



Office of the  
Assistant Attorney General

Washington, D.C. 20530

MAR 2 1984

MEMORANDUM FOR WILLIAM H. TAFT, IV  
Deputy Secretary of Defense

Re: Effect of INS v. Chadha on 44 U.S.C. § 501,  
"Public Printing and Documents"

This memorandum responds to your written request 1/ for our opinion as to the effect of Immigration & Naturalization Service v. Chadha, 103 S. Ct. 2764 (1983), upon the Public Printing and Documents statute, 44 U.S.C. § 501. 2/ You

1/ Your request was dated Oct. 12, 1983, when you were occupying the position of General Counsel of the Department of Defense. We are forwarding a copy of this response to Leonard Niederlehner, Acting General Counsel of the Department of Defense.

2/ Section 501 provides:

All printing, binding, and blank-book work for Congress, the Executive Office, the Judiciary, other than the Supreme Court of the United States, and every executive department, independent office and establishment of the Government, shall be done at the Government Printing Office, except --

(1) classes of work the Joint Committee on Printing considers to be urgent or necessary to have done elsewhere; and

(2) printing in field printing plants operated by an executive department, independent office or establishment, and the procurement of printing by an executive department, independent office or establishment from allotments for contract field printing, if approved by the Joint Committee on Printing.

Printing or binding may be done at the Government Printing Office only when authorized by law.

asked, specifically, whether the Department of Defense must abide by the provision of § 501(2) which seems to condition the printing of documents outside the Government Printing Office (GPO) and the purchasing of equipment and supplies related to such printing on the approval of the congressional Joint Committee on Printing (JCP). If the provision regarding committee approval is unconstitutional under Chadha, and therefore such approval may not be required, you asked us to consider further whether the statutory approval device either acts now as a "report and wait" requirement, or, on the other hand, eliminates entirely the Department's authority to perform those functions heretofore requiring JCP approval. For the reasons set forth below, we conclude that the JCP's committee approval mechanism under § 501(2) involves an unconstitutional exercise of legislative power. That requirement is, however, severable from the flexibility implicit in the statute under which Executive Branch agencies conduct field-plant printing. Thus, it is our judgment that after Chadha the Department of Defense continues to have the power to conduct printing activities outside the GPO to the extent permitted by its authorization and appropriations legislation and considerations of efficiency, without first having to obtain the approval of the JCP.

## I. Constitutionality

### A. The Statute

Section 501(2) of Title 44 provides (see note 2, supra) that all executive, congressional, and judicial printing must be done at the GPO, except printing in field plants operated by executive departments or independent offices, "if approved" by the JCP. We read the language of § 501(2) to mean that executive agencies may proceed with their authorized field-plant printing plans, subject to some form of approval or disapproval by the JCP. This provision does differ in language from statutory provisions which specifically state that an action may be taken unless disapproved by a congressional committee. In our view, however, the effect of the difference between the phrase "if approved" and phrases such as "if not disapproved" is not necessarily constitutionally significant under the reasoning of Chadha. Each specific provision must be analyzed in its particular context and history. As discussed below, the significant issues are whether the act of

approval under the statutory mechanism constitutes a legislative act and whether it is exercised according to constitutionally specified procedures.

For purposes of our analysis, it is not necessary to engage in a lengthy analysis of whether § 501(2) embodies an affirmative grant of authority for executive performance of field-plant printing or some form of added restraint on existing executive authority. Read in conjunction with other statutes expressly or implicitly authorizing printing by the Executive of information, guidance, regulations, instructions or other forms of communication which are absolutely necessary to execution of the laws, § 501(2) at the very least relieves the tension which would otherwise exist between these authorizing statutes and § 501's facially strict confinement of all Executive Branch printing to the GPO. We do not believe that casting § 501(2) as a "grant of authority" or a "limitation of authority" would alter the result of this inquiry in any meaningful way. 3/

#### B. Analysis

We address first the question whether the JCP approval device is unconstitutional under INS v. Chadha. In that case, the Supreme Court enunciated a broad affirmation of the constitutional principle that all exercises of legislative power by the Congress must entail passage by each House of Congress and presentment to the President for signature. 103 S. Ct. at 2782-84. The Court's opinion emphasized the critical importance of the separation of powers, which is much more than "'simply an abstract generalization in the minds of the Framers.'" 103 S. Ct. at 2781, quoting Buckley v. Valeo, 424 U.S. 1, 124 (1976). The Court underscored the point that the structure of Articles I and II of the Constitution delineates both the delegated functions of the Legislative and Executive Branches and the mechanical and procedural constraints upon the exercise of those functions.

The fundamental structural principles were designed, among other things, to require that the exercise of "legislative power" follow precise guidelines. Therefore, the validity of an action of Congress, particularly an action of only a

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3/ In this respect § 501 differs from statutes in which the only source of authority for particular executive actions lies in a provision containing a legislative veto device.

portion of Congress, depends upon whether that specific action is an exercise of legislative power such that the procedural requirements of Article I apply. 103 S. Ct. at 2784. The starting point for such an inquiry is a recognition that when the legislature acts in any manner, it presumptively exercises legislative power. Hampton & Co. v. United States, 276 U.S. 394, 406 (1928). The legislative nature of an action is further determined not by its form, but by its overall character and effect. The Chadha Court declared that an action by Congress or a portion of it is legislative if it has "the purpose and effect of altering the legal rights, duties and relations of persons, including . . . Executive officials . . ., outside the legislative branch." 103 S. Ct. at 2784.

The contemplated action under consideration here is the exercise of the committee approval power set out in § 501(2). Examination of this provision and the manner in which it operates indicates that committee approvals or disapprovals of executive decisions are essentially legislative, both in purpose and in effect. Under the statute, the JCP is purportedly authorized, by approving executive decisions, to permit a deviation from § 501's general mandate that all printing be done at the GPO. The JCP's power to disapprove printing plans has the effect of overruling affirmative authorization for field-plant printing that may be found in various departments' authorization and appropriations legislation. 4/ Simply by exercising its claimed power to withhold approval of a field-plant printing operation, this committee of Congress would modify the effects of prior statutes passed through the plenary legislative process and alter an otherwise permissible Executive Branch decision regarding how to execute its responsibilities. 5/ Without the authority purportedly

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4/ The Department of Justice, for example, includes field-plant printing costs in its budget estimate among "Object Class Distributions," which are then incorporated by Congress into a Working Capital Revolving Fund appropriation. See e.g., Pub. L. No. 98-166, 97 Stat. 1080 (1983).

5/ Similarly, § 501(1) purportedly enables the JCP, by itself, to create exemptions from the legislative general legal requirement that all printing be done at the GPO. Although it does

[Footnote continued]

granted to the committee by § 501(2), Congress could reverse the Executive's decision, if at all, only by legislation revising the law or laws granting the Executive the power to proceed. "There is no provision allowing Congress to repeal or amend laws by other than legislative means pursuant to Art. I." Chadha, 103 S. Ct. at 2785 n.18.

Additionally, the approval clause of § 501(2) purports to empower the committee to authorize or overturn individual printing decisions of Executive Branch officials acting pursuant to delegated statutory authority. It attempts to place the JCP in the midst of the day-to-day decisionmaking functions of an executive department regarding how to implement the department's statutory duties. Thus a committee of Congress, not an entity in the Executive Branch, and not exercising power in the only way Congress may exercise it, is ostensibly permitted by itself to exercise the legislative function of altering the rights and relations established by decisions of executive officials in abrogation of the constitutional scheme.

A final inquiry instructive in determining whether a particular committee or one-house action is legislative in purpose and effect is the nature of the congressional action it supplants. Chadha, 103 S. Ct. at 2785. In this case, the legislative character of the committee approval mechanism is confirmed by the history of the statute. For twenty-five years, the predecessor of § 501 required that all printing be done at the GPO, "except in cases otherwise provided by law." 6/

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[Footnote continued]

not operate expressly upon the statutory functions of the Executive Branch, it does purport to delegate a legislative function to a committee of Congress, which is also impermissible under Chadha. 103 S. Ct. at 2784. Except insofar as the provision allows the JCP to control the internal printing affairs of Congress, id. at 2787, n.21, it inevitably alters the rights, duties and relations of persons outside the Legislative Branch by permitting a committee to effect an exception to a legislated rule, and therefore is an unconstitutional exercise of legislative power.

6/ Ch. 23, § 87, 28 Stat. 662 (1895).

Thus, the JCP's power under § 501(2) to create exceptions to the general requirement is antedated by an express congressional mandate that all exceptions would be legislative in character. Joint committee discretion has supplanted the function of the full Congress and the President in creating legislative exceptions.

In summary, we have no doubt that the power purportedly granted by the approval clause of § 501(2) is legislative in character if exercised by the Legislature and, as such, is subject to the bicameral passage and presentment standards of Article I. The statute's attempt to circumvent these procedures by empowering a committee to exercise Congress's power is an unconstitutional exercise of legislative authority. To the extent the statute authorizes unconstitutional action, it is invalid.

## II. Severability

### A. General Rule

The effect of Chadha's inferential invalidation of the "approval" mechanism in § 501(2) depends upon whether the unconstitutional provision may be severed from the remainder of the section and discarded without affecting the balance of the statute. If the authority to deviate from the the general rule of § 501 requiring the use of the Government Printing Office can be severed from the committee approval clause, the ability of executive departments to utilize that flexibility in carrying out printing projects will survive, but will no longer be subject to committee approval or disapproval. Alternatively, the entire exception could be severed from the statute, leaving intact only the general GPO rule and eliminating specific acknowledgement of executive discretion to perform printing elsewhere.

The severability of an unconstitutional provision from the balance of a statute presents a question of legislative intent: would Congress have wished the constitutional portion of a statute to continue in effect if it had contemplated that part of a provision would be held unconstitutional? See Dorchy v. Kansas, 264 U.S. 286, 290 (1924). "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independent of that

which is not," the invalid part may be dropped if what is left is fully operative as a law. Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932), quoted in INS v. Chadha, 103 S. Ct. at 2774.

Aside from the presumption articulated in Champlin, that an unconstitutional provision is severable unless it is demonstrable that Congress intended otherwise, the Court in Chadha recognized that an additional presumption of congressional intent favoring severability accompanies any statute that contains a severability clause. 103 S. Ct. at 2774. Finally, a further important presumption in favor of severability was articulated by the Chadha Court: a provision is "presumed severable if what remains after severance 'is fully operative as a law.'" Id. at 2775, quoting Champlin Refining Co., 286 U.S. at 234.

Like the statute at issue in Chadha, Title 44 contains a severability clause, which states:

If a provision enacted by this Act is held invalid, all valid provisions that are severable from the invalid provision remain in effect.

44 U.S.C. ch. 1 note (1976). The language of this severability clause, notwithstanding its somewhat tautological use of the term "severable," gives rise to a presumption that Congress intended all valid portions of the act to stand. 7/ See Electric Bond & Share Co. v. SEC, 303 U.S. 419, 434 (1938).

In addition, we have concluded that the unconstitutional committee approval clause in § 502(2) could be severed and the balance of the statute would still be fully operative and workable. If only the approval clause were severed, the statute would continue to dictate that all printing must be

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7/ We are guided by the traditional rule of statutory construction that statutory provisions should be read in such a fashion as to give them meaning, rather than treating them as mere surplusage. United States v. Menasche, 348 U.S. 528, 538-39 (1955).

performed at the GPO with an exception for field plants operated by executive departments. The scope of the field-plant exception would be circumscribed by the limits of authority contained in a department's authorizing legislation and by the monetary limits of the department's available appropriations. 8/ The statutory scheme would continue to operate much as before, but without the necessity for JCP approval of printing decisions. It is certainly an operable system because it would function exactly as it did before -- only without a legislative committee's direct and day-to-day participation in manifestly executive decisions.

An alternative would be to strike down the entire text of § 501(2). This would leave § 501 in effect and the statute would be "operative" in the sense that all printing would have to be done at the GPO. Although we conclude below that this result is not consistent with legislative intent (Subpart C infra), it is nonetheless theoretically a "workable administrative mechanism," Chadha, 103 S. Ct. at 2775, under which all printing matters would be handled by the GPO.

Under either interpretation of the effect of Chadha, Congress's oversight would be preserved through the reporting requirement which, as we conclude below, is implicit in the statute. (Part III infra.)

As did the Court in Chadha, we turn to an examination of the legislative history of the statute to determine whether the presumptions of severability are overcome by a clearly expressed congressional intent to the contrary. The precise question is whether Congress indicated clearly and unmistakably during consideration of § 501 that it would have declined to allow any deviation from the general rule of GPO centralization, if it had known that the implementation of such administrative flexibility could not be controlled on a day-to-day basis by the JCP. See Consumer Energy Council of America v. Federal Energy Regulatory Comm'n, 673 F.2d 425, 442 (D.C. Cir. 1982), aff'd, 103 S. Ct. 3556 (1983).

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8/ The limits of the exception are discussed more fully in connection with the legislative history of the statute. See text accompanying note 15 infra.

## B. Legislative History

Section 501 had its genesis in an act passed in 1895, which provided, simply:

All printing, binding, and blank books for the Senate or House of Representatives and for the Executive and Judicial Departments shall be done at the Government Printing Office, except in cases otherwise provided by law. 9/

Ch. 23, § 87, 28 Stat. 662 (1895).

The first involvement of the Joint Committee on Printing arose when this statute was amended in 1919. 10/ The amendment purported to give the JCP discretion to authorize printing of certain documents outside the GPO:

[A]ll printing, binding, and blank-book work for Congress, the Executive Office, the judiciary, and every executive department, independent office, and establishment of the Government, shall be done at the Government Printing Office, except such classes of work as shall be deemed by the Joint Committee on Printing to be urgent or necessary to have done elsewhere than in the District of Columbia for the exclusive use of any field service outside of said District.

Ch. 86, § 11, 40 Stat. 1270 (1919).

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9/ A prior resolution had provided that all printing, without exception, would be done under the Superintendent of Public Printing. Res. 25, § 5, 12 Stat. 118 (1860).

10/ The Senate added the amendment to a House appropriations bill, with only the explanation that it "will, if adopted, save some money and not take money out of the Treasury of the United States." 57 Cong. Rec. 3865, amending H.R. 14078, 65th Cong., 3d Sess. (1919). The Conference Report adopted it verbatim. H.R. Rep. No. 1146, 65th Cong., 3d Sess. 7 (1919).

The following year, Congress attempted to expand the powers of the JCP by granting it explicit authority to control executive printing decisions. It passed in both Houses a bill that would have required executive departments and all other government offices to obtain authorization, under JCP "regulations," for any printing or for issuance of any government document, no matter where it was to be produced. H.R. 12610, § 8, 66th Cong., 2d Sess. (1920). President Wilson vetoed that bill, condemning the JCP's putative authority as "an invasion of the province of the Executive." In his veto message, President Wilson alluded to the very separation of powers principles that were persuasive to the Supreme Court in Chadha:

The Congress has the right to confer upon its committees full authority for purposes of investigation and the accumulation of information for its guidance, but I do not concede the right, and certainly not the wisdom, of the Congress endowing a committee of either House or a joint committee of both Houses with power to prescribe "regulations" under which executive departments may operate. 11/

In 1949, Congress successfully amended the statute, adopting language substantially identical to that now found in § 501. 12/ For the first time, the printing operations of executive departments were specifically subjected to approval or disapproval by the JCP. A very brief House Report articulated the object of the bill:

[T]o permit essential Government printing to be produced in the best interest of the Government. A recent survey developed that obvious savings of time and expense can be effected by producing much printing within the area where use is required if approved by the Joint Committee on Printing, which committee has jurisdiction over establishment of field-service offices in the Government Printing Office.

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11/ Veto Message on Legislative, Executive, and Judicial Appropriation Bill, H.R. 12610, H.R. Doc. No. 764, 66th Cong., 2d Sess. at 2-3 (1920).

12/ Pub. L. No. 156, 63 Stat. 405 (1949).

It is the opinion of the committee [on House Administration] that, because of the obvious need for the continued operation of such printing plants, based on consideration of efficient, economical operation and justifiable service requirements, . . . the passage of this bill is most important. 13/

On the House floor, the bill's sponsor again pointed to increased efficiency as the primary concern of the bill and reiterated the JCP's supervisory role. 95 Cong. Rec. 7777 (1949). The statute has not been amended substantively since 1949. 14/

This legislative history demonstrates that the statute, in its current form, was apparently aimed at promoting efficiency, both as to time and as to cost, through decentralization of the government printing mechanism created in 1860. We have emphasized in the above quotation from the House Report the language discussing JCP approval, to illustrate that the phrase creating the approval mechanism does not seem to bear any clear textual relationship to the objective of efficiency; indeed the phrase appears, grammatically, to have been tacked on as an afterthought. There is no indication that the purpose of the amendment -- efficiency -- was necessarily enhanced by providing for JCP approval, as opposed to appropriate and diligent legislative oversight. Nor does the history indicate that some other articulated congressional objective was intended to be served by the approval requirement. Although the bill expanded the powers of the JCP significantly, that change was not itself discussed, and the legislative history does not clearly demonstrate that it was more than incidental, rather than central, to the intended alteration of the printing scheme.

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13/ H.R. Rep. No. 841, 81st Cong., 1st Sess., reprinted in 1949 U.S. Code Cong. & Ad. News at 1515-16 (emphasis added).

14/ The statute was restated, without substantive change, in connection with the enactment of Title 44. S. Rep. No. 1621, 90th Cong., 2d Sess. 1, reprinted in 1968 U.S. Code Cong. & Ad. News 4438, 4439; Pub. L. No. 90-620, 82 Stat. 1243 (1968).

It is consistent with the legislative history to surmise that Congress would have recognized the need for flexibility in printing and would have devised some mechanism for filling that need, even if a committee veto had not been an option. At the very least, while contrary arguments can be made, there is no convincing, demonstrable evidence of the type referred to by the Chadha Court, and we cannot therefore determine with any confidence, that Congress would not have created any exceptions to the § 501 rule if it had known that the committee approval device would be stricken. We therefore conclude that the legislative history is insufficient to rebut the various presumptions of severability which the courts have established.

### C. Point of Severance

Less clear is the point at which the unconstitutional provision must be severed. On the one hand, the entire field-plant exception could be stricken on account of its invalid JCP approval clause. A severance of the entire exception, however, would not conform to legislative purpose. It would negate the amendment passed in 1949 and ignore a congressional judgment that increased printing flexibility is in the best interest of the Government. Such a reading would cause § 501 to revert to the rigid, invariable rule found by Congress to foster inefficiency and waste. Moreover, it would create an inconsistency between the firm rule of § 501 and the various authorization and appropriations statutes which permit agencies and departments to maintain printing operations outside the GPO. Such an interpretation would not, we believe, be responsive to the Supreme Court's injunction to accommodate, as faithfully as possible, the intentions of the legislature.

In contrast, a severance of only the committee approval clause in the field-plant provision would allow for the flexibility envisioned by Congress, leaving intact both a general GPO rule and an exception for the efficiency of field-plant printing. Under this approach, Congress would maintain its oversight role because invocation of the exception contained in § 501(2) would still be controlled by the plenary legislative process involved in passage of budget authority and appropriations acts for the printing operations of the various departments and agencies. By maintaining flexibility

and legislative supervision, this resolution of the severance issue is consistent with the intent of Congress at the time § 501(2) was enacted. This construction is all the more compelling because it also takes into account the intentions of Congress in repeatedly approving field-plant printing through its appropriation power. <sup>15/</sup> Further, the field-plant provision, although no longer subject to the JCP approval mechanism, will necessarily remain confined within the bounds Congress chooses to impose upon it through the appropriations process so that the rule of § 501 is not in jeopardy of being consumed by its exception. Finally, the appropriation limits on field-plant printing operations will encourage in executive departments the deliberation Congress expressly desired: "consideration of efficient, economical operation and justifiable service requirements." See note 13.

In light of the restraints on printing activities that appropriations acts impose and in view of the congressional imprimatur they suggest, an adherence to legislative purpose requires that the valid portion of § 501(2) remain effective. A severance of the approval clause alone is the only interpretation that accommodates both the presumption of severability and the additional manifestations of congressional intent surrounding application of the statute. We thus conclude that an executive department's ability to operate its field

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<sup>15/</sup> We understand that the current appropriation and authorization acts governing the Department of Defense do not independently restrict printing operations by requiring JCP participation in printing decisions. The current Defense regulations, however, provide that "[p]rinting, binding, and blank-book work and envelopes, paper, and related supplies shall be procured in accordance with (i) regulations of the Congressional Joint Committee on Printing, and (ii) procedures prescribed by each respective Department." 32 C.F.R. § 5:33 (1983). In our opinion, this regulation is without force and effect insofar as it implements an unconstitutional statute. Cf. Texas Oil & Gas Corp. v. Watt, 683 F.2d 427, 432-33 (D.C. Cir. 1982) (agency may not rely on regulations after statutory authority they track is amended by Congress). We advise that the regulation be amended, however, to eliminate any doubt about its continuing effect.

plants when otherwise authorized survives the excision of the unconstitutional committee approval device, subject to limitations of appropriations and efficiency. 16/

### III. "Report and Wait"

In determining what portions of a statute may be salvaged after an unconstitutional legislative veto is stricken, the courts may interpret the invalid veto as a valid report-and-wait provision. Statutes generally are susceptible to this analysis, however, only when the original version contained some kind of reporting requirement and a time limit for congressional action. Congress's imposition of a reporting requirement, according to Chadha, evinces an intention to preserve its oversight of the exercise of delegated authority in any manner that does not offend the Constitution. 103 S. Ct. at 2775. The constitutionality of the report-and-wait device was confirmed by the Chadha Court. 103 S. Ct. at 2775.

Section 501(2), in contrast, is an example of a committee approval mechanism with no separate, specific reporting provision. Nonetheless, the structure of the approval mechanism embodied in § 501(2) provides its own incentive for timely reporting. As the statute was written, an executive department ostensibly could not proceed until it had reported its plans to the JCP and gained the committee's approval. In our opinion, it would not be consistent with congressional intent to treat the absence of a specific reporting requirement as dispositive in this case. We believe that a reporting requirement is arguably implicit in the statute because the legislative history demonstrates Congress's interest in its oversight functions. Thus, while we cannot say that the statute compels

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16/ You asked, in addition, about the power of the JCP to approve purchases of all equipment related to printing operations. We have found no basis in the statute for any such power and conclude that the JCP is without statutory authority, let alone constitutional authority, to require approval prior to purchases of printing equipment for which budget authority and appropriated funds exist.

it, prudence and respect for the interests of Congress militate in favor of a policy of reporting to Congress in a manner similar to that which has developed under the statute.

There is no basis for implying any particular waiting period, however, because no specific time limit can be drawn from the statute or its legislative history. It is our view that notification of proposed actions within a reasonable time before they are to take effect is the only requirement reasonably to be read into the statute for purposes of comity. We believe your Department has discretion to determine some reasonable period of advance notice you will provide Congress, but we do not believe the law commands any specific waiting period that you must observe.

#### IV. Conclusion

On the basis of the analysis set forth above, we have concluded that the JCP approval requirement set forth in 44 U.S.C. § 501(2) purports to authorize a committee of Congress to take legislative actions; such purported authorization is unconstitutional under the Supreme Court's decision in Chadha. The application of the approval clause of § 501(2) to operations outside the Legislative Branch is therefore invalid. For the reasons expressed above, however, we believe that the provision allowing executive departments to engage in authorized field-plant printing operations is severable from the invalid approval mechanism, and remains effective. In our opinion, therefore, the Department of Defense may conduct its printing activities to the extent permitted by its authorization and appropriations statutes and considerations of efficiency, irrespective of any action of the Joint Committee on Printing. In keeping with the intention of the legislature, your Department should continue to notify the JCP of its proposed actions.



Theodore B. Olson  
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Office of Legal Counsel

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cc: Leonard Niederlehner  
Acting General Counsel  
Department of Defense