfund enforcement actions, in which defendants attempted to join government agencies as party defendants. Both courts have refused to do so, reasoning that the United States may not sue itself. *United States* v. *Shell*, 605 F. Supp. 1064, 1081–84 (D. Colo. 1985); *United States* v. *Conservation Chemical Co.*, No. 82–0983 (W.D. Mo. Mar. 13, 1985). In *Shell*, the court refused to join the Department of the Army as a party defendant, on the ground that the plaintiff "United States" was itself the Army. 605 F. Supp. at 1082. In *Conservation Chemical*, the court granted the Special Master's recommendation to dismiss a third-party complaint against several Executive Branch agencies, holding that because the United States was

[2] In the *Nixon* case, it would have been against President Nixon's personal, as opposed to official, self-interest to resolve the dispute in favor of the Special Prosecutor. Therefore, there was sufficient reason to suspect that he could not "faithfully" execute the law because of a personal conflict of interest. That is not the case with a dispute between EPA and another executive agency. Although many political considerations may influence his decision (as is the case with every Presidential decision), the President does not have a personal stake in the outcome. Furthermore, with respect to ordinary environmental disputes between EPA and other government agencies, the President labors under no disability whatever He is in a position to act.

already a party to the action, the defendants' claims should have been raised by counterclaim.

The Region IV memorandum argues finally that Executive Order No. 12088 (Oct. 13, 1978), *reprinted in* 42 U.S.C. § 4321 note, contemplates judicial enforcement actions against federal agencies by EPA. Just as the term "enforcement" does not have to mean judicial enforcement, neither does the term "sanctions" in Executive Order No. 12088 necessarily contemplate judicial sanctions. Certainly, we agree that Executive Branch agencies are subject to the requirements of RCRA and CERCLA. The question is what enforcement tools can constitutionally be used against them. We maintain that the constitutional scheme established by Article II and Article III calls for achieving compliance with RCRA and CERCLA within the Executive Branch and not in a judicial forum.

PHILLIP D. BRADY
Acting Assistant Attorney General
Office of Legislative and
*Intergovernmental Affairs**

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

Taxability of Indian Treaty Fishing Income

Various treaties between the United States and Indian tribes secure to the Indian signatories the "right of taking fish at all usual and accustomed grounds and stations." In determining whether income derived from the exercise of these fishing rights is subject to federal tax, the relevant analysis is that employed by the Supreme Court in *Squire* v. *Capoeman*, 351 U.S. 1 (1956). *Squire* held that Indians are subject to the payment of income taxes as are other citizens unless a tax exemption is "clearly expressed" in an applicable treaty or statute. *Squire* also held that in analyzing a particular treaty or statute applicable to Indians, ambiguous language should be construed in the Indians' favor. The Tax Court has properly resolved the inherent tension between these two canons of construction by concluding that income earned by Indians from the exercise of treaty fishing rights is subject to the federal income tax.

December 12, 1985

MEMORANDUM OPINION FOR THE SECRETARY OF THE INTERIOR

Your letter to the Attorney General regarding the taxability, under federal law, of income earned by certain Indian tribes from the exercise of commercial fishing rights guaranteed by treaty has been submitted to the Office of Legal Counsel for review. This review, which examines the different positions of the Department of the Interior (Interior) and the Internal Revenue Service (IRS) on this subject, is being undertaken pursuant to Executive Order No. 12146 (July 18, 1979), *reprinted in* 28 U.S.C. § 509 note, and 28 C.F.R. § 0.25, which authorize the Office of Legal Counsel, on behalf of the Attorney General, to resolve legal disputes between Executive Branch agencies.

In 1983, the Solicitor of Interior concluded that treaty language reserving fishing rights to Indian tribes precluded federal taxation of income derived from the exercise of those rights. The IRS does not share that view, and has attempted to collect income taxes on fishing income earned by tribal fishermen from commercial fishing operations.[1] A number of Indians who have received notices of deficiency from the IRS have filed petitions for redetermination in the Tax Court.[2]

As you note in your letter, the Department of Justice will need to resolve this issue in order to arrive at a uniform position of the United States, should the pending cases proceed to litigation handled by the Department. We have

[1] The IRS issued technical memoranda in 1983 adopting the position that members of the affected Indian tribes are subject to the federal income tax. The IRS has maintained that position in ongoing litigation in Tax Court. *See infra* note 2.

[2] We have received copies of pleadings on summary judgment motions filed in two of those proceedings, *Jefferson* v. *Commissioner*, No. 836–84, and *Greene* v. *Commissioner*, No. 15921–84.

therefore reviewed the dispute in that context. As set forth below, we believe that the position of the IRS represents the more reasonable and sound reading of the applicable Supreme Court precedent, and therefore can be maintained in litigation handled by this Department.

I. Background

A. Interpretation of Treaty Fishing Rights

The treaties at issue here were negotiated in the 1850s with Indian tribes living in what is now the State of Washington in order to extinguish the last group of conflicting claims to lands lying west of the Cascade Mountains and north of the Columbia River.[3] *See Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 661–62 (1979). In exchange for their interest in most of the territory, the Indians were given monetary payments and the "exclusive use" of relatively small tracts of land, as well as certain other rights, including the right to fish. *Id.* With immaterial variations, the treaties each provide:

> The right of taking fish at all usual and accustomed grounds and stations is secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing the same; together with the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands.

Treaty of Olympia, art. III, 12 Stat. 971, 972 (July 1, 1855/Jan. 25, 1856). The scope of the fishing rights secured by these treaties, and the extent to which a state may interfere with those rights, has been considered on a number of occasions by the Supreme Court. *See, e.g.*, *United States* v. *Winans*, 198 U.S. 371 (1905); *Seufert Bros.* v. *United States*, 249 U.S. 194 (1919); *Tulee* v. *Washington*, 315 U.S. 681 (1942); *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392 (1968) (*Puyallup I*); *Department of Game* v. *Puyallup Tribe*, 414 U.S. 44 (1973) (*Puyallup II*); *Puyallup Tribe* v. *Department of Game*, 433 U.S. 165 (1977) (*Puyallup III*); *Commercial Passenger Fishing*, 443 U.S. 658. The Court has recognized that the rights secured by the treaties include the right to fish for commercial, as well as subsistence, purposes, and that the fishing right was critically important to the Indians in their acceptance of the treaties.[4] The Court has specifically rejected the argument that the treaties guarantee to the

[3] We understand that the following treaties are applicable here: Treaty of Medicine Creek, 10 Stat. 1132 (Dec. 26, 1854); Treaty of Point Elliott, 12 Stat. 927 (Jan. 22, 1855); Treaty of Point No Point, 12 Stat. 933 (Jan. 26, 1855); Treaty of Neah Bay, 12 Stat. 939 (Jan. 31, 1855); Treaty with the Yakimas, 12 Stat. 951 (June 9, 1855); and Treaty of Olympia, 12 Stat. 971 (July 1, 1855/Jan. 25, 1856).

[4] *See Commercial Passenger Fishing*, 443 U.S. at 676 ("During the negotiations, the vital importance of the fish to the Indians was repeatedly emphasized by both sides, and the Governor's promises that the treaties would protect that source of food and commerce was crucial in obtaining the Indians' assent."); *see also id.* at 665–66 & n.7.

Indians only the opportunity to compete with nontreaty fishermen on an individual basis, finding instead that the treaties entitle the Indians to take a fair share of the available fish.[5] In reaching that conclusion, the Court has found it significant that the Indians reserved to themselves preexisting fishing rights, rather than obtaining rights from the government:

> Because the Indians had always exercised the right to meet their subsistence and commercial needs by taking fish from treaty area waters, they would be unlikely to perceive a "reservation" of that right as merely the chance, shared with millions of other citizens, occasionally to dip their nets into the territorial waters.

Commercial Passenger Fishing, 443 U.S. at 678–79.

The Court has defined an "equitable measure" of the treaty right to be a division of the harvestable portion of each run that passes through a "usual and accustomed" place into "approximately equal treaty and nontreaty shares." *Id.* at 685. The treaty share should be reduced, however, "if tribal needs may be satisfied by a lesser amount." *Id.* Drawing on cases involving Indian reserved water rights,[6] the Court stated:

> [T]he central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but no more than, is necessary to provide the Indians with a livelihood — that is to say, a moderate living. Accordingly, while the maximum possible allocation to the Indians is fixed at 50%, the minimum is not; the latter will, upon proper submissions to the District Court, be modified in response to changing circumstances.

Id. at 686–87 (footnote omitted).

The Court has also made clear that a state cannot interfere with the exercise of the fishing right, other than nondiscriminatory regulations reasonable and necessary for conservation of the fish. Thus, a state may not grant a nontreaty fisherman rights to use a "fish wheel" — a device capable of catching fish by the ton and totally destroying a run of fish, thereby effectively excluding the Indians from the right to take fish at a "usual and accustomed place." *United States* v. *Winans*, 198 U.S. 371, 384 (1905). A state may not require Indians to

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[5] In *Commercial Passenger Fishing*, the Court said:

> But we think greater importance should be given to the Indians' likely understanding of the other words in the treaties and especially the reference to the "right of *taking* fish" — a right that had no special meaning at common law but that must have had obvious significance to the tribes relinquishing a portion of their pre-existing rights to the United States in return for this promise. . . . In this context, it makes sense to say that a party has a right to "take" — rather than merely the "opportunity" to try to catch — some of the large quantities of fish that will almost certainly be available at a given place at a given time.

Id. at 678; *see also id.* at 683; *Puyallup I*, 391 U.S. at 398; *Puyallup III*, 433 U.S. at 48–49.

[6] The Supreme Court has held that treaties reserving land for the use of Indians in the arid western states also reserve, by implication, rights to water sufficient to meet subsistence or other needs of the Indians reasonably within the contemplation of the parties at the time the treaties were negotiated. *See Winters* v. *United States*, 207 U.S. 564, 576 (1908); *see also Cappaert* v. *United States*, 426 U.S. 128 (1968).

obtain a fishing license as a prerequisite to exercise of their treaty rights, *Seufert Bros.* v. *United States*, 249 U.S. 194, 198 (1919), and must give Indians access across private lands, if necessary, in order to assure access to treaty fishing locations, *Tulee* v. *Washington*, 315 U.S. 668, 685 (1942). State regulations justified on the basis of conservation must be both reasonable and necessary, *Puyallup II*, 414 U.S. at 45, and cannot discriminate against exercise by the Indians of their fishing rights, *id.* at 48; *Puyallup I*, 391 U.S. at 398.

On the other hand, the Indians cannot rely on their treaty right to exclude others from access to certain fishing sites outside the reservation in order to deprive other citizens of the state of a "fair apportionment" of a particular run. *Commercial Passenger Fishing*, 443 U.S. at 683–84. In sum:

> Nontreaty fishermen may not rely on property law concepts, devices such as the fish wheel, license fees, or general regulations to deprive the Indians of a fair share of the relevant runs of . . . fish in the case area. Nor may treaty fishermen rely on their exclusive right of access to the reservations to destroy the rights of other "citizens of the Territory." Both sides have a right, secured by treaty, to take a fair share of the available fish. That, we think, is what the parties to the treaty intended when they secured to the Indians the right of taking fish in common with other citizens.

Id. at 684–85.

The analysis in these treaty fishing cases relies heavily on factual evidence about the understanding of the parties at the time the treaties were negotiated and the importance of the fishing rights to the Indians who signed the treaties. The Court, consistent with its approach in other cases involving construction of Indian treaties, gave "special meaning" to the rule that "it is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret the treaties," *id.* at 675, because of the circumstances of the negotiations:

> [This Court] has held that the United States, as the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side. "The treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."

Id. at 675–76 (quoting *Jones* v. *Meehan*, 175 U.S. 1, 11 (1899)).

B. Indian Tax Cases

None of the cases construing the scope of the fishing right guaranteed by treaty discuss whether the income derived from exercise of the right to take a

fair share of fish at "usual and accustomed places" is exempt from federal income taxation. The Supreme Court and the lower federal courts have, however, reviewed the taxability of income earned by Indians in other contexts. The leading case involving the authority of the federal government to tax Indian income is *Squire* v. *Capoeman*, 351 U.S. 1 (1956), in which the Supreme Court considered whether capital gains from the sale of standing timber on lands allotted to noncompetent Indians pursuant to the General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. § 331 *et seq.*), was subject to the federal income tax.[7]

The General Allotment Act was intended to begin a new era in federal Indian policy. By treaty, most Indians had been guaranteed exclusive use of reservation land. Under the General Allotment Act, tribal lands were to be divided and allotted to individual members of the tribe. The allotments were to be held in trust by the United States for twenty five years or longer, if the President deemed an extension desirable, and then to be transferred to the allottee discharged of government trusteeship. 25 U.S.C. §§ 347, 348.

The Court began its analysis in *Squire* with the principle, already established in prior cases,[8] that "Indians are citizens and . . . in ordinary affairs of life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens." 351 U.S. at 5–6. The Court recognized, however, that applicable treaties or statutes could create tax exemptions, if such exemptions were "clearly expressed." *Id.* The Court found such an exemption in the language in § 5 of the General Allotment Act, which provided that lands on Indian reservations allotted to individual Indians and held in trust for them by the government shall ultimately be conveyed to them in fee simple discharged of the trust and "free of all charge or incumbrance whatsoever." 25 U.S.C. § 348.

The Court recognized that this statutory provision was not "expressly couched in terms of nontaxability," and in fact became effective prior to enactment of

[7] A noncompetent Indian is one who holds allotted lands only under a trust patent, and who may not dispose of his property without the approval of the Secretary of the Interior The term does not denote mental capacity.

[8] In *Choteau* v. *Burnet*, 283 U.S. 691 (1931), and *Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U.S. 418 (1935), the Supreme Court definitively rejected the argument that Indians are exempt from federal taxation merely because of their status, in the absence of treaty or statutory provisions to the contrary. In *Choteau*, the Court held taxable the petitioner's share of tribal income from oil and gas leases made by the tribe pursuant to statute, concluding that "[t]he intent to exclude [income from taxation] must be definitively expressed, where, as here, the general language of the Act laying the tax is broad enough to include the subject matter." 283 U.S. at 696 (citations omitted). In *Five Civilized Tribes*, the Court concluded that the proceeds from the investment of funds derived from a restricted allotment were subject to federal taxation *See* 295 U.S. at 420–21.

Both *Choteau* v *Burnet* and *Five Civilized Tribes* were distinguished by the Court in *Squire* v. *Capoeman* The Court noted that *Choteau* concerned the question whether an Indian was exempt from tax solely because of his status, and that the facts in *Choteau* fit within the terms of § 6 of the General Allotment Act, which contemplates taxation of income earned by a competent Indian who has unrestricted control over lands and income thereon. *Five Civilized Tribes* was distinguished on the ground that the income involved was "reinvestment income" or "income derived from investment of surplus income on land." The Court stated that it would not be necessary to exempt such income from taxation in order to fulfill the purposes of the General Allotment Act. *See Squire*, 351 U.S. at 9.

any federal income tax, but nonetheless concluded that the words "charge or incumbrance might well be sufficient to include taxation." 351 U.S. at 7. In reaching this conclusion, the Court relied on its earlier statements indicating that ambiguous language in treaties and statutes applicable to Indians should be interpreted favorably to the Indians:

> Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith. Hence, in the words of Chief Justice Marshall, "The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense." *Worcester* v. *Georgia*, 32 U.S. (6 Pet.) 515, 582 (1832).

351 U.S. at 6–7 (quoting *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930)).

The Court did not find it necessary, however, to rely solely on the language of § 5. It found "additional force" in § 6 of the General Allotment Act, 25 U.S.C. § 349, which authorizes the Secretary of the Interior to issue a patent in fee simple to any allottee competent to manage his own affairs. That section provided that "thereafter *all restrictions as to* sale, incumbrance, or *taxation* of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent" (emphasis added). The Court concluded:

> The literal language of the proviso evinces a congressional intent to subject an Indian allotment to all taxes only after a patent in fee is issued to the allottee. This, in turn, implies that, until such time as the patent is issued, the allotment shall be free from all taxes, both those in being and those which might in the future be enacted.

351 U.S. at 7–8.

The Court also found that its interpretation of the intent of § 5 was supported by several opinions of the Attorney General and unofficial writings "relatively contemporaneous" with the enactment of the General Allotment Act. *Id.* at 8–9. The Court concluded the opinion with the observation that the exemption in § 5 was consistent with the overall purpose of the General Allotment Act:

> Unless the proceeds of the timber sale are preserved for respondent, he cannot go forward when declared competent with the necessary chance of economic survival in competition with others. This chance is guaranteed by the tax exemption afforded by the General Allotment Act, and the solemn undertaking in the patent.

Id. at 10.

The analysis in *Squire* v. *Capoeman* has been applied in a number of subsequent cases in the federal courts of appeals. In those cases arising under the General Allotment Act or other acts construed by the courts *in pari materia* with that act, the courts have generally held that income derived directly from the ownership of restricted allotted land is exempt from federal taxation. *See, e.g.*, *Stevens* v. *Commissioner*, 452 F.2d 741 (9th Cir. 1971); *United States* v. *Hallam*, 304 F.2d 620 (10th Cir. 1962); *see also Big Eagle* v. *United States*, 300 F.2d 765 (Ct. Cl. 1962). Income that is not derived directly from the taxpayer's individual ownership of the land or that is derived from the ownership or use of unrestricted or unallotted land, however, is subject to taxation. *See, e.g.*, *United States* v. *Anderson*, 625 F.2d 910 (9th Cir.) (income from cattle ranching on reservation land), *cert. denied*, 450 U.S. 920 (1980); *Jourdain* v. *Commissioner*, 617 F.2d 507 (8th Cir.) (income earned as chairman of tribal council), *cert. denied*, 449 U.S. 839 (1980); *Fry* v. *Commissioner*, 557 F.2d 646 (9th Cir. 1977) (income from logging operation on reservation land), *cert. denied*, 434 U.S. 1011 (1978); *Holt* v. *Commissioner*, 364 F.2d 38 (8th Cir. 1966) (income from grazing on reservation land), *cert. denied*, 386 U.S. 931 (1967); *Commissioner* v. *Walker*, 326 F.2d 261 (9th Cir. 1964) (income earned as employee of the Indian community).

These cases interpret *Squire* v. *Capoeman* to teach that a tax exemption must derive from some particular language in a treaty or statute, although that language need not specifically set out a tax exemption, and that an exemption may not be based on policy alone or on generalized references to treaties and statutes. In *United States* v. *Anderson*, the Ninth Circuit explained the *Squire* analysis as follows:

> The rule that ambiguous statutes and treaties are to be construed in favor of Indians applies to tax exemptions, . . . but this rule "comes into play only if such statute or treaty contains language which can reasonably be construed to confer income tax exemptions." "The intent to exclude must be definitely expressed, where, as here, the general language of the Act laying the tax is broad enough to include the subject matter."

625 F.2d at 913 (citations omitted). The court explained further that although "policy arguments are fruitless in the absence of statutory or treaty language that arguably is an express tax exemption," they "might persuade courts to construe such arguable language, if any exists, actually to be an express tax exemption." *Id.* at 914 n.6.

In *Karmun* v. *Commissioner*, 749 F.2d 567 (9th Cir. 1984), the Ninth Circuit applied this analysis in a case arising under the Reindeer Industry Act of 1937, 25 U.S.C. § 500. That Act authorizes the Secretary of the Interior to acquire for the Alaskan natives reindeer and other property owned by non-natives. The Secretary is authorized to distribute or hold in trust the reindeer and other property, and to organize, manage, and regulate the reindeer industry in such a manner as to establish and maintain for the Alaskan natives a self-sustaining

business. *See* 749 F.2d at 569. The court rejected the claim made by Indians who operated herds of reindeer under that Act that their income should be exempt from federal taxation under the *Squire* v. *Capoeman* rationale. The Court noted that "[i]ncome is tax exempt under *Squire* only when the governing treaty or statute contains language which can reasonably be construed to confer an exemption," and it found "no clear expression of intent to exempt" in the Reindeer Act. 749 F.2d at 570. In addition, the court found it significant that the purposes of the General Allotment Act and the Reindeer Act were different:

> The purpose of the [General Allotment Act] was to benefit the individual allottees by preparing them to become independent citizens. Accordingly, the *Squire* Court found that the tax exemption was crucial to fulfilling this purpose. By contrast, the purpose of the Reindeer Act is to provide a continuing food source to the Eskimos of northwestern Alaska through the establishment of a native operated reindeer industry. That purpose is not undermined by requiring the owners and operators of reindeer herds to pay federal income taxes on their profits from the successful conduct of such operations.

Id. (citations omitted).

The issue we have been asked to address — the taxability of treaty fishing rights — has been considered twice by the Tax Court, once before the *Squire* decision and once again in 1982. *See Strom* v. *Commissioner*, 6 T.C. 621 (1946), *aff'd per curiam*, 158 F.2d 520 (9th Cir. 1947); *Earl* v. *Commissioner*, 78 T.C. 1014 (1982). In both *Strom* and *Earl*, the Tax Court concluded that income earned by the Indians from the exercise of treaty fishing rights is subject to federal tax. In *Strom*, the court rejected the argument advanced by the Indians that imposition of a tax upon income earned in carrying on a commercial fishing business is a restriction on the right to fish guaranteed by treaty:

> The Quinaielt Indians on the reservation were as free to fish in the Quinaielt River after the imposition of an income tax as they were prior to that time. The disputed income tax is not a burden upon the *right to fish*, but upon the income earned through the exercise of that right.

6 T.C. at 627. Noting that there was no express exemption from tax in the treaty, and that the income involved was derived "personally" by a restricted Indian (rather than in trust), the Tax Court concluded that the income was subject to the general provisions of the Internal Revenue Code. *Id.* at 627–28.

In *Earl*, the petitioner relied on *Squire* v. *Capoeman* as a basis for his claimed tax exemption, arguing that income from fishing in the usual and accustomed fishing grounds is analogous to income from the cutting of timber

from allotted lands.[9] The Tax Court rejected that analogy, finding instead that the treaty language guaranteeing the right to fish "contains nothing dealing with the taxation of income derived from such fishing." 78 T.C. at 1017. Moreover, it found that the right of an Indian to share in treaty fishing rights is more like his rights as a member of the tribe in unallotted land on the reservation (income from which would not be exempt under *Squire*) than individual rights in allotted land (income from which would fall within the "free from charge or incumbrance" language analyzed in *Squire*). *Id.*

In contrast to its treatment of cases involving federal taxation, the Supreme Court has repeatedly held that Indians and their property are exempt from *state* taxation within their reservations, unless Congress clearly manifests its consent to such taxation. *See Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 764–65 (1985); *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 170–71 (1973). Those decisions rest on a preemption rationale, as explained by the Court in *Bryan* v. *Itasca County*, 426 U.S. 373 (1976):

> The *McClanahan* principle derives from a general pre-emption analysis that gives effect to the plenary and exclusive power of the federal government to deal with Indian tribes, and "to regulate and protect the Indians and their property against interference even by a state." This pre-emption analysis draws support from "the 'backdrop' of the Indian sovereignty doctrine," "'the policy of leaving Indians free from state jurisdiction and control which is deeply rooted in the Nation's history,'" and the extensive federal legislative and administrative regulation of Indian tribes and reservations. "Congress has acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation," and therefore "'State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply.'"

Id. at 376 n.2 (citations omitted). Property and income earned outside the reservation, however, have generally been held to be subject to nondiscriminatory state taxation, unless federal law otherwise provides for an exemption. *See Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148–49, 155–56 (1973) (holding that the state may impose gross receipts tax on ski resort operated by Indian tribe on off-reservation land).

C. Positions of Interior and the IRS

Interior and the IRS both recognize that the relevant analysis here is that used by the Court in *Squire* v. *Capoeman*. The disagreement centers on whether

[9] Pleadings filed by some of the Indian tribes in the pending Tax Court proceedings state that the factual premise of the holding in *Earl* — that the income was earned through exercise of treaty fishing rights — is incorrect, because the individual involved, although an Indian, was fishing as a crewmember on a vessel owned by a non-Indian, and merely shared in proceeds of fishing attributable to non-Indian treaty shares.

the treaty language is sufficiently specific to meet the threshold requirements of *Squire*, and what role policy considerations play in interpreting that language.

1. Interior Position

Interior maintains that the treaty language expressly securing to the Indians the right of "taking fish at usual and accustomed grounds and stations" is language that meets the threshold requirement of *Squire* v. *Capoeman* that a tax exemption be based on specific language. It is language that is "directly applicable" to the fishing activity, and it does not state any limitation on the right other than that it is to be exercised in common with other citizens. Interior therefore argues that the language, on its face, "might well be read to prohibit any limitation on diminishment of the fishing right other than the one specified."

Interior acknowledges that the language "might also be read otherwise," but argues that, at a minimum, an ambiguity exists and, accordingly, that the treaty must be construed in the light most favorable to the Indians. *See generally Squire*, 351 U.S. at 7. Interior notes that at the time of negotiation of the treaty, the reference to the right of "taking fish at usual and accustomed grounds and stations" was clearly intended to include commercial fishing activities, *see Commercial Passenger Fishing*, 443 U.S. at 665–66 & n.7, 676, and that the Indians were assured that they would be able to fish and trade as they had prior to the treaties — that is, without taxation and with no obligation to turn over a portion of their fishing catch or proceeds to the federal government. Thus, Interior reasons that "it is no more likely that the Indians understood that the federal government would tax their fishing right than that they understood that future states would be able to impose a charge upon it."[10]

2. IRS Position

The IRS contends that the interpretation advanced by Interior would be "an unwarranted expansion of the principles announced in *Squire* v. *Capoeman*." The IRS believes that the treaty language granting the fishing rights cannot reasonably be construed to create a tax exemption. The IRS views Interior's position as a policy argument of the type the courts have rejected as a sole basis for a tax exemption, and views the "non-tax cases" cited by Interior (that is,

[10] This argument is considerably expanded in the pleadings filed by Indian tribes in the Tax Court proceedings. Those tribes have opposed motions for summary judgment filed by the IRS on the ground, *inter alia*, that "a decision cannot be made without a thorough understanding of the historical and anthropological data surrounding the negotiation of the Treaty," which can be presented only at trial. *See, e.g.*, Brief for Petitioner at 2, *Jefferson* v. *Commissioner*, No. 836–84 (T.C. Apr. 18, 1985). A number of affidavits have been offered with those pleadings to provide a foundation for petitioners' claims that at trial they will demonstrate that the Indians negotiating the treaties did not contemplate that the United States would be allowed to tax or otherwise to take a share of the fishery that the Indians reserved for themselves. The tribes also argue that there is no evidence that the United States attempted to negotiate for the right to tax treaty fishing income in the treaty negotiations or understood that the treaty gave it that right, and that there is no suggestion in the numerous Supreme Court and lower federal court decisions construing treaty fishing rights that "one of the federal purposes in negotiating these agreements was to enable [the government] to raise revenue from the Indians' commerce." *Id.* at 6.

those cases construing the treaty fishing rights) as inapposite, because they merely "clarify the rights which the treaties guarantee — rights which we are disputing only to the extent that Interior is reading them to convey a specific tax exemption." Accordingly, the IRS maintains that the reasoning of the Tax Court in *Strom* and *Earl* is persuasive, and should be followed by the IRS in its enforcement efforts.

II. Analysis

The dispute between Interior and the IRS arises out of an inherent tension between two applicable and longstanding canons of construction: first, that regardless of the circumstances, exemptions from federal income taxation be "definitely expressed," *see supra* note 8 and accompanying text; and second, that treaties and statutes affecting Indians be interpreted liberally, in light of the trust responsibility of the United States and bearing in mind the Indians' historically inferior bargaining position, which characterized the negotiation of the treaties, *see supra* text immediately preceding Part I.B. Unfortunately, the courts have not been wholly consistent in describing how the balance between the competing canons should be struck. In *Squire*, the Court noted that the "free from charge or incumbrance" language of § 5 was not "expressly couched in terms of nontaxability," but found that the words used were "susceptible of a more extended meaning than their plain import, as connected with the tenor of their treaty." 351 U.S. at 7. In *Choteau* v. *Burnet*, the Court stated that the intent to exclude income from taxation must be "definitively expressed." 283 U.S. at 696. The language used in *United States* v. *Anderson* referred both to the need for "express exempting language in a statute or treaty," 625 F.2d at 917, and to statutory or treaty language "that arguably is a tax exemption," *id.* at 914 n.6. In *Holt* v. *Commissioner*, the court referred to language that "can reasonably be construed to confer income tax exemptions." 364 F.2d at 40.

Nor have the courts articulated precisely what types of underlying considerations would be persuasive in construing specific language to be a tax exemption. Although the courts have generally rejected arguments that the general goal of increased economic opportunities for Indians justifies an exemption from federal income taxes, they have nevertheless recognized that the federal government's responsibility to the Indians must color interpretation of treaty rights and obligations. Moreover, there are few concrete examples to guide our analysis, because as far as we are aware, the only specific language that has been analyzed by the courts for the purpose of determining whether a federal tax exemption exists is the language in §§ 5 and 6 of the General Allotment Act.

Although in the absence of direct guidance from the courts it is difficult to determine definitively whether the treaty language falls within the *Squire* rationale, we believe that the position taken by the IRS represents the more sound view of the law. For this reason, as we discuss below, we believe that if the pending cases proceed to the federal courts, the Department of Justice could argue the position set out by the IRS.

Interior has argued that because the treaty contains some language dealing with fishing rights, the threshold *Squire* v. *Capoeman* test has been met. We believe that is an overly broad reading of *Squire*. There is a significant difference between the specific language relied upon by the Court in *Squire* and the language relied upon by Interior to support a tax exemption. In *Squire*, and in its preceding decisions in *Choteau* and *Five Civilized Tribes*, the Court emphasized that the language creating a tax exemption must be specific and clear, because the language of the Internal Revenue Code otherwise plainly encompasses income earned by Indians from any source. *See supra* note 8 and accompanying text. In *Choteau* and *Five Civilized Tribes*, the Court did not find such language, even in the face of express treaty guarantees of exclusive use of reservation land (language that the Court did not address). The difference in *Squire* was the presence of specific statutory language that, although not expressly mentioning taxation, expressly dealt with "charges" and "incumbrances" that might be levied on the allotted land. In addition, the Court had the benefit of other literal language in the statute dealing with the grant of the land in fee simple to the Indians, which expressly included taxation as a restriction that otherwise might be applicable to the land. Thus, it was not difficult for the Court to conclude that Congress intended to include taxation (including taxation of income derived directly from the land) as a "charge or incumbrance" within the meaning of § 5 of the General Allotment Act.

Here the treaty language granting Indians the "right of taking fish" does not contain any comparable specific language dealing with "charges," "incumbrances," "restrictions," or other types of limitations. Rather, that language merely grants a particular right. It is more analogous to broad treaty language granting the Indians exclusive use of reservation land,[11] or language in the General Allotment Act granting Indians rights to allotted lands[12] — neither of which was even considered by the Court in *Squire* or subsequent cases. On its face, then, the treaty language lacks the specificity and focus of the language at issue in *Squire*.

To be sure, the Supreme Court, in considering the scope of the "right of taking fish," suggested that the only permissible limitations on that right are reasonable, nondiscriminatory regulations designed to conserve the fish (and thereby preserve the fishing right). *See, e.g.*, *Puyallup II*, 414 U.S. at 45, 48; *Puyallup I*, 391 U.S. at 398. As noted above, however, the Court has not considered the question whether taxation of the income earned from the exercise of the fishing right is or is not contemplated by the treaty language. We

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[11] *See, e.g.*, Treaty of Olympia, art. II, 12 Stat. at 971:

> There shall . . . be reserved, for the use and occupation of the tribes and bands aforesaid, a tract or tracts of land sufficient for their wants within the Territory of Washington, to be selected by the President of the United States, and hereafter surveyed or located and set apart for their exclusive use, and no white man shall be permitted to reside thereon without permission of the tribe and of the superintendent of Indian affairs or Indian agent.

[12] *See, e.g.*, 25 U.S.C. § 331 (authorizing allotment to each Indian located upon a reservation); *id.* § 334 (granting allotments to Indians not residing on reservations), *id.* § 336 (granting allotments to Indians making settlement on unappropriated lands).

believe that taxation of the income earned from the exercise of the treaty fishing right would have a qualitatively different effect on those rights than did the restrictions struck down by the Court in the treaty cases. The latter restrictions involved an actual limitation on the ability or opportunity of the Indians to take fish at the treaty locations — such as prohibitions on access, the use of physical devices that diminish or destroy the runs of fish available to the Indians, and license fees required as a prerequisite for exercise of fishing rights. *See* discussion *supra* Part I.A. An income tax on the profits received from exercise of those fishing rights, although it may diminish the economic value of the right, does not interfere with the scope of the right itself — that is, the right to take a reasonable share of the available fish.

The taxation of profits earned from the exercise of treaty fishing rights will, of course, have an economic impact on Indians who earn that income. But the reduction of the economic value of a right guaranteed to the Indians has generally not been considered to be sufficient reason, standing alone, to create a tax exemption. *See, e.g, United States* v. *Anderson*, 625 F.2d at 914 n.6 ("*Capoeman* and every other Supreme Court and Ninth Circuit case have held that such policy arguments are fruitless in the absence of statutory or treaty language that arguably is an express tax exemption."); *Fry* v. *United States*, 557 F.2d at 649 ("[I]t is one thing to say that courts should construe treaties and statutes dealing with Indians liberally, and quite another to say that, based on those same policy considerations which prompted the canon of liberal construction, courts themselves are free to create favorable rules."). That the right was created by language in a treaty does not provide an exception to the general rule favoring taxation, when that language merely establishes the existence of the right in broad terms. Otherwise, *Squire* v. *Capoeman* would be reduced to quite mechanical operation: that is, if a right is granted to Indians by express language in a statute or treaty that benefits the Indians economically, income earned from exercise of that right is exempt from federal income taxation. We believe that conclusion is inconsistent with *Squire*, as well as with the conclusions in *Choteau* v. *Burnet* and *Five Civilized Tribes.*[13]

In addition, in *Squire* the Court was able to point to a direct link between the tax exemption and the purpose of the statute, which was to grant individual Indians an unencumbered right to their allotted land, when they were judged ready to assume full responsibility for that land and the obligations flowing from ownership. During the period of trusteeship, that purpose could be thwarted

[13] If *Squire* were to be read that broadly, we would have difficulty developing a principled distinction between cases in which a right is granted by express language and cases in which a right is implied. For example, the statute at issue in *Karmun* v. *Commissioner*, the Reindeer Industry Act, arguably gave Indians an implied right to operate herds of reindeer for profit, subject to the supervision of the Secretary of the Interior. Similarly, treaties between the United States and Indians in the western states have generally been interpreted to grant implied rights to use water that is minimally necessary to carry out the needs of the tribe, even if no water is expressly guaranteed by the treaties. It seems to us that to the extent it is argued that the express grant of a right to Indians that has economic benefit carries with it a tax exemption, the argument should also apply to implied treaty rights. Clearly, however, that argument is inconsistent with the Court's analysis in *Squire* and its repeated assertions that exemptions from taxation must be clearly and definitively expressed.

by taxation of income received directly from use of the land, because a failure to pay that tax could result in a tax lien on the property. *See* 351 U.S. at 10. Here, however, the link is much more tenuous, for it is difficult to argue that taxation of the net income derived from exercise of the fishing right would threaten the continued availability of that right. Accordingly, this situation is analogous to that described by the Court in *Karmun* v. *Commissioner*:

> Moreover, as the Tax Court observed, the purpose of the legislation involved here [the Reindeer Industry Act] is entirely different from that in *Squire*. The purpose of the [General Allotment Act] was to benefit the individual allottees by preparing them to become independent citizens. Accordingly, the *Squire* Court found that the tax exemption was crucial to fulfilling this purpose. By contrast, the purpose of the Reindeer Act is to provide a continuing food source to the Eskimos of northwestern Alaska through the establishment of a native-operated reindeer industry. That purpose is not undermined by requiring the owners and operators of the reindeer herds to pay federal income taxes on their profits from the successful conduct of such operations.

749 F.2d at 570 (citations omitted).

Nor do we find persuasive the further argument that because neither the Indians nor the United States contemplated, at the time the treaties were negotiated, that income derived from commercial fishing would be taxable, the rights reserved by the Indians include the right to be free from taxation. This argument, if taken to its logical extreme, would require that all income earned by Indians deriving from the exercise of a treaty or statutory right that predates the federal income tax be exempt from that tax. In *Choteau*, *Five Civilized Tribes*, and *Squire*, the Supreme Court implicitly rejected that argument, holding that Indians are not exempt from federal income taxation merely because of their status as Indians (that is, as formerly sovereign people who had not been subject to the tax), but rather could claim an exemption only on the basis of specific treaty or statutory language indicating an intent to exempt them.

Furthermore, this argument, again if taken to its logical extreme, would mean that the courts could never take account of changes in conditions, laws, or regulations that postdate negotiation of the treaties — a view that would, we believe, stretch the canon of construction favoring interpretation of treaties as the Indians understood them beyond the scope intended by the Supreme Court. As the Court stated in *Kennedy* v. *Becker*, 241 U.S. 556, 563 (1916):

> It has frequently been said that treaties with the Indians should be construed in the sense in which the Indians understood them. But it is idle to suppose that there was any actual anticipation at the time the treaty was made of the conditions now existing to which the legislation in question was addressed.

Finally, we do not believe the cases dealing with state taxation of Indians are relevant to the question of federal taxation. As discussed above, *see supra* text immediately preceding Part I.C, those cases rest on a preemption rationale that is not pertinent to interpretation of federal law:

> Royalties received by the government from mineral leases of Indian lands have been held to be beyond a State's taxing power on the ground that, while in the possession of the United States, they are a federal instrumentality, to be used to carry out a governmental purpose. It does not follow, however, that they cannot be subjected to a federal tax.

Choteau v. *Burnet*, 283 U.S. at 696 (citations omitted).

Conclusion

For these reasons, we conclude that the position maintained by the IRS that income earned from exercise of treaty fishing rights is subject to the federal income tax is the more sound view of the law. We believe that position is fully consistent with the applicable Supreme Court precedents and is consonant with the trust relationship held by the United States with respect to Indian tribes.

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Constitutionality of a Judicial Review Provision Providing for Automatic Affirmance of Agency Decisions

The Northeast Interstate Low-Level Radioactive Waste Management Compact would establish a Commission whose final administrative decisions would be subject to review in the United States Court of Appeals for the District of Columbia Circuit. A proposed amendment to a bill granting the consent of Congress to the Compact provides that if review is sought of the Commission's decision relative to the designation of a "host state" for a regional radioactive waste disposal facility and the court of appeals does not rule within ninety days after the petition for review has been filed, the Commission's decision "shall be deemed to be affirmed."

This provision raises serious constitutional problems that implicate the doctrine of separation of powers. Although Congress has broad authority to prescribe rules concerning judicial practice, procedure, jurisdiction, and remedies and to establish the substantive law that governs judicial decisions, the proposed amendment exceeds this authority by effectively exercising the core judicial function of deciding particular cases.

December 13, 1985

LETTER FOR THE CHAIRMAN, SENATE COMMITTEE ON THE JUDICIARY

This responds to your request that we review the constitutionality of a proposed amendment to the judicial review provisions of S. 1798, a bill "[t]o grant the consent of the Senate to the Northeast Interstate Low-Level Radioactive Waste Management Compact." The amendment would set a ninety-day time limit for judicial review of certain administrative decisions made by the Commission established under the Compact, and would mandate that the decision of the Commission be "deemed affirmed" if the court did not rule within that time. As we discuss below, the proposed amendment raises serious constitutional problems.

The purpose of S. 1798 is to grant the consent of Congress, pursuant to the Compact Clause, U.S. Const. art. I, § 10, cl. 3,[1] and § 4(a)(2) of the Low-Level Radioactive Waste Policy Act, 42 U.S.C. § 2021d(a)(2), to the Northeast Interstate Low-Level Radioactive Waste Management Compact. The Compact, which was negotiated by Connecticut, New Jersey, Delaware, and Maryland, implements a regional approach to the management and disposal of low-level radioactive waste by providing a mechanism for establishment of regional waste disposal facilities and by granting to party states the right to deposit wastes at those facilities. The Compact establishes the Northeast Interstate Low-Level Radioactive Waste Commission (Commission), composed of members appointed by the party states. Among other responsibilities, the Commission may designate "host states" that must establish regional disposal facilities

[1] The Compact Clause provides that "[n]o State shall, without the consent of Congress, . . . enter into any Agreement or Compact with another State."

to accept wastes generated by other party states, if the states fail to pursue voluntarily the development of such facilities. Art. IV(i)(9).[2]

The Compact establishes jurisdiction in the federal courts for suits arising from actions of the Commission. Jurisdiction is provided in the United States District Court for the District of Columbia for "all actions brought by or against the Commission." Any actions initiated in a state court "shall be removed" to federal court. Art. IV(n). In addition, the United States Court of Appeals for the District of Columbia Circuit is given jurisdiction "to review the final administrative decisions of the Commission." Art. IV(o).[3] Persons aggrieved by a final administrative decision of the Commission may obtain review of the decision by filing a petition for review within sixty days after the Commission's final decision. Art. IV(o)(1). On review, the court of appeals is precluded from substituting its judgment for that of the Commission "as to the decisions of policy or weight of the evidence on questions of fact," but may remand the case for further proceedings if it finds that the petitioner has been aggrieved because the findings, inferences, conclusions, or decisions of the Commission are: (a) in violation of the Constitution of the United States; (b) in excess of the authority granted to the Commission under the Compact; (c) procedurally defective "to the detriment of any person;" or (d) arbitrary, capricious, or an abuse or clearly unwarranted exercise of discretion. Art. IV(o)(3).

As drafted, the Compact provides that the court of appeals "shall accord . . . an expedited review" to any Commission decision "relative to the designation of a host state." Art. IV(o)(2). The proposed amendment you have asked us to review would expand on the requirement for expedited review by providing as follows: "[I]f the Court does not rule within 90 days after a petition for review has been filed, the Commission's decision shall be deemed to be affirmed." We assume that the purpose of this amendment is to ensure that the court of appeals will expeditiously consider and rule on the designation of host states responsible for construction and operation of regional disposal facilities, so that the construction of such facilities can proceed as promptly as possible.[4] The effect

[2] The Commission also would exercise several other responsibilities, including approving the export or import of hazardous wastes not otherwise permissible under the Compact, accepting applications of other states to become members of the Compact, adopting a regional management plan for the disposal of low-level radioactive wastes, and overseeing implementation of the Compact. The Commission is given authority to hold hearings and to require testimony or other information from the party states, to intervene in judicial or administrative proceedings, and to impose sanctions on party states for violation of the Compact, including revocation of membership.

[3] The Compact does not define "final administrative decisions," nor does it state expressly that jurisdiction in the court of appeals to review such decisions is exclusive of the district court jurisdiction to review "all actions brought by or against the Commission." It does state, however, that the provision granting jurisdiction to the district courts "shall not alter the jurisdiction of the United States Court of Appeals for the District of Columbia Circuit to review the final administrative decisions of the Commission." Art. IV(n).

[4] Because the Compact negotiated by the states does not include this provision, the proposed amendment would in effect be a condition imposed by Congress on its consent to the Compact. Congress may attach binding conditions to its consent to the formation of an interstate compact, provided such conditions are otherwise within Congress' authority and not in contravention of any constitutional limits. *See, e g., Petty* v. *Tennessee-Mo. Bridge Comm'n*, 359 U S. 275 (1952); *Tobin* v. *United States*, 306 F.2d 270 (D.C. Cir. 1962), *cert. denied*, 371 U.S. 902 (1963). A state that objects to such conditions may, of course, withdraw from an interstate compact in accordance with its terms.

of this amendment would be to establish an outside limit of 150 days (sixty days for filing the petition for review and ninety days for the court's ruling) from the time of the Commission's determination to the end of review by the court of appeals. The amendment, however, would not just limit the time available to the court of appeals to rule on a petition for review; it would also effectively "affirm" any designation decision of the Commission not ruled on by the court within that time, regardless of whether the court had in fact reviewed the petition and determined that affirmance was warranted under the standards set forth in the Compact.

To our knowledge, this provision is virtually unprecedented. We are not aware of any comparable provision in statutes authorizing judicial review of administrative actions. The closest analogy we have found is the Speedy Trial Act, 18 U.S.C. §§ 3161–3174, which requires that federal criminal defendants be charged and tried within certain time limits.[5] If the time limits are not met, the charges against the defendant must be dismissed, either with or without prejudice.[6] The constitutionality of the Speedy Trial Act was upheld by the Fourth Circuit in *United States* v. *Brainer*, 691 F.2d 691 (4th Cir. 1982). As discussed below, however, we believe that the purpose and effect of the Speedy Trial Act differ significantly from the purpose and effect of the proposed amendment, and therefore that the *Brainer* decision does not answer satisfactorily the difficult constitutional questions presented by the amendment.

Our primary concern is that the proposed amendment would violate the constitutionally mandated separation of powers between the Legislative and Judicial Branches. "Basic to the constitutional structure established by the Framers was their recognition that 'the accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.'" *Northern Pipeline Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 57 (1982) (plurality opinion) (quoting *The Federalist* No. 47, at 300 (J. Madison) (H. Lodge ed. 1888)). Accordingly:

> [t]he Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure as nearly as possible, that

[5] The Speedy Trial Act requires, *inter alia*, that any information or indictment charging an individual with an offense be filed within 30 days from the date of arrest, and that the trial be commenced within 70 days of the filing of the information or indictment. 18 U.S.C. § 3161(a), (b), (c). The statute excludes from the computation of time several types of delay, including: delays resulting from other proceedings concerning the defendant; delays during which prosecution is deferred by agreement with the defendant; delays resulting from the absence or unavailability of the defendant or an essential witness; delays resulting from the mental incompetence or physical inability of the defendant to stand trial; delays resulting from the treatment of the defendant under 28 U.S.C. § 2902; and delays occasioned by the joinder of the defendant with a codefendant as to whom the time for trial has not run. 18 U.S.C. § 3161(h)(1)-(7). Also excluded are delays resulting from a continuance granted by any judge "if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." *Id.* § 3161(h)(8)(A).

[6] In determining whether to dismiss with or without prejudice, the court must consider three factors: the seriousness of the offense; the facts and circumstances of the case that led to the dismissal; and the impact of a reprosecution on the administration of the Speedy Trial Act and on the administration of justice. *Id.* § 3162(a)(2).

> each branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.

INS v. *Chadha*, 462 U.S. 919, 951 (1983); *see also Buckley* v. *Valeo*, 424 U.S. 1, 122 (1976).

The Constitution vests all federal judicial power "in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. Thus, "our Constitution unambiguously enunciates a fundamental principle that the 'judicial Power of the United States' must be reposed in an independent Judiciary." *Northern Pipeline*, 458 U.S. at 60 (plurality opinion). As Alexander Hamilton wrote in *The Federalist*, it is necessary for the Judiciary to remain "truly distinct from the Legislature and the Executive. For I agree that 'there is no liberty, if the power of judging be not separated from the legislative and executive powers.'" *The Federalist* No. 78, at 466 (C. Rossiter ed. 1961) (citation omitted). Thus, it is a violation of the separation of powers for the Legislative and Executive Branches to exercise judicial power, just as it is unconstitutional for the Judiciary to engage in lawmaking or executive functions.

The core of the judicial power, which the Legislative and Executive Branches may not invade, is the rendering of decisions in court cases, that is, the "application of principles of law or equity to [the] facts" of a particular case. *Vermont* v. *New York*, 417 U.S. 270, 277 (1974); *see also Williams* v. *United States*, 289 U.S. 553, 578 (1933); *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872); *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856). Certainly Congress has the constitutional authority to enact laws establishing the framework within which judicial decisions must be made. It has broad authority to prescribe rules of practice and procedure,[7] to define and limit jurisdiction,[8] and to limit remedies available to litigants.[9] In addition, Congress prescribes the substantive law that governs judicial decisions.[10] But once that framework has been established, only the courts themselves can render the actual decisions.

Separation of powers questions regarding the exercise of the judicial power have frequently arisen in other contexts, such as cases concerning the powers of non-Article III courts. *See Northern Pipeline*, 458 U.S. at 63–76 (plurality opinion). The amendment discussed here, however, presents a different — and as we have said, a virtually unique — separation of powers question. Under the proposed amendment, if the court of appeals failed to rule on a petition for

[7] *See, e.g., Hanna* v. *Plumer*, 380 U.S. 460, 472 (1965); *Palermo* v. *United States*, 360 U.S. 343, 353 n.11 (1959); *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 9 (1941); *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825).

[8] *See, e.g., Sheldon* v. *Sill*, 49 U.S. (8 How.) 441 (1850); *Cary* v. *Curtis*, 44 U.S. (3 How.) 236 (1845).

[9] *See, e.g., Yakus* v. *United States*, 321 U.S. 414 (1944); *Lockerty* v. *Phillips*, 319 U.S. 182 (1943); *Lauf* v. *E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938).

[10] *See, e.g., Vandenbark* v. *Owens Ill. Glass Co.*, 311 U.S. 538 (1941); *Carpenter* v. *Wabash Ry.*, 309 U.S. 23 (1940); *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 102 (1801).

review within the prescribed time limit, the Commission's decision would "be deemed to be affirmed." Such an affirmance would be tantamount to a judgment of the court of appeals and would accordingly have a legal status very different from a mere decision of the Commission.[11] Such an affirmance would plainly represent an exercise of the core judicial function of deciding cases. Yet it would derive not from any action taken by the Judiciary, but from an automatic decisionmaking mechanism created by legislative enactment. Therefore, in enacting this amendment, Congress would effectively be creating a mechanical substitute to do the work of the court of appeals. Because of the novelty of the proposed amendment and the consequent lack of judicial authority addressing the constitutionality of similar measures, any judgment about the amendment's constitutionality must proceed from first principles relating to the separation of powers. Nevertheless, we believe that this measure would be unconstitutional.

We do not believe our conclusion is inconsistent with the Fourth Circuit's decision in *United States* v. *Brainer*, holding that the time constraints and dismissal sanction of the Speedy Trial Act do not violate the separation of powers. The *Brainer* court assumed that "the application of existing law to the facts of a case properly before the courts is a judicial function which the legislature may not constitutionally usurp." 691 F.2d at 695. But the court analogized the challenged provisions of the Speedy Trial Act to:

> the host of other procedural requirements of unquestioned validity by which Congress regulates the courts of its creation — such measures as the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure, the Federal Rules of Evidence, and statutes prescribing who may sue and where and for what.

Id. at 696. The court added that "[s]tatutes of limitation provide perhaps the closest analogy." *Id.*

[11] In general, an affirmance by the court of appeals of a final administrative decision would bar relitigation of the same claims under the doctrines of res judicata and collateral estoppel. Because of the preclusive effect of an "affirmance," it is possible that an individual who had sought judicial review could mount a due process challenge to the judicial review provisions.

Congress may, of course, preclude or limit judicial review in cases involving statutory rights. *See, e.g.*, *Morris* v. *Gressette*, 432 U.S. 491 (1977); *Weinberger* v. *Salfi*, 422 U.S. 749, 761–62 (1975); *Johnson* v. *Robison*, 415 U.S. 361 (1974); *see generally Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967). An absolute bar against judicial review of constitutional claims, however, would raise difficult constitutional questions that have not been fully resolved by the Supreme Court. *See, e.g.*, *Weinberger* v. *Salfi*, 422 U.S. at 762 (stating that an interpretation that absolutely precluded review of constitutional claims "would have raised a serious constitutional question of the validity of the statute"); *Briscoe* v *Bell*, 432 U.S. 404, 414–15 (1977) (upholding absolute preclusion of judicial review of Attorney General's determination under the Voting Rights Act as within Congress' specific power to enforce the Fourteenth and Fifteenth Amendments). Thus, although Congress could preclude any judicial review of Commission determinations on statutory grounds and leave to the original jurisdiction of the district courts any constitutional challenges to such determinations, the proposed amendment does not pursue this course. Rather, the practical effect of an "affirmance," given the operation of res judicata, could well be to cut off an individual's right to litigate constitutional issues, which would, as we have said, raise difficult constitutional questions.

Whatever the merits of these inexact analogies may be in the context of the Speedy Trial Act, they have no force here. For example, we see no meaningful comparison for separation of powers purposes between a statute of limitations, which bars a party from bringing suit after the passage of a specified period of time, and the proposed amendment, which may result in the rendering by extra-judicial means of a decision in a case that is properly before the court of appeals. A statute of limitations, unlike the proposed amendment, does not create an automatic decisionmaking mechanism to take the place of a court. A better rationale for the result in *Brainer* is that mandatory dismissal under the Speedy Trial Act is necessary to remedy a violation of the criminal defendant's statutory right to a speedy trial — a right that has roots in the Sixth Amendment and that plays an important role in safeguarding the accuracy of the trial process. As the Supreme Court has recognized in cases involving the Sixth Amendment speedy trial guarantee, dismissal of the action is really "the only possible remedy" for deprivation of a right to a speedy trial. *Barker* v. *Wingo*, 407 U.S. 514, 522 (1972).[12] The proposed amendment, by contrast, does not appear designed to protect any particular substantive right (let alone any constitutional right), for it mandates the automatic affirmance of the Commission no matter what the Commission has decided. Although the proposed amendment demonstrates Congress' desire to ensure expeditious review of the Commission's designation decisions, affirmance of such decisions cannot be viewed in any sense as a "remedy" to redress injury to other parties from delay in completion of judicial review. It is not at all clear, for example, that parties who support the Commission's decision would necessarily be injured by any further delay in review, or that affirmance of the decision would alleviate any such injury.

Moreover, under the Speedy Trial Act, the court has discretion to dismiss the case either with or without prejudice, based on the court's evaluation of the reasons for, and effect of, the delay in the particular case. The choice whether to give the dismissal preclusive effect is therefore left to the courts, and the courts are required to conduct the sort of factfinding that is at the core of the judicial function. No such latitude is given the court of appeals under the proposed amendment; regardless of the circumstances and the merits of the petition for review, the Commission's decision is automatically deemed to be affirmed once the ninety-day period has run.

In *Brainer*, the court also considered a separate constitutional challenge to the Speedy Trial Act based on the time limits imposed by the Act — that those

[12] In *Strunk* v. *United States*, 412 U.S. 434, 438–40 (1973), the Court explained:

> By definition, such denial is unlike some of the other guarantees of the Sixth Amendment. For example, failure to afford a public trial, an impartial jury, notice of charges, or compulsory service can ordinarily be cured by providing those guaranteed rights in a new trial. The speedy trial guarantee recognizes that a prolonged delay may subject the accused to an emotional stress that can be presumed to result in the ordinary person from uncertainties in the prospect of facing public trial or of receiving a sentence longer than, or consecutive to, the one he is presently serving — uncertainties that a prompt trial removes. . . . In light of the policies which underlie the right to a speedy trial, dismissal must remain, as *Barker* noted, "the only possible remedy."

time limits, in and of themselves, "intrude upon the zone of judicial self-administration to such a degree as to 'prevent[ ] the [Judiciary] from accomplishing its constitutionally assigned functions.'" 691 F.2d at 698 (quoting *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977)). Although expressing some doubt about the existence and scope of the Judiciary's inherent power to administer its own docket, the court concluded that the Speedy Trial Act did not unduly intrude upon that power. *Id.* at 698. In reaching that conclusion, however, the court cited the considerable flexibility provided by the Act, including the ability of the courts to dismiss an action without prejudice, the exclusion of certain common types of delay from the time limit, and the authority of the courts to grant continuances, upon certain conditions, if "the ends of justice . . . outweigh the best interests of the public and the defendant in a speedy trial." *Id.*

There is no such flexibility built into the proposed amendment. Moreover, it may well be unreasonable in particular cases to require that the entire process of appellate decisionmaking be completed within ninety days. Ninety days is less than the time generally allowed under the Federal Rules of Appellate Procedure just for briefing a case.[13] We note that at the present time in the District of Columbia Circuit, the average case is not decided until almost seven months after the last brief is filed in the case.[14]

We do not believe that statutes prescribing a time limit for judicial decisions in particular types of cases are necessarily unconstitutional. *See, e.g.*, 28 U.S.C. § 1826(c) (imposing thirty-day limit for disposition of appeals under recalcitrant witness statute).[15] As the court noted in *Brainer*, the separation of powers inquiry must focus on the extent to which such time limits actually prevent the Judiciary from accomplishing its constitutionally assigned functions and on the justification for legislative intervention.[16] Without knowing how the time limit in question here would affect the ability of the District of Columbia Circuit to conduct its business, and without additional information about the need for and

[13] Under the Appellate Rules, the record must be filed within 40 days after service of the petition for review; the appellant must file his brief within 40 days after filing of the record; the appellee must file his brief within 30 days after service of the appellant's brief; and the appellant has 14 days after service of the appellee's brief to file a reply. *See* Fed. R. App. P. 17, 31.

[14] The Administrative Office of the United States Courts has informed us that as of June 1985, the average time in the District of Columbia Circuit from filing of the last brief to hearing or submission is 4.5 months, and the average time from hearing or submission to final disposition is 2.4 months.

[15] "The circuits are in general agreement that the passing of the 30-day period does not deprive an appellate court of jurisdiction." *United States* v. *Johnson*, 736 F.2d 358, 362 n.5 (6th Cir. 1984); *see also, e.g.*, *In re Grand Jury Proceedings (A Grand Jury Witness* v. *United States)*, 776 F.2d 1099, 1101–02 (2d Cir. 1985); *Melickian* v. *United States*, 547 F.2d 416, 417–20 (8th Cir.), *cert. denied*, 430 U.S. 986 (1977). *But see In re Berry*, 521 F.2d 179, 181 (10th Cir.) (dictum that 30-day rule is mandatory), *cert. denied*, 423 U.S. 928 (1975).

[16] The *Brainer* court stated:

> In determining whether the Speedy Trial Act disrupts the constitutional balance between Congress and the courts, "the proper inquiry focuses on the extent to which [the Act] prevents the [Judiciary] from accomplishing its constitutionally assigned functions." A considerable degree of congressional intervention in judicial administration is constitutionally permissible if such intervention is "justified by an overriding need to promote objectives within the constitutional authority of Congress."

691 F.2d at 697–98 (quoting *Nixon*, 433 U.S. at 443).

purpose of the proposed amendment, we cannot predict how that balance would be struck.

In sum, we believe that the proposed amendment raises serious constitutional problems arising from the doctrine of separation of powers. The most critical of those problems — that Congress would usurp the Judiciary's role in determining the outcome of particular cases — could be alleviated by deleting from the amendment the provision that if the court of appeals does not rule on a petition for review within ninety days of its filing, the Commission's decision "shall be deemed to be affirmed."

PHILLIP D. BRADY
Acting Assistant Attorney General
Office of Legislative and
*Intergovernmental Affairs**

* NOTE: This letter was drafted by the Office of Legal Counsel for the signature of the Acting Assistant Attorney General for the Office of Legislative and Intergovernmental Affairs. Congress subsequently granted its consent to the Compact, *see* Pub. L. No. 99-240, §§ 212, 227, 99 Stat. 1842, 1860, 1909-24 (1986) (codified at 42 U.S.C. § 2021d note), and the proposed amendment discussed herein became part of the Compact, *see* art. IV(o)(2), 99 Stat. at 1917.

Authority to Transfer Forfeited Property to the General Services Administration for Potential Sale to a Municipality

The Attorney General has authority under 21 U.S.C. §881(e)(3) to transfer to the General Services Administration real property forfeited to the United States Pursuant to the drug laws. Under 40 U.S.C. §484(k)(2), if GSA determines that the property is needed to carry out neither its own responsibilities nor the responsibilities of any other federal agency, it may assign the property to the Secretary of the Interior upon the Secretary's recommendation that the property be used as a public park. This statute also allows the Secretary to sell the land for public park or recreational purposes to a municipality. If warranted by the public benefit that would accrue from use of the land as a park or recreation area, the sales price might be so heavily discounted as to be normal.

December 19, 1985

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

I. Introduction and Summary

This memorandum responds to your request for our opinion on the following questions: (1) whether you have authority to transfer certain forfeited real property to the General Services Administration (GSA); and (2) whether, assuming that GSA and the Secretary of the Interior (Secretary) choose to exercise their discretion in certain statutorily authorized ways, the land may be sold at a discounted price to a county in Florida for use as a park.

As we understand the facts underlying this request, on March 16, 1984, agents of the United States Marshals Service (USMS) seized 167 acres of Florida land. The land was liable to forfeiture under 21 U.S.C. § 881(a)(6) because it represented "proceeds traceable to an exchange for a controlled substance." On June 14, 1984, a judicial decree of forfeiture was entered, ordering the USMS to deliver the property to the United States of America "for disposition according to law." *United States* v. *One (1) One Hundred Ninety-Seven Acre Parcel of Property Situation in Alachua County, Florida,* No. GCA-84-0027 (N.D. Fla. June 14, 1984). On August 21, 1984, the United States Attorney for the Northern District of Florida directed the transfer of the property from the USMS to GSA pursuant to the Controlled Substances Act, which permits the Attorney General to transfer forfeited property to GSA "for disposition according to law." 21 U.S.C. § 881(e)(3).[1]

[1] GSA, however, appears to have treated this disposition as a request that it sell the property of behalf of the Department of Justice pursuant to 21 U.S.C. § 881(e)(2). At the request of the Department, GSA has not yet publicly advertised the property.

The forfeited land is adjacent to a state park and is considered to be ecologically valuable. Alachua County, Florida has therefore expressed an interest in acquiring the land from the federal government at nominal cost for use as a park. The County, however, is willing to satisfy the liens and local back taxes that burden the land in the amount of approximately $100,000.

We conclude that 21 U.S.C. § 881(e)(3) authorizes the Attorney General to transfer forfeited property to GSA. If GSA determines that the property is needed to carry out neither its own responsibilities nor the responsibilities of any other federal agency, GSA may declare the property surplus and dispose of it under the Federal Property and Administrative Services Act of 1949 (FPASA), 40 U.S.C. §§ 471–544, a statute that vests GSA with considerable discretion over the final disposition of surplus property.

One of FPASA's provisions, *id.* § 484(k)(2), permits GSA to assign to the Secretary land that the latter recommends for use as a public park. If the Secretary does make such a recommendation and if GSA does assign the land to the Secretary, the Secretary has authority under § 484(k)(2)(B) to sell the land to Alachua County at a discounted price in consideration of the public benefits that will accrue to the citizens of the United States through the use of the land as a park.[2]

II. Analysis

A. Legal Authority to Classify Land as "Excess Property" Under the Federal Property and Administrative Services Act of 1949

Section 511(e)(3) of the Controlled Substances Act, 21 U.S.C. § 881(e)(3) provides: "Whenever property is forfeited under this subchapter the Attorney General may . . . require that the General Services Administration take custody of the property and remove it for disposition according to law."[3] The plain

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[2] We have no view, of course, concerning: (1) whether the Secretary should recommend that this Florida land be sold to Alachua County for use as a park; (2) whether GSA should exercise its discretion under § 484(k)(2) to assign the land to the Secretary; or (3) whether the Secretary should exercise his discretion under § 484(k)(2)(B) to determine that the land should be sold to the County at a discounted price reflecting the public benefit derived from use of this land as a park.

[3] Section 881(e) also provides that the Attorney General may:

> (1) retain the [forfeited] property for official use or transfer the custody or ownership or any forfeited property to any Federal, State, or local agency pursuant to [19 U.S.C. §1616];
>
> (2) sell any forfeited property which is not required to be destroyed by law and which is not harmful to the public; [or]
>
> * * *
>
> (4) forward it to the Drug Enforcement Administration for disposition (including delivery for medical or scientific use to any Federal or State agency under the regulations of the Attorney General).

None of these other authorities are available to transfer the land directly to Alachua County at a nominal price. The property may not be transferred directly to a state or local agency under § 881(e)(1) in this instance because no state or local enforcement agency directly participated "in any of the acts which led to the seizure or forfeiture of the property." *See* 19 U.S.C. § 1616(a)(2). The authority under § 881(e)(2) to sell forfeited property clearly carries with it the requirement that the property be sold in an arm's length transaction at a reasonable rather than a below-market price. Section 881(e)(4) is inapplicable by its terms. We therefore believe that § 881(e)(3) provides the only means by which Alachua County may legally receive this land at a discounted price.

meaning of this provision is that the Attorney General may transfer forfeited property to GSA for disposition pursuant to any legal authority applicable to the property.[4]

One such authority is the FPASA, which vests GSA with discretion to dispose of "surplus property" in a variety of ways. 40 U.S.C. § 484. The FPSA defines "surplus property" as "excess property not required for the needs and discharge of the responsibilities of all Federal agencies, as determined by [GSA]." *Id.* § 472(g). "Excess property," in turn, is defined as "any property under the control of any Federal agency which is not required for its needs and the discharge of its responsibilities, as determined by the head thereof." *Id.* § 472(e). Accordingly, a two-step process is required before property may be disposed of as surplus under the FPASA. First, the head of the agency that controls the property must declare it excess with respect to the needs of the agency. GSA then must determine that the property is excess with respect to the needs of other federal agencies.

We conclude that GSA, which presently controls the forfeited land, may designate it as excess property under 40 U.S.C. § 472(e) if it determines in the exercise of its discretion that the property is not required for the needs of GSA or the discharge of its responsibilities. Nothing in the FPASA nor, to our knowledge, in any other statute, prevents forfeited property from being classified as "excess" property, assuming that it otherwise meets the statutory definition of "excess."[5]

GSA, however, in both oral and written communications with the Department, has stated that in its view, forfeited property cannot be classified as excess property for purposes of disposal under the FPASA.[6] The only rationale

[4] The legislative history of this provision is wholly consistent with its plain language. *See* H.R. Rep. No. 1444, 91st Cong., 2d Sess. 56 (1970) (stating that the section permits the Attorney General, at his option, to dispose of forfeited property in a variety of ways).

[5] The Comprehensive Crime Control Act of 1984 established a Department of Justice Assets Forfeiture Fund into which "[t]here shall be deposited . . . all amounts from the forfeiture of property under any law enforced or administered by the Department of Justice remaining after the payment of expenses for forfeiture and sale authorized by law." 28 U.S.C. § 524(c). The legislative history of the 1984 Act discusses only two options available to the Attorney General with respect to forfeited property: to retain the property or sell it. *See* H.R. Rep. No. 1030, 98th Cong., 2d Sess. 1940 & n.16 (1984). Therefore, an argument could be constructed from the legislative history and structure of the 1984 Act that Congress understood that the Department of Justice would sell at market value any forfeited property not retained.

The forfeiture provisions of the 1984 Act, however, apply only to property that was in the custody of the Department of Justice on or after October 12, 1984, the effective date of these provision. *See* 28 U.S.C. § 524(c)(7). The forfeited land in Alachua County, however, was transferred to the custody of GSA pursuant to § 881(e)(3) on August 21, 1984, and thus is not covered by these provisions. Moreover, even if the property had been transferred after the effective date of the forfeiture provisions, we would not be inclined to conclude that it could not be transferred under § 881(e)(3). In the 1984 Act, Congress did not explicitly repeal the clear authority under § 881(e)(3) for the Attorney General to transfer the property to GSA for disposition under any applicable legal authority, including authorities such as 40 U.S.C. § 484(k)(2), even if the transfer does not bring the Department market value for the forfeited property. Accordingly, we believe that it is wholly legal for the Attorney General to continue to exercise his authority under § 881(e)(3), particularly in light of the venerable doctrine that repeals by implication are disfavored. *See United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976).

[6] In support of its position, GSA cites the "Agreement Between United States Marshals Service and General Services Administration" (June 24, 1985) and a document entitled "Real Property Forfeitures Questions and

Continued

offered by GSA for this analysis is that forfeited property is not acquired for the mission of the Department, but in rather connection with law enforcement, and it therefore cannot be deemed excess property.

An agency is entitled to deference in its interpretation of a statute it administers when the statue is unclear. *See Udall* v. *Tallman,* 380 U.S. 1, 16 (1965). GSA's interpretation of "excess property," however, is at odds with the plain language of the FPASA. The definition of excess property does not focus on the means by which or the purpose for which the property at issue was originally acquired, but instead considers only whether the property is required for the needs and the discharge of responsibilities of an agency. If the forfeited property is not so required, therefore, it may be classified as excess. GSA has not cited, and we have not found, any legislative history of the FPASA that casts doubt on this plain language.[7]

For the foregoing reasons, we conclude that the Attorney General has the statutory authority to transfer the land to GSA pursuant to § 881(e)(3) and that the property may then be classified as "excess property" by GSA.[8]

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[6] (. . . continued)
Answers." GSA apparently uses the latter document in connection with the training of employees involved in this area. The first two questions and answers read·

> Q. Is seized or forfeited property disposed of under the Federal Property and Administrative Services Act of 1949, as amended (FPASA)?
>
> A. No. Property is seized and forfeited pursuant to the Comprehensive Forfeiture Act of 1984. Certain properties are then disposed of pursuant to our memorandum of understanding with the U.S. Marshals Service.
>
> Q. Is forfeited property excess or surplus?
>
> A. See previous question and answer.

Another one of the questions and answers seems to address specifically the question whether forfeited property can be disposed in a public discount conveyance of the kind contemplated in 40 U.S.C. § 484(k)(2)(B):

> Q. Is forfeited property surplus for the purpose of public discount conveyances?
>
> A. No, it is not surplus Federal real property within the context of 1949 FPASA. Additionally, the USMS Agreement requires that the property will be sold to provide the maximum monetary return to the government.

We believe that the agreement between GSA and the USMS controls only the procedures for disposition of properties that the Department of Justice decides to sell according to 21 U.S.C. § 881(e)(2), and is irrelevant to the disposition of properties transferred by the Department of Justice to GSA pursuant to § 881(e)(3).

[7] The definitions of "excess property" and "surplus property" were contained in the original Act. *See* Pub. L. No. 82–288, § 3, 63 Stat. 377, 378–79 (1949). The only legislative history pertaining to these definitions simply repeated their language. *See* H.R. Rep. No. 670, 81st Cong., 1st Sess. 8 (1949). The definitions have remained unchanged in all subsequent amendments of the statute and have not been the subject of any comment in the legislative history to these subsequent amendments.

[8] We note, however, that the current guidelines concerning seized and forfeited property do not appear to contemplate disposition to GSA under 21 U.S.C. § 881(e)(3). These guidelines provide, in pertinent part:

> [Section 881(e) of 21 U.S.C.] authorizes the Attorney General to dispose of forfeited property by (1) retaining the property for official use; (2) transferring custody or ownership of the property to any Federal, State or local agency pursuant to [19 U.S.C. §1616]; or (3) placing the forfeited cash or proceeds of sale of forfeited property in an appropriation called the Department of Justice Assets Forfeiture Fund . . . . A decision of the Attorney General regarding placing the forfeited property to another agency is not subject to judicial review.

Attorney General's Guidelines on Seized and Forfeited Property, 50 Fed. Reg. 24,052, 24,052 (1985).

When the United States Attorney transferred this property to GSA on August 21, 1984, however, the Department, had not yet promulgated internal guidelines concerning the disposition of forfeited property. We therefore believe, assuming that the United States Attorney was acting as the Attorney General's delegate, that his transfer of property in August 1984 cannot be seen as inconsistent with any guidelines extant at that time.

B. Authority of the Secretary of the Interior to Sell Land to a Municipality at a Discounted Price Under 40 U.S.C. § 484(k)(2)(B)

Once the land is classified as excess property, GSA would have to determine that the property "was not required for the needs and the discharge of responsibilities of all federal agencies" before the property can be classified as "surplus." *See* 30 U.S.C. § 472(g). Once the land has been classified as surplus property, it may be disposed of under 40 U.S.C. § 484. Because a variety of disposal options are available under the section,[9] GSA undertakes an analysis to determine "the estimated best and highest use" of the property. 41 C.F.R. § 101–47.303–1. GSA then notifies certain public agencies, including the Department of the Interior, of the potential availability of the property. *See id.* § 101–47.303–2.

The Secretary of the Interior may then submit an application to GSA, recommending that the land be used as a public park or recreation area. *Id.* § 101–47.308–7. On receipt of such an application, GSA is authorized under 40 U.S.C. § 484(k)(2) to assign the property for use as a park or recreation area. The Secretary, in turn may "sell or lease" the land "for public park or recreational purposes to any State, political subdivision, instrumentality or municipality" under § 484(k)(2)(A).[10] Although the Secretary may not make a gift of the property to Alachua County,[11] he is authorized to sell or lease the land to the County at a discounted price. Section 484(k)(2)(B) provides:

> In fixing the sale or lease value of property to be disposed of under subparagraph (A) of this paragraph, the Secretary of the Interior shall take into consideration any benefit which has accrued or may accrue to the United States from the use of such property by any such State, political subdivision, instrumentality, or municipality.

It is not clear from the language of the statute whether the Secretary is authorized to sell the land at a wholly nominal price. The legislative history of § 484(k)(2)(B) makes clear, however, that Congress intended to authorize the

[9] *See, e.g.,* 40 U.S.C. § 484(e) (authorizing public sale of surplus property); *id.* § 484(h) (authorizing transfer to the Department of Agriculture for price support reasons); *id.* § 484(k)(1) (authorizing transfer to the Department of Education for educational purposes).

[10] Section 484(k)(2) provides in part:

> Under such regulations as he may prescribe, the Administration [of General Services] is authorized, his discretion, to assign to the Secretary of the Interior for disposal, such surplus real property, including buildings, fixtures, and equipment situated thereon, as is recommended by the Secretary of the Interior as needed for use as a public park or recreation area.
>
> (A) Subject to the disapproval of the Administrator within thirty days after notice to him by the Secretary of the Interior of a proposed transfer of property for public park of public recreational use, the Secretary of the Interior, through such officers or employees of the Department of the Interior as may designate, may sell or lease such real property, including buildings, fixtures, and equipment situated thereon, for public park or public recreational purposes to any State, political subdivision, instrumentalities thereof, or municipality.

[11] Section 484(k)(2)(A) clearly requires the sale or lease of property to be used as a public park. In contrast, GSA is authorized under the FPASA to donate surplus federal property for certain other purposes. *See, e.g.,* 40 U.S.C. § 484(k)(3) (permitting GSA to donate surplus property to states for use as historic monuments).

Secretary to convey land to localities for use as public parks at discounts approaching one-hundred percent. Section 484(k)(2)(B) was added to the FPASA by the Land and Water Conservation Fund Act Amendments of 1970, Pub. L. No. 91–485, § 2, 84 Stat. 1084, 1084–85. At the time the 1970 amendments were enacted, statutory authority already existed to permit a public use discount of fifty percent on surplus land sold for park and recreation purposes. The House Report accompanying the 1970 amendments states that this discount was inadequate. *See* H.R. Rep. No. 1225, 91st Cong., 2d Sess. 5 (1970). The House Report notes that the "intangible value which attaches to public outdoor recreation . . . cannot be measured in monetary terms or comparative appraisals." *Id.* at 6. It also quotes approvingly the recommendation of the Outdoor Recreation Resources Review Committee: "Surplus Federal Land suitable for outdoor recreation purposes should be made available to State and local governments at no cost, with appropriate reservation clauses." *Id.*

Thus, although the language of § 484(k)(2)(B) requires that the Secretary sell the land for some price and does not authorize an outright donation, it is clear from the legislative history of the provision that Congress contemplated that the price might be so heavily discounted as to be nominal if warranted by the public benefit that would accrue form use of the land as a park or recreation area.[12]

Conclusion

We conclude that the Attorney General has authority to direct GSA to take custody of the forfeited land in Florida under 21 U.S.C. § 881(e)(3). We also believe that GSA is authorized to dispose of the property as surplus and assign it to the Secretary of the Interior on the latter's recommendation that the land be used as a public park. Finally, the Secretary has authority under 40 U.S.C. § 484(k)(2)(B) to sell the land at a discounted price to Alachua County, Florida for use as a public park.

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[12]As we understand the facts of this case, the requirement that the Secretary receive at least a nominal price for land sold pursuant to § 484(k)(2) will be satisfied by the County's discharge of the liens and back taxes on the land. There does not seem to be any legal obstacle to accepting the amount necessary to satisfy these liabilities as the purchase price of the land. Our opinion that such a transaction would satisfy the requirements of § 484(k)(2)(B), of course, does not constitute a recommendation that the Secretary pursue this course of action.