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Coverage of the Smithsonian Institution
by certain Federal Statutes.

You have asked us for our opinion as to whether the Smithsonian Institution is required to comply with the reporting, release, and safeguard procedures imposed on agencies of the government of the United States by the Freedom of Information Act (5 U.S.C. §552 as amended by P.L. 93-502), the Federal Advisory Committee Act (5 U.S.C. App. I §3(3)), and the Privacy Act (P.L. 93-579). Although not free from doubt, it is our opinion that the Smithsonian is not an agency of the government of the United States of the type which Congress intended to fall within the coverages of those three statutes, and while the present voluntary compliance by the Institution with the spirit of the Acts is commendable in the spirit of public responsibility, it is not mandated by law. The Smithsonian is an establishment created by Federal statutes in order to fulfill a basic trust obligation originating in the will of James Smithson. But it is so uniquely distinctive a fusion of public and private cooperation and of joint action by all three traditional branches of our government that it seems fairly evident that the Congress could not have meant it to be treated as a traditional agency covered by the three statutes.

This conclusion is supported not only by examination of distinctive features of the Smithsonian itself but by analysis of those provisions of the three statutes which restrict their coverage to defined types of governmental agencies, a definition which ought not to be interpreted to include the Smithsonian. There is as well a considerable likelihood that each

of the three statutes is intended to affect only agencies falling within the traditional bounds of the Executive branch of government, while the Smithsonian is confined to none of the three basic subdivisions.

I.

Each of the Acts in question applies only to agencies of the United States government. In each case the term "agency" is defined by reference to the basic definition of that term included in the Administrative Procedure Act (5 U.S.C. § 551(1)). The APA in the cited section defines an "agency" as:

> [E]ach authority of the government of the United States, whether or not it is within or subject to review by another agency, but does not include:
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> A. The Congress;
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> B. The courts of the United States;
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> C. The Government of the Territories or Possessions of the United States;
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> D. The Government of the District of Columbia. . . . (Emphasis added.)

The APA definition is the sole test of coverage under the Federal Advisory Committee Act (5 U.S.C. App. I §3(3)), while both the Freedom of Information Act and the Privacy Act include additional guidance introduced by 1974 amendments to the FOIA and adopted by the Privacy Act.

> For purposes of this . . . [Act], the term "agency" as defined in section 551(1) of this title, includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of Government (including the Executive Office of the President), or any independent regulatory agency. 5 U.S.C. §552(e).

It is clear that the basic definition of covered agencies for all three acts continues to be that drawn in the APA, an "authority of the government of the United States." Any body which cannot be so considered must fail the threshold test of coverage under each statute, and is therefore excepted from their requirements. Examination of the legislative history of that original definition also makes it clear that the term "authority" was chosen as a matter of nomenclature rather than of substance, necessitated by variances in the practice of the federal government in naming its operational branches. The Senate Judiciary Committee Print of June 1945, Document No. 248, 79th Congress, addresses this point rather directly:

> It is necessary to define agency as "authority" rather than by name or form, because of the present system of including one agency within another or of authorizing internal boards or "divisions" to have final authority. "Authority" means any officer or board, whether within another agency or not, which by law has authority to take final and binding action, with or without appeal, to some superior administrative authority.

The same view is taken by the first authoritative Executive branch interpretation of the APA, a view which has been uniformly adopted by the Executive since that date. The Attorney General's Manual on the Administrative Procedure Act, 1947, states (p. 9):

> This definition [of agency] was adopted in recognition of the fact that the Government is divided not only into departments, commissions, and offices, but that these agencies, in turn, are further subdivided into constituent units, which may have all the attributes of an agency insofar as rule-making and adjudication are concerned.

It is certainly permissible to conclude from these statutory definitions of "agency" that they were intended to apply solely to agencies within the Executive branch of government.

The APA, after all, is an Administrative Procedure Act rather than a "Governmental" one, and the basic definition of agency expressly excludes the Congress and courts of the United States from its coverage. That argument is considerably strengthened by the language and history of the explanatory 1974 amendments to the FOIA and incorporated in the Privacy Act as they relate to the meaning of the term "agency."

When those amendments were first introduced in the Senate, they defined "agency" to include, in addition to units covered by the APA definition, "the United States Postal Service, the Postal Rate Commission, and any other authority of the Government of the United States which is a corporation and which receives any appropriated funds." See S. Rep. No. 93-854, 93d Cong., 2d Sess. 43 (1974). The Senate Report noted that the Postal Service had taken the position that without specific inclusionary language, amendments to the FOIA would not apply to it. Thus the Committee felt it necessary (Id. at 33)--

> [t]o assure the F.O.I.A.['s] application to the Postal Service and also to include publicly funded corporations. . . . [Therefore] section 3 incorporates an expanded definition of agency to apply under the F.O.I.A.

The much broader definition which was ultimately adopted came in the counterpart House bill. The House Report notes that (H.R. Rep. No. 93-876, 93d Cong., 2d Sess., p. 8 (1974)):

> the definition of "agency" has been expanded to include those entities which may not be considered agencies under section 551(1). . . but which perform governmental functions and control information of interest to the public.

And the Conference Report explains that the new definition of "agency" was intended to include both those encompassed by the APA definition and other operating entities of the Government then existent or to be created in the future. The criteria set out, both in the words of the 1974 amendments themselves ("or other establishment in the executive branch of the Government") and in their history, lend considerable credence to

the contention that an authority must be within the Executive branch in order to be covered by the three Acts.

If that is the case, the Smithsonian clearly is not within their coverage. It is readily apparent that the Smithsonian, created by Act of Congress as "an establishment" of the United States (see the charter of the Smithsonian, 20 U.S.C. §41 et seq.) but under no executive power of control or appointment whatever, is not within the Executive branch. Nor can it by any stretch of the legal imagination be considered "an independent regulatory agency." The Smithsonian, headed by a Board of Regents, six of whose members are drawn from the Legislative branch, nine from the general public, one from the Judicial branch, and only one from the Executive branch,1/ is not an executive agency of the government. No member of the Smithsonian's Board of Regents is appointed by the President; of its seventeen members two hold office ex officio and fifteen are appointed by the Congress. But if the Smithsonian were an "executive agency" this mode of appointment might raise serious constitutional questions, in the sense that the Congress cannot appoint executive officers of the United States (Constitution of the United States, Article II, Section 2, clause 2). That being so it could be argued that the Smithsonian is either an arm of the Congress itself (and by definition not an agency) or a body entirely separate from the government of the United States utilized to fulfill trust obligations created by an English will and authorized by an English Court of Chancery. Under either of these interpretations the Smithsonian would not appear to qualify as "an authority of the government of the United States."

Yet there is a still more compelling argument leading to the conclusion that the Smithsonian is not included within the three statutes in question. The nature of the Smithsonian Institution is so widely different from the kinds of agencies otherwise included that it is apparent Congress could not have intended to place it into the same category. This argument is addressed in Part II of this memorandum.

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1/ The Vice President, when he acts as President of the Senate, presumably is an officer of the Legislative branch.

II.

A. Although the definition of agency in the APA is not wholly satisfactory as written it has received perhaps the most exhaustive and detailed consideration by scholars and courts of any section of that Act. See, for example, K. Davis, Administrative Law Treatise, §1.01 (1958); Freedman, Administrative Procedure and the Control of Foreign Direct Investment, 119 U. Pa. L. Rev. 1 (1970); Soucie v. David, 448 F. 2d 1067, 1073 (D.C. Circuit 1971).

The definition which has met with the most general acceptance is the one developed by Freedman--

> an administrative agency is a part of government which is "generally independent in the exercise of [its] functions" and which "by law has authority to take final and binding action" affecting the rights and obligations of individuals, particularly by the characteristic procedures of rule-making and adjudication. Freedman, supra, at 9.

Soucie adopts that definition enthusiastically, and is itself mentioned with approval in the House Reports on the 1974 amendments. Most cases seem to adopt both the "separability" test stated above and an emphasis on "substantial independent authority" possessed by the agency in question. See, e.g., Grumman Aircraft Engineering Corp. v. Renegotiation Board, 482 F. 2d 710, 714-5 (D.C. Cir. 1973), and cases there cited. In some other cases the focus necessarily shifts from the kind of governmental authority possessed by the asserted agency to whether that body is in fact an instrumentality of the government at all.

That was precisely the question in Lombardo v. Handler (Civ. No. 74-431, U.S.D. Ct., D.C. July 28, 1975), where the court was faced with the question whether the National Academy of Sciences was covered by these same three statutes. The court there found that the traditional "independent authority" test, while helpful, was not dispositive in cases where the very question was whether the asserted agency was governmental in the first instance. That court, and others which have

considered the same question, found that an examination of the nature of the body concerned and its relation to the operations of government was necessary to determine whether it, too, was "of the Government of the United States."2/ Ultimately the test was whether the organization performed governmental functions of the administrative sort as a part of government. A brief review of the origin, structure, and operations of the Smithsonian Institution plainly demonstrates that it is not the sort of instrumentality of the United States which the Congress intended to include, either as "administrative" within the APA and FACA, or as "executive" or "regulatory" under the 1974 amendments to the FOIA and their incorporation in the Privacy Act.

B. The Smithsonian Institution is an establishment constituted for the increase and diffusion of knowledge among men. 20 U.S.C. §41. The Institution began with a bequest by an Englishman, James Smithson, to the United States for those purposes. The bequest was accepted and has since been treated by the United States as a solemn testamentary trust independent of any traditional branch or role of government but operated as a responsibility of the Nation. Management of the Institution is vested in a Board of Regents drawn from among all three branches of the government, but with a majority of members from the general public. The Chief Justice of the United States, who serves as Chancellor of the Institution, and the Vice President are by law members of the Board of Regents. All other members are appointed by the Congress. 20 U.S.C. §43. The Institution possesses substantial trust funds, part of which are held in trust for it by the Treasury, derived both

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2/ See, e.g., Washington Research Project, Inc. v. Department of Health, Education, and Welfare, 504 F. 2d 238 (D.C. Cir. 1974). Even where the defendant organization is concededly an "agency" for most cases its performances of "private" or "non-agency" functions in others may prevent release of information acquired by it in the non-agency context. Soucie, supra (Office of Science and Technology as both agency and presidential staff); Sharp v. FDIC (D.C.D.C., Civil No. 75-1428, Oct. 15, 1975) (FDIC-in role as State court-appointed receiver bank - not required to release confidential financial records of bank in receivership in response to an FOI request.)

from James Smithson's original bequest and from the subsequent generosity of other private donors. It employes many persons who are compensated entirely from the trust funds of the Institution, including its chief executive officer, the Secretary, and it has long carried out many activities with solely private funds, using no appropriated monies or federal employees.

While the Smithsonian has always been an instrumentality of the United States since it is established to fulfill the nation's trust obligations, it has also been long recognized as distinct from the ordinary governmental structure of the nation. The Senate Committee Report supporting the original legislation 3/ to establish the Institution recognized this special nature of the Institution when discussing how the trust funds were to be handled:

> The fund given to the United States by Mr. Smithson's will, is nowise, and never can become, part of their revenue; they cannot claim or take it for their own benefit; they can only take it as trustees, to apply to the charitable purpose for which it was intended by the donor. (Quoted in Rhees, The Smithsonian Institution, at 139 (1879)).

The same point is repeated, with great authority, throughout the history of the Institution. Chief Justice Taft in 1927 said:

> I must make clear, gentlemen, that the Smithsonian Institution is not, and has never been considered a government bureau. It is a private institution under the guardianship of the Government.

Another Senate Report, issued in 1855 in connection with the unsuccessful effort to compel the Smithsonian to become a major national library as an operating organ of government,

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3/ 5 Stat. 64.

notes that the trust monies are not to be used for the governmental purposes of the United States, but in trust to apply the increase and diffusion of knowledge among mankind generally, Rhees, supra, pp. 563-4.

Two other Chief Justices of the United States, on separate occasions, also emphasize the unique character and independence of the Smithsonian. Chief Justice Stone opposed extension of mandatory federal retirement coverage to employees of the Smithsonian who were compensated by use of trust funds because it

> might jeopardize the private status of the Smithsonian Institution . . . and might have the effect of invalidating the Trusts which are administered for the benefit of those institutions. Those Trusts contemplate that the private character of the Smithsonian Institution and the National Gallery of Art shall continue and that certain of their employees shall remain private employees. (Letter to Civil Service Commission, June 25, 1943.)

Chief Justice Vinson noted that

> absolute control over the appointment, compensation, direction and removal of the trust fund employees of the Smithsonian Institution is vested in the Regents of the Institution by the . . . Charter. (Letter to Chairman, Civil Service Commission, May 4, 1953.)

Thus, in his view Smithsonian trust fund employees were not subject to Civil Service Commission regulation as federal employees.

The Institution is an establishment unique unto its own terms, created to further private ends which coincide with public desires. Its range of activity is immense, covering the entire spectrum of educational, scientific, and cultural activities. Its unique blend of public and private expertise and resources enables the Smithsonian to undertake plans and

actions which would have been beyond the authority or pocketbook of either alone. As the trust instrumentality of the United States the Institution has created a repository of knowledge and beauty unique in the history of mankind, freely available for public inspection and study. Under its "private" trust mandate the Smithsonian has sponsored and undertaken the development of musical, literary and scientific efforts which might well have been outside the authority of a purely governmental agency. Acting with both public and private support, the Smithsonian has preserved a view of our past and a vision of our future with special value to all mankind, whether of American citizenship or not.

This mixture of resources and accomplishments is one without counterpart in the United States, and cannot lightly be forced into a mold meant to accommodate the commonplace instruments of day-to-day federal administration and regulation. The Smithsonian performs none of the purely operational functions of government which have been given such significant weight in determinations of agency status in other cases. It neither makes rules of general application binding the public nor adjudicates disputes of that character. It issues no orders. It regulates no industry or profession. Although created by the United States as an instrument of national trust, it plays no part in the process of administration, regulation, and government. It is not a "Government corporation," or a "Government-controlled corporation," and--with a governing body headed by the Chief of the Judicial branch and largely appointed by the Legislative branch--cannot be viewed as an establishment within the Executive branch of government. It neither functions under the President nor is it accountable to him. In sum, the Smithsonian Institution is not a body of the kind described in the three Acts in question.

The strength and thrust of those three statutes is their concept of public accountability and public responsibility in the operation of federal agencies. They were not intended to be applied to instrumentalities of the United States which do not fill an administrative, operational, regulatory, or executive role within the government. Thus, the Smithsonian Institution is not within their mandatory coverage.