OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

OF THE

UNITED STATES DEPARTMENT OF JUSTICE

CONSISTING OF SELECTED MEMORANDUM OPINIONS
ADVISING THE

PRESIDENT OF THE UNITED STATES, THE ATTORNEY GENERAL

AND OTHER EXECUTIVE OFFICERS OF THE FEDERAL GOVERNMENT

IN RELATION TO

THEIR OFFICIAL DUTIES

VOLUME 14

1990

WASHINGTON
1998

Attorney General

Richard L. Thornburgh

Assistant Attorneys General

Office of Legal Counsel

William P. Barr

J. Michael Luttig

Deputy Assistant Attorneys General

Office of Legal Counsel

Douglas R. Cox

Timothy E. Flanigan

John C. Harrison

J. Michael Luttig

John O. McGinnis

Lynda G. Simpson

OFFICE OF LEGAL COUNSEL

Attorney-Advisers

(1990)

Barbara E. Armacost
John E. Barry
John Randolph Beck
Benedict S. Cohen
Paul P. Colborn
Daniel P. Collins
Steven M. Colloton
Douglas R. Cox
Robert J. Delahunty
John F. Duffy
John C. Harrison
Rosemary A. Hart
Daniel L. Koffsky
David G. Leitch
Herman Marcuse
Andrew G. McBride
Mark L. Movsesian
Richard A. Nagareda
John C. Nagle
Michael S. Paulsen
John J. Sullivan
Carol A. Williams
Marian E. Wysocki

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 thirteen volumes of opinions published covered the years 1977 through 1989; the present volume covers 1990. The opinions included in Volume 14 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 1990 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 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 U.S.C. § 0.25.

Opinions of the Office of Legal Counsel in Volume 14

Contents *Page*

Authority of Education Department Administrative Law Judges in Conducting Hearings (January 12, 1990) 1

Executive Branch Encouragement of Contributions to a Nicaraguan Opposition Party (January 25, 1990) 7

The Effect of an Appropriations Rider on the Authority of the Justice Department to File a Supreme Court Amicus Brief (Febrary 5, 1990) 13

Authority of the Federal Financing Bank to Provide Loans to the Resolution Trust Corporation (February 14, 1990) 20

Congressional Request For Appointment Calendars of a Former GSA Official (February 15, 1990) 34

Issues Raised by Foreign Relations Authorization Bill (February 16, 1990) 37

Application of Federal Advisory Committee Act to Editorial Board of Department of Justice Journal (March 27, 1990) 53

Presidential Authority to Extend Deadline for Submission of an Emergency Board Report Under the Railway Labor Act (March 13, 1990) 57

Authority to Use Funds from Fiscal Year 1990 Appropriation to Cover Shortfall from Prior Award Year's Pell Grant Program (March 29, 1990) 68

Application of Conflict of Interest Rules to Members of Department of Health and Human Services Advisory Committee (April 13, 1990) 79

Prohibitions and Penalties Under Section 582 of the 1990 Foreign Operations, Export Financing, and Related Programs Appropriations Act (April 16, 1990) 84

Constitutional Limits on "Contracting Out" Department of Justice Functions under OMB Circular A-76 (April 27, 1990) 94

Pocket Veto Clause (May 17, 1990) 103

Whether Agents of the Department of Justice Office of Inspector General are "Investigative or Law Enforcement Officers" Within the Meaning of 18 U.S.C. § 2510(7) (May 29, 1990) 107

Authority of the General Services Board of Contract Appeals to Order Reimbursement of the Permanent Judgment Fund for Awards of Bid Protest Costs (May 29, 1990) 111

Lease or Loan of Aircraft to Foreign Countries for Assistance in International Narcotics Control Under Subsection 506(a)(2) of the Foreign Assistance Act of 1961 (June 4, 1990) 119

Applicability of Conflict of Interest Laws to Current and Former Executive Branch Employees Serving as Trustees in Bankruptcy Cases (June 7, 1990) 121

Employment Status of the Members of the Board of Directors of the Federal Housing Finance Board (July 11, 1990) 127

Reimbursing Justice Department Employees for Fees Incurred in Using Private Counsel Representation at Congressional Depositions (September 27, 1990) 132

Attorney General's Authority with Respect to the Regulatory Initiatives of the U.S. Parole Commission (October 10, 1990) 139

White House Communications Agency Expenses Incurred on Political or Personal Travel by the President (October 22, 1990) 144

Constitutionality of Subsection 4117(b) of Enrolled Bill H.R. 5835, the "Omnibus Budget Reconciliation Act of 1990" (November 5, 1990) 154

Appointment of Members of the Board of Directors of the Commission on National and Community Service (December 28, 1990) 157

OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

Authority of Education Department Administrative Law Judges in Conducting Hearings

Administrative law judges within the Department of Education, being employees of the Department, do not have authority to conduct administrative hearings in a manner contrary to the Department's rules, to invalidate such rules, or to interpret such rules in a manner contrary to the Secretary's interpretation.

January 12, 1990

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF EDUCATION

You have requested our opinion whether administrative law judges ("ALJs") within the Department of Education ("Department") who preside over agency hearings required by 20 U.S.C. § 1234 to be conducted in accordance with the Administrative Procedure Act, 5 U.S.C. §§ 551-596 ("APA"), have independent authority to conduct those proceedings in a manner contrary to the Department's rules, to invalidate such rules, or to interpret such rules in a manner contrary to the Secretary's interpretation.[1] We conclude that ALJs, being employees of the Department, have no such authority. While ALJs have authority to regulate the conduct of administrative proceedings before them, such authority remains "[s]ubject to published rules of the agency," *id.* § 556(c), and therefore may be exercised only in accordance with "such rules as the Secretary shall prescribe by regulation." 20 U.S.C. § 1234(f).

I. Background

The questions posed here concerning the scope of a Department ALJ's power have arisen as a result of decisions by such ALJs asserting independent authority over procedural matters in administrative hearings. You have provided us with a copy of one such decision, the recent opinion of ALJ Daniel R. Shell in *In the Matter of Franklin-Northwest Supervisory Union*, No. 89-4-R ("Order Denying Stay for Settlement Negotiations [and] Order Granting Stay for Mediation") (Dec. 11, 1989) ("Opinion"). In that matter, applicant Franklin-Northwest and the Department jointly requested a stay of administrative proceedings pending settlement negotiations. The applicable Department regulation provides that "[i]f the parties to a case file a joint motion requesting a stay of the proceedings for settlement negotiations or the approval of a settlement agreement, the ALJ grants the stay." 34 C.F.R. § 81.14(a) (1989).

[1] *See* Memorandum for the Under Secretary, Department of Education, from Edward C. Stringer, General Counsel, Department of Education (Dec. 15, 1989) (expressing General Counsel's concerns with recent ALJ rulings).

ALJ Shell denied the motion. He concluded that administrative law judges have the duty under the APA and under their delegated judicial authority in the Department of Education to exercise the judicial function in an independent manner and to regulate the course of proceedings before them. ALJ Shell concluded that 34 C.F.R. § 81.14(a) interfered with his exercise of this judicial responsibility, and he ruled that "the Secretary cannot promulgate regulations that would deny the [administrative law] judge the opportunity to exercise the responsibilities of the judicial function of 5 U.S.C. 554, 556, 557 nor deny the [administrative law] judge judicial independence." Opinion at 9. Mr. Shell therefore rejected the authority of the Secretary's regulation and denied the joint stay application of the Department and Franklin-Northwest. In the alternative, Mr. Shell construed 34 C.F.R. § 81.14(a) as not requiring an ALJ to grant a joint stay motion for settlement.

III. Analysis

Administrative law judges have no constitutionally based judicial power, *see Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 132-33 (1953), but are employees of the executive branch department or agency employing them. *See* 20 U.S.C. § 1234(c) (statute establishing the Office of Administrative Law Judges within the Department of Education provides that ALJs "shall be officers or employees of the Department"). As such, ALJs are bound by all policy directives and rules promulgated by their agency, including the agency's interpretations of those policies and rules. *See Nash v. Bowen*, 869 F.2d 675, 680 (2d Cir.), *cert. denied*, 493 U.S. 813 (1989); *Mullen v. Bowen*, 800 F.2d 535, 540-41 n.5 (6th Cir. 1986); *Brennan v. Department of Health and Human Services*, 787 F.2d 1559 (Fed. Cir.), *cert. denied*, 479 U.S. 985 (1986); *Goodman v. Svahn*, 614 F. Supp. 726, 728 (D.D.C. 1985); *Association of Administrative Law Judges, Inc. v. Heckler*, 594 F. Supp. 1132, 1141 (D.D.C. 1984); *cf. D'Amico v. Schweiker*, 698 F.2d 903, 906 (7th Cir. 1983). *Accord* 34 C.F.R. § 81.5(b) (embodying in Department regulations the requirement that ALJs adhere to policies and rules of the agency). ALJs thus do not exercise the broadly independent authority of an Article III judge, but rather operate as subordinate executive branch officials who perform quasi-judicial functions within their agencies. In that capacity, they owe the same allegiance to the Secretary's policies and regulations as any other Department employee.

The obligation of ALJs to adhere to their employer's policies and rules extends to matters of administrative procedure in the conduct of agency hearings. The APA explicitly provides that the power of employees presiding at agency hearings is subject to the rules prescribed by the employing agency:

> *Subject to published rules of the agency and within its powers*, employees presiding at hearings may — . . . (5) regulate the course of the hearing; . . . (9) dispose of procedural requests or similar matters; . . . .

5 U.S.C. § 556(c) (emphasis added). The statute establishing the Office of Administrative Law Judges within the Department echoes the restrictions of § 556(c) by stating that

> [t]he proceedings of the Office shall be conducted according to such rules as the Secretary shall prescribe by regulation in conformance with the rules relating to hearings in Title 5, sections 554, 556, and 557.

20 U.S.C. § 1234(f)(1).

That ALJs remain subject to the authority of the agency in all matters of policy, procedure, and interpretation of law is wholly consistent with the type of judicial independence mandated by the APA. The APA requires both a separation of functions within the agency, 5 U.S.C. § 554(d), and that ALJs have certain tenure protections. *Id.* § 7521. Thus, to maintain the integrity of agency adjudicative proceedings, an ALJ is prohibited from certain ex parte contacts with parties involved in the adjudication, may not be responsible to another employee engaged in investigative or prosecutorial functions, and may not participate in the decision of a case in which he has performed an investigative or prosecutorial function. These restrictions do not, however, establish that ALJs are free to ignore agency rules for the conduct of agency hearings. To draw the conclusion that ALJs are not bound by such agency rules would be to read § 554(d) as implicitly nullifying § 556(c). Such a construction would be contrary to well established principles of statutory interpretation disfavoring implied repeals. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017-18 (1984) (repeals by implication are disfavored). Rather, an ALJ is "independent" within the meaning of § 554(d) only in that he may not also perform another agency function with respect to a proceeding over which he presides as a hearing officer.

Similarly, 5 U.S.C. § 7521 provides ALJs with only a limited "independence" from agency officials by providing tenure protection from unjustified agency reprisal. Section 7521 provides that ALJs may be removed from their positions, or otherwise disciplined, only for cause and after notice and a hearing before the Merit Systems Protection Board. 5 U.S.C. §§ 5372, 7521. *See generally* 5 C.F.R. §§ 930.201-930.216 (1981). This measure of independence does not, however, mean that ALJs may disregard agency rules that are binding on them. *Mullen*, 800 F.2d at 540 n.5. To the contrary, failure to adhere to agency policies and procedures may constitute "good

cause" sufficient to warrant the discharge or discipline of an employee serving as an administrative law judge. 5 U.S.C. § 7521; *see, e.g.*, *Brennan v. Department of Health and Human Services*, 787 F.2d 1559 (Fed. Cir.), *cert. denied*, 479 U.S. 985 (1986) (affirming suspension of ALJ for failure to comply with office administrative procedures).

A 1977 published Attorney General opinion supports our conclusion. In describing the legislative history of the APA, that opinion notes that Congress rejected a minority recommendation for complete segregation of administrative law judges into independent agencies in favor of more limited independence for ALJs in terms of tenure and compensation. 43 Op. Att'y Gen. 64-67 (1977). The opinion does observe that, within the scope of powers granted ALJs under 5 U.S.C. § 556(c), those powers are to be exercised without agency interference. But this conclusion in no way implies that ALJs are not "[s]ubject to published rules of the agency," 5 U.S.C. § 556(c), in the conduct of agency proceedings and the exercise of their other statutory powers. Such an implication would be contrary to the plain language of § 556(c).

ALJ Shell relied on *Butz v. Economou*, 438 U.S. 478, 513 (1978), as support for his theory that ALJs are not bound by agency rules. We believe, however, that the *Butz* case is fully consistent with our conclusion. In that case, the Supreme Court described the role of an ALJ as being "functionally comparable" to that of a judge. Read in context, however, that statement provides no support for the assertion that ALJs may conduct agency hearings or adjudications independently of agency regulations. The issue in *Butz* was whether ALJs and other investigative, prosecuting, and trial officials of the Department of Agriculture were entitled to the same immunity from tort liability for their official actions as Article III judges and government prosecutors. The Court held that, like Article III judges, agency officials must be able to make decisions free from the intimidation or harassment of retaliatory litigation. *Id.* at 514-17. In that context, the Court held that an administrative law judge is "functionally comparable" to an Article III judge, who enjoys absolute immunity. Significantly, however, the Court held that this functional comparability also applied to prosecutors and grand jurors, *id.* at 511-12; *see Imbler v. Pachtman*, 424 U.S. 409 (1976), and therefore to agency officials who initiate administrative proceedings against individuals, and to those who conduct trials and present evidence. *Butz*, 438 U.S. at 515-17. "Functional comparability" in this context thus bears no relation to the scope of an ALJ's authority with respect to agency rules. *Butz* does not overrule the holding in *Ramspeck* that ALJs are "semi-independent *subordinate* hearing officers," *id.*, 345 U.S. at 132 (original quotation marks omitted, emphasis added), or supersede 5 U.S.C. § 556(c), which plainly requires

ALJ subordination to agency procedures for conduct of administrative hearings or adjudications.[2]

As an alternative ground for denying the joint stay application in the Franklin-Northwest matter, Mr. Shell interpreted 34 C.F.R. § 81.14(a) as not requiring an ALJ to grant a joint stay motion for settlement. The regulation provides that, upon joint motion of the parties requesting a stay of proceedings for settlement negotiations, "the ALJ grants the stay." *Id.* Mr. Shell declared that because the language states that "the ALJ grants" rather than "the ALJ *shall* grant," the granting of the motion was not mandatory. Opinion at 10-12. Based on the analysis provided above, we believe that it is clear that an ALJ, being a subordinate employee of the Secretary, is without authority to adopt a construction of a Department rule at variance from the construction of the Secretary or his designee (here, the General Counsel). *See Nash*, 869 F.2d at 680; *Brennan*, 787 F.2d at 1559-61; *Bauzo v. Bowen*, 803 F.2d 917, 921 (7th Cir. 1986); *Association of Administrative Law Judges*, 594 F. Supp. at 1141.

In any event, we believe that the Department's interpretation of § 81.14(a) is plainly correct. The fact that the regulations are written in a present tense, active voice style does not negate their mandatory character. We think Mr. Shell's construction is strained and effectively nullifies the regulation. The plain import of this provision is that the ALJ is *required* to grant the stay upon the joint motion of the parties. The explanatory notes accompanying the proposed regulations clearly indicate that the ALJ is required to stay the proceedings if requested by both parties. *See* 53 Fed. Reg. 48,866 (1988). We are informed that no comments were received on this section of the proposed regulations. The wording of the final regulation therefore was not changed, nor was the intended meaning of the provision as set forth in the explanatory comment contradicted. Accordingly, the correct inference is that the meaning and effect of the regulation were unchanged from that reflected in the explanatory comment accompanying the proposed rule.

---

[2] No due process issue is presented by the requirement that ALJs adhere to the agency's policies and rules. The requirement specifically at issue here — that ALJs stay administrative proceedings for settlement discussions upon the joint motion of the parties, 34 C.F.R. § 81.14(a) — cannot be said to conflict with any provision of the APA or to deprive any person of due process of law. Moreover, it is plain that ALJs lack standing to assert such a due process challenge, which can arise only where a private party is aggrieved by the adjudicative procedures employed by an agency. *Goodman*, 614 F. Supp. at 728; *see Kalaris v. Donovan*, 697 F.2d 376, 399 n.91 (D.C. Cir.), *cert. denied*, 462 U.S. 1119 (1983); *D'Amico*, 698 F.2d at 905-06. An administrative law judge lacks any legally cognizable "right" to raise a constitutional challenge to an agency rule or procedure that does not injure him in his personal capacity, but has only such rights of stature by virtue of his position as are conferred by statute. *Ramspeck*, 345 U.S. at 133; *Goodman*, 614 F. Supp. at 728. *See also Nash*, 869 F.2d at 680; *Association of Administrative Law Judges*, 594 F. Supp. at 1141.

III. Conclusion

For these reasons, we conclude that administrative law judges within the Department of Education must abide by the written rules and regulations adopted by the Secretary for the conduct of administrative proceedings and by the Secretary's interpretation of such regulations.

WILLIAM P. BARR
Assistant Attorney General
Office of Legal Counse

Executive Branch Encouragement of Contributions to a Nicaraguan Opposition Party

No provision of United States law precludes the President or members of his Administration from encouraging private parties to contribute funds to the National Opposition Union, a Nicaraguan political party, for use in the scheduled Nicaraguan elections.

January 25, 1990

MEMORANDUM OPINION FOR THE ASSISTANT TO THE PRESIDENT FOR NATIONAL SECURITY AFFAIRS

This responds to your request for our legal opinion on whether there are any legal prohibitions under United States law precluding the President and members of his Administration from encouraging private parties to contribute funds to the National Opposition Union ("UNO") for use in the scheduled Nicaraguan elections. As we understand the proposal, the Administration would not itself contribute funds, nor would it collect funds from others for delivery to UNO. The Administration would merely encourage those who might be interested to make contributions directly to the party for use in the campaign.

After a careful review, we have discovered no provision of United States law which would prevent the President or members of his Administration from encouraging private donors to contribute funds to a foreign political party for use in a foreign election. The Legal Adviser of the State Department has independently reviewed the legal authorities and has reached the same conclusion.

Certain statutes prohibit the provision of funds or other assistance by the United States to the "Nicaraguan Resistance" or the "Nicaraguan democratic resistance." *See, e.g.*, Pub. L. No. 101-14, § 7(a), 103 Stat. 37, 38 (1989); Pub. L. No. 100-463, 102 Stat. 2270 (1988); Pub. L. No. 100-453, § 104, 102 Stat. 1904, 1905 (1988). Such statutes are inapplicable to the current proposal because the actions contemplated are not intended to support the activities of the Nicaraguan Resistance, a military organization, but rather the political activities of UNO, a separate political entity. Further, we do not believe that such statutes prevent the President and members of his Administration from encouraging private donations, as opposed to providing United States assistance.

Nor do we believe that the Act to Provide Assistance for Free and Fair Elections in Nicaragua, Pub. L. No. 101-119, 103 Stat. 699 (1989), restricts the President or members of his Administration from encouraging private donations. That law made certain funds available to the Administrator of the Agency for International Development "for assistance for the promotion of

democracy and national reconciliation in Nicaragua." Certain categories of funds may only be made available "consistent with" the Charter, or both the Charter and the standard operating procedures, of the National Endowment for Democracy. The National Endowment for Democracy is "a private, non-profit corporation . . . which is not an agency or establishment of the United States Government." 22 U.S.C. § 4411. The Endowment receives grants from the United States Information Agency. Id. § 4412. However, "[f]unds may not be expended, either by the Endowment or by any of its grantees, to finance the campaigns of candidates for public office." Id. § 4414(a)(1).

The proviso in Public Law No. 101-119 restricting the use of funds made available therein clearly applies only to the funds administered under that Act. Thus, it cannot be construed to express any congressional intent to prohibit the President or members of his Administration from encouraging private financial support for UNO. The proposal does not involve making any appropriated funds available to UNO, much less funds covered by the proviso in Public Law No. 101-119. We thus do not see how the proposed activity could be in contravention of that act.

The proposal also would not implicate the Obey Amendment to the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1990, Pub. L. No. 101-167, § 582, 103 Stat. 1195, 1251.[1] The Obey Amendment prohibits the provision of the funds appropriated in Public Law No. 101-167 to any foreign government, foreign person, or United States person in exchange for undertaking any action which a United States official or employee would be expressly prohibited from taking under a provision of United States law. The Obey Amendment restrictions thus apply only to funds appropriated under the Foreign Operations Act. Those restrictions are inapplicable here because the proposal, as we understand it, would not involve the provision of funds appropriated in the Act to any person or foreign

---

[1] The Obey Amendment provides in its entirety:

(a) None of the funds appropriated by this Act may be provided to any foreign government (including any instrumentality or agency thereof), foreign person, or United States person in exchange for that foreign government or person undertaking any action which is, if carried out by the United States Government, a United States official or employee, expressly prohibited by a provision of United States law.

(b) For the purpose of this section the term "funds appropriated by this Act" includes only (1) assistance of any kind under the Foreign Assistance Act of 1961; and (2) credits, and guaranties under the Arms Export Control Act.

(c) Nothing in this section shall be construed to limit —

(1) the ability of the President, the Vice President, or any official or employee of the United States to make statements or otherwise express their views to any party on any subject;

(2) the ability of an official or employee of the United States to express the policies of the President; or

(3) the ability of an official or employee of the United States to communicate with any foreign country government, group or individual, either directly or through a third party, with respect to the prohibitions of this section including the reasons for such prohibitions, and the actions, terms, or conditions which might lead to the removal of the prohibitions of this section.

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1990, Pub. L. No. 101-167, § 582, 103 Stat. 1195, 1251.

government. Further, we are aware of no provision of United States law expressly prohibiting the United States from contributing funds to UNO.[2] Finally, the Obey Amendment specifically states that it shall not be construed to limit "the ability of the President, the Vice President, or any official or employee of the United States to make statements or otherwise express their views to any party on any subject," nor to limit "the ability of an official or employee of the United States to express the policies of the President."

We have also reviewed the Hatch Act, 5 U.S.C. § 7324(a)(1), and conclude that it does not restrict Administration officials from encouraging donations to a foreign political party. Section 7324(a)(1) prohibits "[a]n employee in an Executive agency" from "us[ing] his official authority or influence for the purpose of interfering with or affecting the result of an election." We do not believe this provision applies extraterritorially to foreign elections. Laws are presumed to apply only territorially, unless the contrary is clearly indicated in the the statute. Restatement (Second) of Foreign Relations Law of the United States § 38 (1965). *Accord* 1 Restatement (Third) of the Foreign Relations Law of the United States § 403, cmt. g (1987). *See American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909) ("All legislation is *prima facie* territorial.").

Even without that presumption, it is clear that Congress's concern in enacting the Hatch Act was the interaction of federal employees with the domestic political process. As the Supreme Court noted in upholding section 7324(a)(2) against a First Amendment challenge, the political history of the United States has confirmed that "it is in the best interest of the country, indeed essential, that federal service should depend upon meritorious performance rather than political service, and that the political influence of federal employees on others and on *the electoral process* should be limited." *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 557 (1973) (emphasis added). Congress was concerned about attempts to utilize federal employees to staff domestic political machines, and wished to free such employees from coercion to vote on partisan lines or to perform political tasks in domestic elections. *Id.* at 565-66. As described by one Congressman, "[t]his proposed legislation seeks only to make certain the inherent right of every citizen of our land of the freedom of the ballot and his or her right to vote as they may elect without interference from illicit political manipulators." 84 Cong. Rec. 9603 (1939) (remarks of Rep. Springer).[3]

---

[2] As discussed above, Public Law No. 101-119 does not constitute an express prohibition, but merely a limitation on the use of certain specified funds.

[3] Further, we note that the President and Vice President are clearly not bound by the statute because they are not "employee[s]" as that term is used in title 5. *See* 5 U.S.C. § 2105. A specific exemption for the President and Vice President was removed from section 7324(d) as unnecessary. *See* 5 U.S.C. § 7324, Historical and Revision Notes.

We also believe that the Anti-Lobbying Act, 18 U.S.C. § 1913, is inapplicable because Presidential encouragement of support for UNO would not in any way be "intended or designed to influence in any manner *a Member of Congress*." 18 U.S.C. § 1913 (emphasis added).

We are aware that 31 C.F.R. § 540.205 prohibits the export of "goods" to Nicaragua. But a prohibition on export of "goods" does not apply to political contributions of money. Indeed, the regulation was promulgated under the authority given the President by the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706, where the distinction between orders blocking "goods" and those blocking "property," including monetary payments, is well established. *Compare* 31 C.F.R. § 535.201 (prohibiting all Iranian "property" in the United States from being "transferred, paid, exported, withdrawn or otherwise dealt in except as authorized").

Moreover, even if some provision of law purported to prohibit the President from encouraging financial support for UNO, we do not believe that the law would be constitutional. The Department of Justice made this point publicly:

> [N]o law can constitutionally prevent the President or his aides under his authority from urging private citizens to contribute funds for foreign entities to which donations can legally be made. The President has independent authority from two distinct sources to solicit such funds. First and foremost, the President "is a representative of the people, just as the members of the Senate and of the House are." *Myers v. United States*, [272 U.S. 52, 123 (1926)]. It is therefore essential that the President be able to engage in a dialogue with the citizens of the United States. He would be unable to fulfill many of his constitutional duties if he were not permitted to communicate with those people whom he represents and to ask them to undertake any legal act.
>
> Moreover . . . in the area of foreign affairs the President's powers are "plenary and exclusive." [*United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936)]. This requires that he be free to gauge public opinion and to lead the country in the direction he thinks most prudent. He may inform the public of their legal rights and responsibilities and encourage them to take any legal action that would support one of his foreign policy positions.

Memorandum of Law of the United States Filed by the Department of Justice as Amicus Curiae, *United States v. North*, Crim. No. 88-0080-02 at 30-31 (D.D.C. Nov. 18, 1988).

We are not aware of any reporting requirement which would be applicable to actions of the sort contemplated in the proposal. In particular, we

do not believe that Administration officials encouraging donations to a foreign political party would be required to register as "agents of a foreign principal" pursuant to the Foreign Agents Registration Act of 1938, as amended, 22 U.S.C. §§ 611-621. That statute provides that "[n]o person shall act as an agent of a foreign principal unless" he has registered with the Attorney General or is exempt from the registration requirements. 22 U.S.C. § 612(a). The term "foreign principal" includes a foreign political party. *Id.* § 611(b)(1). An "agent of a foreign principal" is

> any person who acts as an agent, representative, employee, or servant, or *any person who acts in any other capacity at the* order, *request*, or under the direction or control, of a foreign principal or of a person any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal, *and who directly or through any other person—*
>
> (i) *engages within the United States in political activities for or in the interests of such foreign principal*;
>
> (ii) *acts within the United States as a public relations counsel,* publicity agent, information-service employee *or political consultant for or in the interests of such foreign principal*;
>
> (iii) *within the United States solicits, collects, disburses, or dispenses contributions,* loans, money, or other things of value *for or in the interest of such foreign principal.*

22 U.S.C. § 611(c)(1) (emphasis added).

We do not believe a government official, acting on behalf of the United States to carry out its foreign policy, is acting "as an agent, representative, employee, or servant, or . . . at the order, request, or under the direction or control, of a foreign principal" within the meaning of section 611(c)(1). Such officials are acting under the direction and control of the United States, rather than of the foreign principal, and they act to further the interests of the United States, which may or may not coincide with those of the foreign entity. Moreover, this reading best comports with the purposes of the Foreign Agents Registration Act. "The general purpose of the legislation was to identify agents of foreign principals who might engage in subversive acts or in spreading foreign propaganda, and to require them to make public record of the nature of their employment." *Viereck v. United States*, 318 U.S. 236, 241 (1943). Thus, the aim of the legislation was to protect the United States Government from outside threats, rather than to constrain the duly authorized actions of government officials.

Furthermore, we do not believe that the contemplated conduct would violate the ethics laws.[4] As a general matter, however, all officials who will be involved in providing such encouragement should be careful to avoid any appearance of impropriety.[5] Thus, for example, it would be unwise for an

official to encourage a contribution from a corporation that has a direct interest in a matter pending before the official, even if there is no indication of a quid pro quo. It is, of course, impossible to detail all such situations in advance; in order to avoid any appearance of impropriety, additional advice should be sought from the White House Counsel's Office as particular questions arise.

Finally, the proposed arrangement could not be deemed an improper augmentation of executive branch appropriations. Mere encouragement of private activity does not constitute augmentation. Private individuals would be making contributions directly to UNO, rather than to the United States Government. The government would exercise no control over the donated funds. Thus, funds available for executive branch purposes would not be increased.

The foregoing addresses the Administration's encouragement of donations to foreign political parties as a matter of domestic law. We have been informed by the State Department that foreign donations are legal under Nicaraguan law if they comply with certain procedures. We understand that members of the Administration will encourage donors to contact UNO, which will then take responsibility for complying with Nicaraguan law. Were a donor to violate Nicaraguan law, he would presumably be subject to prosecution in that country. Even if the actions of a donor were found illegal under Nicaraguan law, however, that fact alone would not make the actions of the donor, or of any Administration official who had encouraged him, improper under United States law. While we do not address generally the international law implications of these actions, we note that the encouragement of acts that are legal under Nicaraguan law could not be viewed under international law as interfering with Nicaragua's internal affairs.[6]

WILLIAM P. BARR
Assistant Attorney General
Office of Legal Counsel

---

[4] For example, section 208 of title 18, United States Code, which concerns official acts affecting a personal financial interest, would only apply if an official had knowledge that he, or certain other persons with whom he is associated, had a financial interest that would be affected by the provision of money to UNO. This statute might conceivably apply if assistance to UNO were channeled through persons or entities in which an official involved, or persons with whom he is associated, had a financial interest.

[5] In particular, officials should not in any way indicate that they will be influenced in the performance of their duties in return for contributions to UNO. Such conduct would violate the federal bribery statute. 18 U.S.C. § 201(b)(2) ("Whoever... being a public official... directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally *or for any other person or entity*, in return for ... being influenced in the performance of any official act ... [shall be punished as prescribed].") (emphasis added).

[6] While we do not believe there is any general legal prohibition against contributions to Nicaraguan political parties, we have not addressed legal restraints which may be applicable to donors in specific situations. Thus, donors interested in doing business in Nicaragua may wish to consider the applicability of the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1, 78dd-2.

The Effect of an Appropriations Rider on the Authority of the Justice Department to File a Supreme Court Amicus Brief

A rider in the 1990 appropriations legislation for the Justice Department, the Federal Communications Commission, and other agencies that provides that no funds appropriated by that legislation may be used to repeal, modify, or reexamine certain FCC policies does not forbid the Justice Department from filing a Supreme Court amicus brief in a case in which those policies are at issue.

Febrary 5, 1990

MEMORANDUM OPINION FOR THE ACTING SOLICITOR GENERAL

This responds to your request for our opinion on whether a rider in the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990 ("1990 Appropriations Act"), Pub. L. No. 101-162, 103 Stat. 988 (1989) forbids the Department of Justice from filing an amicus brief with the Supreme Court in *Metro Broadcasting, Inc. v. FCC*, No. 89-453, and *Astroline Communications Co. v. Shurberg Broadcasting*, No. 89-700.[1] For the reasons discussed below, we agree with your conclusion that the rider does not forbid such a filing.

I. Background

The 1990 Appropriations Act provides funding for several federal government entities, including the Department of Justice (title II), the Judiciary (title IV), and a variety of agencies, among them the Federal Communications Commission (title V). A rider appears in the provision of title V making appropriations for the Federal Communications Commission ("FCC"), which is also found in materially the same language in the two prior annual appropriations acts.[2] It reads:

[1] *See* Memorandum for William P. Barr, Assistant Attorney General, Office of Legal Counsel, from John G. Roberts, Jr., Acting Solicitor General, *Re: Use of Departmental Appropriations to File Briefs Amicus Curiae in Metro Broadcasting, Inc. v. FCC, No. 89-453 and Astroline Comm. Co. v. Shurberg Broadcasting, No. 89-700* (Jan. 11, 1990) ("Roberts Memorandum").

[2] The original provision from which the current rider is derived appears in Pub. L. No. 100-202, 101 Stat. 1329-1, 1329-31 (1987). *See also* Pub. L. No. 100-459, 102 Stat. 2186, 2216-17 (1988).

> [N]one of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses . . . other than to close MM Docket No. 86-484 . . . .

103 Stat. at 1020.

No such rider appears in title II, which appropriates funds for the Justice Department, not even in the "General Provisions" of that title. 103 Stat. at 995-1006.[3] Nor does any such rider appear in title IV, which appropriates monies for the federal courts, including the Supreme Court. *Id.* at 1010-16. Finally, no such rider appears in title VI ("General Provisions"), which sets forth general restrictions on the use of the funds appropriated under all of the preceding titles of the Act. *Id.* at 1031-40.

The questions of the FCC rider's possible application to a Justice Department amicus filing initially arose in August 1988, when the Civil Rights Division sought permission to file an amicus brief with the Court of Appeals for the District of Columbia Circuit in what is now the *Metro Broadcasting* case.[4] Both the Civil Rights Division and the Solicitor General concluded, as do we here, that the rider does not prohibit amicus filings by the Department. The Solicitor General authorized Civil Rights to file an informational amicus brief with the court of appeals,[5] and such a brief was in fact filed.[6]

II. Analysis

The FCC rider prohibits the use of "funds appropriated by this Act . . . to repeal, to retroactively apply changes in, or to continue a reexamination of, the [specified] policies of the Federal Communications Commission." 103 Stat. at 1021. It is clear from the language and purpose of the rider, and from the overall structure of the 1990 Appropriations Act, that the rider was

---

[3] The "General Provisions" of title II do otherwise impose restrictions on the use of Justice Department funds. *See* 1990 Appropriations Act §§ 205-206, 103 Stat. at 1005 (restrictions on abortion-related use of funds).

[4] *See* Memorandum for the Solicitor General, from William Bradford Reynolds, Assistant Attorney General, Civil Divison, *Re: Steele v. FCC and Winter Park Communications, Inc. v. FCC, Nos. 84-1176 & 85-1755 (D.C. Cir.)* (July 22, 1988) (rider did not prohibit amicus filing in court of appeals); handwritten comments of the Solicitor General on Memorandum for the Solicitor General, from Thomas W. Merrill, Deputy Solicitor General, *Re: Steele v. FCC* (Aug. 3, 1988) (rider did not prohibit filing of an "informational" amicus brief).

[5] In his handwritten marginal comments authorizing a filing, the Solicitor General wrote that "[t]he argument relating to the appropriations rider is troublesome but I think Civil Rights has the better of it." He further observed that a purely "informational" filing would not "come within ten miles of the appropriation rider's prohibition (even on its most expansive interpretation)."

[6] *See Brief for the United States as Amicus Curiae, Winter Park Comm., Inc. v. FCC & Metro Broadcasting, Inc. v FCC*, D.C. Cir. Nos. 85-1755 & 85-1756 (Aug. 29, 1988).

intended to impose restrictions only on the FCC, and thus does not forbid the filing of an amicus (or any other) brief by the Department of Justice. Even if this conclusion were less than clear, we would resolve any ambiguity in favor of this construction to avoid the very serious constitutional problems that would exist were the rider interpreted to prevent the Department from filing in the Court.

The 1990 Appropriations Act is essentially an omnibus enactment comprising a number of separate and unrelated appropriations "Acts" (titles I-V), and a number of general provisions that apply to all titles of the Act (title VI). Each of titles I-IV is expressly designated an "Act." *Id.* at 995, 1006, 1010, 1016. For example, title II, which appropriates funds for the Justice Department, provides that title II "may be cited as the 'Department of Justice Appropriations Act, 1990.'" *Id.* at 1006.[7] With the exception of title VI, which for understandable reasons Congress might not separately designate an "Act," title V is the only title that is not expressly designated an Act. Because it is not designated an "Act," there is some question as to whether the term "this Act" in title V was intended to refer only to title V or to the entire 1990 Appropriations Act.

We believe that title V also should be considered a separate act for the purpose of construing the provisions within that title, which appears to be the only purpose for Congress' separate designation of titles I-IV as "Acts." We can think of no substantive reason why Congress would have wanted title V treated any differently in this respect from titles I-IV. Indeed, it appears that the only reason title V may not have been designated an "Act" is that, unlike titles I-IV, it appropriates monies to a number of different federal government entities[8] and, as a consequence, would not have been easily entitled. It follows from the fact that title V was intended to be understood as a separate "Act" for the same purposes that titles I-IV are to be so understood that the term "this Act" in the title refers only to title V, not to the entire 1990 Appropriations Act.[9] Accordingly, we conclude that the expenditure restriction in the rider applies only to the FCC appropriations made in title V.[10]

Interpreting the rider as applicable only to the FCC is the interpretation

---

[7] The Act provides that title I "may be cited as the 'Department of Commerce Appropriations Act, 1990'", *see* 103 Stat. at 995; that title III "may be cited as the 'Department of State Appropriations Act, 1990'," *id.* at 1010; and that title IV "may be cited as 'The Judiciary Appropriations Act, 1990'," *id.* at 1016.

[8] Each of titles I-IV appropriates monies for a single agency or, in the case of title IV, an entire branch of government (the federal judiciary).

[9] This interpretation of the term is consistent with the other uses of the term in title V. *See* 103 Stat. at 1018 (Commission on the Bicentennial of the United States Constitution); *id.* at 1022 (Securities and Exchange Commission); *id.* at 1023 (Small Business Administration); *id.* at 1024 (same); *id.* at 1028 (same).

[10] The restriction would apply to, although presumably have no practical effect on, the other agencies for which appropriations are made in title V.

most consistent with the rider's character as a proviso. Sums are appropriated "[f]or necessary expenses of the Federal Communications Commission . . . *Provided*" that the rider's terms are observed. 103 Stat. at 1020. While it would be possible to read the provision as conditioning the FCC appropriations on Commerce, Justice, State and other agency compliance with the terms of the rider, clearly the most natural reading of the proviso is as a condition only on the immediately preceding appropriation to the FCC. It would be odd indeed for Congress to condition one agency's appropriations on compliance by other agencies with enacted prohibitions. This is especially the case where, as here, the other agencies have no apparent authority to engage in the prohibited activities.

The legislative history confirms that Congress intended the rider to apply only to the FCC. The Senate Report on the bill that first included the rider explains the purpose of the rider as follows:

> The Committee has inserted a provision in the bill which bars *the Federal Communications Commission* from expending funds to repeal, retroactively restrict, or continue a pending reexamination of, longstanding rules to promote the ownership of broadcasting licenses by minority group members and women. The FCC has commenced an inquiry, In the Matter of Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications, MM Docket No. 86-484, which calls into question the advisability and legality of these rules.
>
> The Committee believes the inquiry is unwarranted . . . .

S. Rep. No. 182, 100th Cong., 1st Sess. 76 (1987) (emphasis added) ("Senate Report"). The report continues with instructions *to the FCC* to close MM Docket No. 86-484, and to resolve within sixty days certain proceedings that had been either remanded by the District of Columbia Circuit Court of Appeals — including the *Shurberg* case — or held in abeyance pending the outcome of the FCC's rulemaking, "in a manner consistent with the policies that mandated incentives for minorities and women in broadcast ownership." *Id.* at 77.

These passages make clear that the purpose of the rider was to prevent the FCC from using its appropriated funds to continue the then-pending FCC administrative proceeding reexamining the minority and gender preference policies[11] or, at most, to prevent the FCC from conducting any such reexamination in the future. The rider even identifies by docket number

[11] The FCC's rulemaking followed a request by the FCC to the D.C. Circuit — before which a constitutional challenge to the FCC's comparative licensing gender preference policy was pending -- to permit the agency to reexamine its preferences. *See Race and Gender Preferences*, 1 F.C.C. Rcd 1315 (1986)
Continued

(MM Docket No. 86-484) and, almost verbatim, the title of the specific FCC rulemaking (or "reexamination") with which it was concerned.[12]

The structure of the 1990 Appropriations Act also supports the conclusion that Congress did not intend the rider as a restriction on the use of all funds appropriated in the 1990 Appropriations Act. If Congress intended to apply the rider's restrictions to all of the federal entities, presumably it would have inserted language of restriction in the respective titles—each of which includes other restraints on the use of the appropriated monies—or, more likely, in title VI, a catch-all section that includes provisions limiting the use of funds appropriated in *any* of the earlier titles. Neither titles I-IV nor title VI contains any restriction substantively similar to that in the rider.

Even assuming that the rider extends to the funds appropriated to the Department of Justice, we do not believe that filing an amicus brief would be prohibited. The rider only prohibits the expenditure of funds "to repeal, to retroactively apply changes in, or to continue a reexamination of" the specified FCC policies. The Department of Justice does not even have the power to "repeal" or to "apply changes in" an FCC policy. That administrative power rests in the FCC and, through legislation, Congress.

Nor, we think, can the filing of an amicus (or any other) brief be regarded as "continu[ing] a reexamination" of the FCC policies at issue.[13] First, read in the context of the immediately preceding proscriptions on "repeal" and "changes in" the FCC policies, the term "continu[ing] a reexamination" is

---

[11] (...continued)

(MM Docket No: 86-484), *modified*, 2 F.C.C. Rcd 2377 (1987). The FCC had sought this reexamination in part because of its opinion at that time that both the racial and the gender preferences were unconstitutional. *See Brief for the Federal Communications Commission on Rehearing En Banc in Steele v. FCC*, D.C. Cir. No. 84-1176. The FCC was engaged in preparing findings in the rulemaking when Congress decided to abort the proceedings. In obedience to Congress' directive, the FCC closed the rulemaking and reinstituted the preferences on January 14, 1988. *See* FCC 88-17.

[12] There is no suggestion in either the text or legislative history of the subsequently-enacted riders that Congress' purposes for including the rider in the FCC appropriation has changed since the rider was first enacted in 1987. *See* S. Rep. No. 144, 101st Cong., 1st Sess. 86 (1989) (Committee "recommends retention" of provisos enacted previously); S. Rep. No. 388, 100th Cong., 2d Sess. 79 (1988) (Committee has "continued language from previous appropriations acts with regard to . . . minority and women ownership of broadcasting licenses").

[13] Arguably, no expenditure made after closure of the rulemaking proceeding in MM Docket No. 86-484 by any of the federal entities for which appropriations were made in the 1990 Appropriation Act could run afoul of this portion of the rider's prohibition. The rider could fairly be interpreted to prohibit only the expenditure of funds to continue the particular "reexamination" of the FCC policies then in progress in MM Docket No. 86-484, which was closed on January 14, 1988. *See, e.g.*, S. Rep. No. 182 at 76 (rider inserted to prohibit expenditures to "continue a *pending* reexamination" of the FCC policies (emphasis added)). If the rider were so interpreted, it would not prohibit a new "reexamination" of the policies.

Congress clearly understood and appreciated the difference between *beginning* a reexamination and *continuing* a reexamination of a particular matter, as evidenced by its prohibition in the same appropriations act of expenditures "to repeal, to retroactively apply changes, or *to begin or continue a reexamination* of the rules and policies established to administer such rules of the Federal Communications Commission as set forth at section 73.3555(c) of title 47 of the Code of Federal Regulations." *See* 103 Stat at 1021 (emphasis added).

best understood to refer only to administrative reexamination of the policies.[14] A court does not examine policies *qua* policies; it reviews the legality of the policies. Thus, while the prohibition might prevent commencement of a new *administrative* inquiry into the wisdom (or even the legality) of the agency's racial and gender preference policies, we do not believe it would stand as a bar to a *legal* challenge to those policies before the courts of law.[15]

Second, even if the rider were interpreted to extend to challenges in a judicial forum, we do not believe that the filing of a brief once the Court has decided to hear a challenge entails the use of funds "*to* continue a reexamination" of the FCC policies. The Court perhaps expended funds to continue the reexamination by docketing the cases, and will continue to do so by retaining the case on its docket for briefing, argument and disposition. With certiorari granted, however, the Department would only be expending funds *to participate* in a "reexamination" that has already been continued; it would not be expending funds "to" continue a reexamination. The reexamination, if that it be, *see* discussion *infra*, is underway and will continue, whether or not the Department participates. The Department fully complied with the terms of the prohibition (assuming that it applies) by opposing the grant of certiorari.

Finally, the Supreme Court's review of these cases would not properly be considered a "*re*examination" of the FCC policies because the Court has never previously examined these policies. One could argue that *any* second and successive examination constitutes a "reexamination" because the FCC has already once examined them. We believe, however, that the better reading of the rider (regardless to whom it applies) is as a prohibition on a second and successive examination by the same entity. This especially would seem to be the better interpretation, given that the prohibition is against "continuing" a reexamination, not merely reexamining, the specified policies. One does not ordinarily think of a second body "continuing" a reexamination begun by another body. Of course, this interpretation finds substantial support in the legislative history. *See* discussion *supra* at 16.

For the aforementioned reasons, we believe it is clear that Congress did not intend the rider to serve as a limitation on Department of Justice expenditures. Even if Congress' intent were less than clear, however, we would

---

[14] In the Senate Report accompanying the first appropriations bill to which the rider was attached, the Committee instructed the FCC to resolve certain pending cases in a manner consistent with the FCC's racial and gender preference policies. S. Rep. No. 182 at 77. The Committee's instruction identifies the cases to which it refers as ones which had been either remanded to the FCC by the District of Columbia Circuit Court of Appeals, or held in abeyance by the FCC pending reexamination of its policies. The Committee thus merely instructed the FCC to apply the racial and gender preference policies in administrative adjudication, which is consistent with our view that the rider was directed only at administrative actions that might lead to reversal of the specified FCC policies.

[15] Indeed, if the prohibited "reexamination" of FCC's policies bars a Justice Department legal challenge to those policies, it would also preclude judicial review of those policies, since the federal judiciary is funded by title IV of the Act, and would be subject to the same restrictions in the rider. Apart from the serious constitutional issue that would be presented by a provision purporting to prevent constitutional challenges to a law, *see, e.g., Webster v. Doe*, 486 U.S. 592, 603 (1988), it would be extraordinary to construe a provision to prevent judicial review sub silentio.

interpret the rider to permit an amicus filing so as to avoid the serious constitutional problems, *see NLRB v. Catholic Bishop*, 440 U.S. 490 (1979), that would otherwise exist. A statute that purported to prohibit the Executive from filing an amicus or other brief on the constitutionality of federal agency action or policy would raise the most serious constitutional concerns.[16]

The President is constitutionally required to take care that the laws, including the Constitution, be faithfully executed. *See* U.S. Const. art. II, § 3. Before entering office, the Constitution requires that he "solemnly swear" that he will "to the best of [his] Ability, preserve, protect and defend the Constitution of the United States." *Id.* art. II, § 1, cl. 8. The filing of briefs in courts of law through his subordinates—particularly as such filings may bear on the legality of action taken by Executive departments or agencies—is integral to the discharge of his constitutional duty to see that the laws are faithfully executed. As a consequence, while the question never has been and may never be litigated, it is doubtful that Congress, through exercise of its appropriations power or otherwise, could ever prevent the Executive from advancing before the courts a particular view of the constitutionality of an Executive agency action or policy.

CONCLUSION

For the foregoing reasons, we conclude that the 1990 Appropriations Act does not bar the Department of Justice from filing an amicus brief with the Supreme Court in the *Metro Broadcasting* litigation.

J. MICHAEL LUTTIG
Principal Deputy
Assistant Attorney General
Office of Legal Counsel

[16] Interpreting the rider so that it would extend to the Department of Justice would result in its application to the judiciary, as well. Application of the rider to prohibit the judiciary from expending any of its appropriated funds "to continue a reexamination" of the FCC policies would raise separate, but equally serious, constitutional questions.

Authority of the Federal Financing Bank to Provide Loans to the Resolution Trust Corporation

The Resolution Trust Corporation is a "federal agency" within the meaning of the Federal Financing Bank Act of 1973, and the RTC is authorized to issue financial obligations under the Federal Home Loan Bank Act. Accordingly, under the FFB Act the Federal Financing Bank is authorized to provide loans to the RTC.

February 14, 1990

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF THE TREASURY

This memorandum responds to your request for our views as to whether the Federal Financing Bank ("the Bank") is authorized to provide loans to the Resolution Trust Corporation ("RTC"). Section 6 of the Federal Financing Bank Act of 1973 ("the FFB Act"), 12 U.S.C. § 2285, authorizes the Bank to provide loans by directly purchasing notes or other obligations from any "Federal agency" that is authorized to issue such obligations. As explained more fully below, we conclude that RTC is a "Federal agency" within the meaning of the FFB Act and that RTC is authorized to issue obligations by virtue of its authority under section 21A(b)(4) of the Federal Home Loan Bank Act, 12 U.S.C. § 1441a(b)(4). Accordingly, we conclude that the Bank may provide loans to RTC by directly purchasing RTC notes or obligations.

I. Background

The Federal Financing Bank was created in 1973 to reduce the cost of federal and federally assisted borrowing by coordinating financing programs among various federal agencies. Prior to enactment of the FFB Act, many agencies financed their programs by issuing their own debt securities directly into the market. H.R. Rep. No. 299, 93d Cong., 1st Sess. 2 (1973), *reprinted in* 1973 U.S.C.C.A.N. 3153, 3154. This required the agencies to develop their own financing staffs and consequently to incur significant under-

writing costs. Lack of coordination among agencies in timing the introduction of various issues into the market and liquidity costs associated with having a proliferation of competing small issues also increased borrowing costs. *Id.*

The FFB Act reduced these costs by allowing agencies to issue obligations directly to the Bank, which would then issue its own securities into the market or directly to the Treasury, which is the current procedure. Section 6 of the Act provides, in part, that "[a]ny Federal agency which is authorized to issue, sell, or guarantee any obligation is authorized to issue or sell such obligations directly to the Bank." 12 U.S.C. § 2285(a). The Bank thus may provide financing for the Resolution Trust Corporation if, within the meaning of the FFB Act, (1) RTC is a "Federal agency," and (2) RTC is authorized to "issue, sell, or guarantee any obligation[s]."

II. Discussion

A. *RTC is a "Federal Agency" Within the Meaning of the FFB Act*

We believe that RTC is a federal agency within the meaning of the FFB Act. Section 3(a) of the Act provides that the term "'Federal agency' means"

> an executive department, an independent Federal establishment, or a corporation or other entity established by the Congress which is owned in whole or in part by the United States.

12 U.S.C. § 2282(1). In our view, RTC is a "corporation or other entity established by the Congress which is owned in whole or in part by the United States."[1]

1. *Scope of the Corporation Coverage Clause*

There is no dispute that RTC is a "corporation" and that it was "established by the Congress." *See* Federal Home Loan Bank Act, section 21A(b)(1)(A), as added by Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, § 501, 103 Stat. 183, 369 (codified at 12 U.S.C. § 1441a(b)(1)(A)) ("There is hereby established a Corporation to be known as the Resolution Trust Corporation . . . ."). The central question in determining whether RTC is a "Federal agency" within the meaning of the FFB Act therefore is whether it is "owned in whole or in part by the United States."

The FFB Act does not define the phrase "owned in whole or in part by the United States." Ordinarily, ownership in a corporation is a function of stock ownership: Under general principles of corporate law, one has an

[1] Throughout this opinion, we will refer to this phrase as the "corporation coverage clause."

ownership interest in a corporation if he or she owns capital stock in that corporation. Stock ownership in turn entitles the holder to certain ownership rights. This conventional ownership test, however, is not especially helpful in determining ownership in government corporations. Several government corporations, such as the Tennessee Valley Authority and the Government National Mortgage Association, were intended to be "Federal agencies" within the scope of the corporation coverage clause, but they do not issue stock at all.[2] *See* 16 U.S.C. §§ 831-831dd (outlining powers and duties of TVA); 12 U.S.C. §§ 1716-1724 (1970 & Supp. III 1973) (outlining powers and duties of GNMA); *see also infra* pp. 22-24. Private capital contributions to government corporations, moreover, do not always entitle contributors to the kind of ownership rights that typically follow from capital investment in private corporations. For example, although RTC issues "capital certificates" to the Resolution Funding Corporation ("REFCORP"), a private corporation that raises money for RTC by selling REFCORP bonds, these certificates entitle REFCORP to few of the usual rights of corporate ownership. The certificates are nonvoting, pay no dividends, and do not provide REFCORP with any control over the management of RTC. *See infra* pp. 29-30. Thus, the precise scope of the corporation coverage clause is difficult to discern from the text of the clause alone.

The legislative history of the FFB Act, however, provides further guidance on the meaning of the clause by providing examples of the kinds of corporate entities that were and were not intended to be covered by the clause. By contrasting the characteristics of the included and excluded entities, one can glean a clearer understanding of the reach of the clause.

The legislative history shows that Congress intended the FFB Act[3] to cover a range of corporate entities, including the Government National Mortgage Association, 118 Cong. Rec. 22,015 (1972); the Export-Import Bank of the United States, 119 Cong. Rec. 36,004 (1973), *1973 House Hearings* at 15; the Commodity Credit Corporation, *id.*; S. Rep. No. 166, 93d Cong., 1st Sess. 5 (1973); and the Tennessee Valley Authority, H.R. Rep. No. 299 at 5, 1973 U.S.C.C.A.N. at 3157; *1973 House Hearings* at 33.[4] In contrast to the excluded corporations, *see infra* pp. 24-26, the essential characteristics of

---

[2] Despite its eligibility to finance certain issues through the Bank, *see Federal Financing Bank Act: Hearings Before the House Comm. on Ways and Means*, 93d Cong., 1st Sess. 15 (1973) ("*1973 House Hearings*") (GNMA mortgage-backed securities); 118 Cong. Rec. 22,015 (1972) (same), GNMA has never done so.

[3] The original Federal Financing Bank bill, S. 3001, passed in the Senate during the second session of the Ninety-Second Congress in 1972 was favorably reported by the House Ways and Means Committee. The full House, however, was not able to act upon the bill before adjournment. H.R. 5874, the bill ultimately enacted during the first session of the Ninety-Third Congress in 1973, was very similar to S. 1001 and included the identical definition of "Federal agency." *Compare* S. 3001, 92d Cong., 2d Sess. (1972) *with* H.R. 5874, 93d Cong., 1st Sess. (1973).

[4] By statute, all of these entities were defined as "corporate" entities. 12 U.S.C. § 1717(a)(2)(A) (1970) (GNMA); *id.* § 635(a) (Export-Import Bank); 15 U.S.C. § 714 (1970) (Commodity Credit Corporation); 16 U.S.C. § 831 (1970) (TVA). Although TVA is a "Federal agency" eligible to borrow from the Bank under section 6 of the FFB Act, the TVA is exempt from the prior approval requirements of section 7 of the Act, 12 U.S.C. § 2286. *See infra* note 7.

each of these covered corporate entities were typical of the characteristics of government entities generally. Each of these corporations received government funding, was subject to significant federal oversight and, with one exception, generally issued securities backed by the full faith and credit of the federal government.[5]

Each of these four corporations received substantial government funding. Two of them received direct capital contributions from the United States, *see* 12 U.S.C. § 635b (1970) ($1,000,000,000 for Export-Import Bank); 15 U.S.C. § 714e (1970) ($100,000,000 for Commodity Credit Corporation), and at least three received direct appropriations. *See* Pub. L. No. 93-137, 87 Stat. 491, 491 (1973) ($19,821,000 for GNMA); Pub. L. No. 93-135, 87 Stat. 468, 477 (1973) ($3,301,940,000 for Commodity Credit Corporation); Pub. L. No. 93-97, 87 Stat. 318, 328 (1973) ($45,676,000 for TVA).

These corporations were generally subject to closer federal oversight than were the excluded corporations, *see infra* pp. 25-26, although the precise relationship of the various corporations to the federal government differed. Indeed, two of the four covered corporations were placed within executive departments. *See* 12 U.S.C. § 1717(a)(2)(A) (1970) (declaring GNMA to be a body corporate within the Department of Housing and Urban Development); *id.* § 1723(a) (powers and duties of GNMA vested in the Secretary of HUD); 15 U.S.C. § 714 (1970) (Commodity Credit Corporation is an instrumentality of the United States within the Department of Agriculture and subject to the general supervision and direction of the Secretary of Agriculture).[6]

The principal officers and directors of these covered corporations were not elected by private entities; they were appointed directly by the President or by the head of an executive department. *See* 12 U.S.C. § 1723(a) (1970) (Secretary of HUD selects president, vice-president, and other principal officers of GNMA); *id.* § 635a(b) & (c) (board of directors of Export-Import Bank, which includes its president and first vice-president, are appointed by President with advice and consent of the Senate); 15 U.S.C. § 714g(a) (1970) (six members of board of directors of Commodity Credit Corporation appointed by President with advice and consent of the Senate; Secretary of Agriculture is a member *ex officio* and serves as Chairman); 16 U.S.C. § 831a(a) (1970) (board of directors of TVA appointed by President with advice and consent of the Senate).

---

[5] The significance of the references to these corporations for purposes of determining congressional intent is not so much that we know whether these particular corporations were to be covered or not (although this is important), but rather that we know the *types* of corporations Congress did and did not intend to be covered. Indeed, several of these particular entities have been substantially restructured since the FFB Act was enacted in 1973. Of course, changes in the structure, management and/or funding of these corporations after the date of enactment of the FFB Act are irrelevant to determining Congress' intent in enacting the legislation. We have considered, therefore, only their structure and operations at the time the FFB Act was considered and enacted.

[6] The other covered corporations functioned as independent agencies of the United States *See, e.g.*, 12 U.S.C. § 635(a) (1970) (Export-Import Bank).

Finally, each of these corporations, except for the Tennessee Valley Authority, generally issued obligations that were backed by the full faith and credit of the United States government.[7] *See* 12 U.S.C. § 635k (1970) ("All guarantees and insurance issued by the [Export-Import] Bank shall be considered contingent obligations backed by the full faith and credit of the Government of the United States of America."); 15 U.S.C. § 713a-4 (1970) (obligations of Commodity Credit Corporation "shall be fully and unconditionally guaranteed both as to interest and principal by the United States"); 12 U.S.C. § 1721(g) (Supp. III 1973) (full faith and credit of United States pledged to payment of certain GNMA obligations); *but see* 12 U.S.C. § 1721(b) (1970) (certain other GNMA obligations not backed by government).

The characteristics of these covered corporations were very different from the characteristics of those entities that we know from the legislative history were intended to be excluded from coverage. The committee reports on the FFB Act state that the Act would *not* cover the federal land banks, the federal intermediate credit banks, the banks for cooperatives, the federal home loan banks, the Federal Home Loan Mortgage Corporation, the Federal National Mortgage Association, and the federal reserve banks. H.R. Rep. No. 299, at 5, 1973 U.S.C.C.A.N. at 3157; S. Rep. No. 166, at 3. At the time, all of these excluded corporations were wholly privately financed, had significant management independence and, with one exception,[8] did not issue obligations backed by the full faith and credit of the United States.

The Federal National Mortgage Association, the federal home loan banks, the banks for cooperatives, the federal land banks, and the federal intermediate credit banks were initially capitalized in part by contributions from the United States.[9] However, by the time the FFB Act was enacted, the shares

[7] The bulk of TVA's existing borrowing authority in 1973 consisted of obligations that were not guaranteed by the government, *see* 16 U.S.C. § 831n-4(b) (1970), but TVA had previously issued bonds that were backed by the full faith and credit of the United States, *see id.* §§ 831n-1 & 831n-3. Indeed, in order to exempt TVA from the prior approval requirements of the FFB Act, Congress inserted a clause into section 7 of the Act exempting from these requirements any "obligations issued or sold pursuant to an Act of Congress which expressly prohibits any guarantee of such obligations by the United States." 12 U.S.C. § 2286(a). This exemption would apply to few, if any, agencies other than TVA, because virtually all federal agencies covered by the FFB Act issued obligations backed by the government.

[8] Federal Reserve notes were and continue to be "obligations of the United States," 12 U.S.C. § 411 (1970), backed by the federal government. The FFB Act, however, expressly excludes from its coverage "Federal Reserve notes." 12 U.S.C. § 2282(2). Thus, notwithstanding their private capitalization and substantial day-to-day management independence, the federal reserve banks could not obtain financing from the Bank by issuing "Federal Reserve notes" to the Bank.

[9] *See* 12 U.S.C. § 1718(a) & (d) (1970) (FNMA); *id.* § 1426(f) (federal home loan banks); *id.* § 1134d(a)(1) (banks for cooperatives), *repealed by* Pub. L. No. 92-181, § 5.26(a), 85 Stat. 583, 624 (1971); 12 U.S.C. §§ 692 & 695 (1970) (federal land banks), *repealed by* Pub. L. No. 92-181, § 5.26(a); 12 U.S.C. § 1061(a)(1) (1970) (federal intermediate credit banks), *repealed by* Pub. L. No. 92-181, § 5.26(a).

of the United States had been retired, and these entities were entirely privately capitalized.[10] Although the federal reserve banks were originally authorized to issue stock to the United States, they had never done so. *See* 12 U.S.C. note following section 284 (1970). The Federal Home Loan Mortgage Corporation ("FHLMC") had, from its inception, obtained all of its equity capital from private sources. *See* 12 U.S.C. § 1453 (1970).

In addition to being fully privately capitalized, these entities generally relied solely upon their own income, rather than upon appropriations, to fund their operating expenses. *See 1974 Budget Appendix*, *supra* note 10, at 1098 ("The entire operating expenses of the [Federal Home Loan Banks] are paid from their own income and are not included in the budget of the United States."); *id.* at 1094 (banks for cooperatives); *id.* at 1097 (federal land banks); *id.* at 1095 (federal intermediate credit banks).

These corporations were relatively independent in the management of their day-to-day affairs, although the extent of direct federal supervision differed substantially. With one exception,[11] private entities elected a substantial majority of the boards of directors of each of these corporations, and the shares issued by these corporations consisted of voting stock. Thus, two-thirds of the directors of the FNMA, the federal reserve banks, and the federal home loan banks were elected by the respective shareholders and members of these entities. *See* 12 U.S.C. § 1723(b) (1970) (FNMA); *id.* §§ 302 & 304 (federal reserve banks); *id.* § 1427(a) (federal home loan banks). Similarly, private parties elected a substantial majority of the boards of directors of the three types of farm credit banks. Under 12 U.S.C. § 2224 (Supp. III 1973), the same seven members of the board of directors of each farm credit district served as the board of directors for the federal land bank, the federal intermediate credit bank, and the bank for cooperatives of each such district. Six of the seven members were elected by private entities:

---

[10] *See* 12 U.S.C. § 1718(a) (1970) (requiring retirement of preferred shares in FNMA held by the Secretary of the Treasury); *id.* § 1426(g) (retirement of stock held by the United States in federal home loan banks); 12 U.S.C. § 2126 (Supp. III 1973) (providing for retirement of stock held by the Governor of the Farm Credit Administration in the banks for cooperatives); U.S. Bureau of the Budget, *The Budget of the United States Government, Fiscal Year 1974, Appendix* at 1094 (1973) ("*1974 Budget Appendix*") (U.S. Government capital m banks for cooperatives was fully retired on December 31, 1968); *id.* at 1097 ("The last of the Government capital that had been invested in the [federal land banks] was repaid in 1947."); 12 U.S.C. § 2073(g) (Supp. III 1973) (providing for retirement of stock held by the Farm Credit Administration in the federal intermediate credit banks); *1974 Budget Appendix* at 1095 (government-held stock in federal intermediate credit banks was fully retired on December 31, 1968). Although the various farm credit banks were authorized to issue nonvoting stock to the Governor of the Farm Credit Administration on a temporary basis when needed to meet emergency credit needs of borrowers, *see* 12 U.S.C. § 2151(a) (Supp. III 1973); *see also id.* §§ 2013(d), 2073(d) & 2124(e) (authorizing issuance of nonvoting stock to Governor of the Farm Credit Administration), the ownership of such stock was, for most purposes, expressly "deemed to not change the status of ownership of the banks," *id.* § 2151(a), and such stock was required to be retired when no longer needed. *See id.* § 2151(b)

[11] The members of the Federal Home Loan Bank Board, who were appointed by the President with the advice and consent of the Senate, *see* Reorganization Plan No. 3 of 1947, § 2(a), 3 C.F.R. 1071, 1072 (1943-1948), *reprinted in* 12 U.S.C. § 1437 note at 2532 (1970), served as the board of directors of the Federal Home Loan Mortgage Corporation. 12 U.S.C. § 1452(a) (1970).

two were elected by the shareholders of the federal land bank for that farm credit district, two by the shareholders of the federal intermediate credit bank, and two by the shareholders of the bank for cooperatives. 12 U.S.C. § 2223(a) (Supp. III 1973).[12]

Finally, each of these corporations (except the federal reserve banks[13]) issued obligations that were not guaranteed by the full faith and credit of the United States government. Indeed, for most of these corporations there was an express statutory bar to full faith and credit pledges. *See* 12 U.S.C. § 1719(b) (1970) (FNMA); *id.* § 1435 (federal home loan banks); 12 U.S.C. § 2155(c) (Supp. III 1973) (federal land banks, federal intermediate credit banks, and banks for cooperatives). Although no provision expressly barred FHLMC from issuing obligations backed by the federal government, section 306(c) of the Federal Home Loan Mortgage Corporation Act, 12 U.S.C. § 1455(c) (1970), provided that the obligations of the corporation would be guaranteed, if at all, *by the federal home loan banks.* There was no provision for FHLMC's obligations to be backed by the full faith and credit of the United States.

From this review of the entities that we know Congress considered and determined were either covered or not, it is relatively clear that the Act was intended generally to reach a range of federally created corporations that receive substantial funding from the government, that are subject to significant federal control, and that issue obligations guaranteed by the federal government. On the other hand, the Act was intended generally to exclude the fairly small group of federally created corporations that are wholly privately funded, that have a significant measure of independence in their management, and that issue obligations not backed by the full faith and credit of the federal government.[14] The apparent purpose of excluding from coverage this latter type of corporation was to prevent privately owned insti-

---

[12] Section 2223(a) provided, in part, that:

> Two of the district directors shall be elected by the Federal land bank associations, two by the production credit associations, and two by the borrowers from or subscribers to the guaranty fund of the bank for cooperatives.

These three groups which, in turn, were fully privately owned and managed, *see* 12 U.S.C. §§ 2032 & 2034 (Supp. III 1973) (federal land bank associations — which were distinct entities from the federal land banks); *id.* §§ 2092 & 2094 (production credit associations), were the respective shareholders of the federal land banks, *id.* § 2013(b), the federal intermediate credit banks, *id.* § 2073(b), and the banks for cooperatives, *id.* §§ 2124(c) & 2127.

[13] Federal Reserve notes were obligations of the United States backed by the federal government. *See supra* note 8.

[14] Of course, any given corporation may not have all of the principal characteristics of either the included or excluded corporations mentioned above, or it may have the characteristics of one or the other, but to a lesser or greater extent. In these circumstances, one must determine, with due regard for the purposes of the FFB Act, whether the corporation's principal characteristics render it most analogous to those corporations that were intended to be covered by the FFB Act or to those that were not.

tutions from obtaining the advantages of Bank financing, in particular the benefit of financing backed by the full faith and credit of the United States. *See infra* note 16.[15]

The few actual discussions of the scope of the corporation coverage clause in Congress or in the materials submitted in connection with the legislation are fully consonant with these conclusions concerning the scope of the clause. The original Federal Financing Bank bill was proposed by the Department of the Treasury, and the definition of "Federal agency" was taken unaltered from the language of that original Treasury proposal. *Compare* 12 U.S.C. § 2282 *with* Letter from John B. Connally, Secretary of the Treasury, to Carl B. Albert, Speaker of the House of Representatives (Dec. 9, 1971) (attaching draft bill). In submitting the proposed bill, the Secretary of the Treasury emphasized that the corporation coverage clause was intended to exclude "Government-sponsored agencies which are entirely privately owned and issue obligations which are not directly guaranteed by the Government." *Id.*

The Secretary's understanding of the clause as excluding from coverage government corporations that were wholly privately owned and whose obligations were not backed by the government is supported by testimony given by Paul Volcker, then-Under Secretary of the Treasury for Monetary Affairs, before the House Committee on Ways and Means. In the course of extensive questioning concerning the coverage of the proposed legislation, Mr. Volcker reiterated that wholly privately owned corporations were excluded from coverage. He explained that one of the principal reasons for excluding these corporations was to prevent them from issuing to the Federal Financing Bank securities that were not government-backed in exchange for Bank financing that would be backed by the full faith and credit of the United States.[16] These comments, especially taken together with others to the effect

---

[15] These conclusions as to the reach of the clause are supported by the treatment of government-sponsored agencies in the annual Budgets of the United States. The list of corporations that the House and Senate Reports stated were excluded from the FFB Act's coverage closely corresponds to the list of "government-sponsored credit agencies" contained in the appendix to the annual Budget report. Thus, for example, the appendix to the Fiscal Year 1974 Budget (which was the last to be submitted before the FFB act was passed) lists six such entities: the FNMA, the banks for cooperatives, the federal intermediate credit banks, the federal land banks, the federal home loan banks, and the FHLMC *See 1974 Budget Appendix* at 1084, 1092-1100. This almost exact correspondence with the list of excluded corporations is not coincidental; these corporations are excluded from the normal budgetary process because they are considered to be "privately owned." *Id.*; *see also Report of the President's Commission on Budget Concepts* 30 (1967) ("Government-sponsored enterprises [should] be omitted from the budget when such enterprises are completely privately owned.").

[16] Mr. Volcker testified that there were two basic reasons for excluding certain "privately owned enterprise agencies":

> One is that these institutions are privately owned, and there is some philosophic question in our mind, if you will, whether privately owned institutions should in the nature of things have access to this bank, which, of course, will be emitting full faith and credit securities of the United States.
>
> [Second,] [i]f you look at the practicalities, these agencies . . . are large borrowers and they are well established and have a niche in the market, so to speak. . . . Their securities are somewhat more easily traded than many of the securities that we do cover here.

Federal Financing Bank Act: Hearings on S. 3001 Before the House Comm. on Ways and Means, 92d Cong., 2d Sess. 26-27 (1972) ("*1972 House Hearings*").

that the term "Federal agency" was intended to have a broad reach, *see, e.g., Federal Financing Authority: Hearings on S. 1015, S. 1699, S. 3001 & S. 3215 Before the Senate Comm. on Banking, Housing and Urban Affairs*, 92d Cong., 2d Sess. 14 (1972) (statement of Paul Volcker) (there were to be few exceptions to the coverage of the FFB Act), confirm our conclusions concerning the relatively narrow scope of the exclusion.

2. *The Resolution Trust Corporation*

RTC clearly most resembles the corporate entities that were intended to be covered by the Act. It has all of the principal characteristics of the covered corporations; it has none of the principal characteristics of the entities that were intended to be excluded. First,[17] RTC has received substantial funding from the federal government. Congress ordered the Treasury to provide RTC $18.8 billion in fiscal year 1989 and authorized the Secretary to use the proceeds from the sale of Treasury securities to supply the necessary funds. 12 U.S.C. § 1441a(b)(14).

Second, RTC is subject to significant federal oversight and control. The day-to-day operations of RTC are managed by the Federal Deposit Insurance Corporation ("FDIC"), subject to the ultimate oversight of a new federal agency, the "Oversight Board." *Id.* § 1441a(a). Unless removed by the Oversight Board, *see* 12 U.S.C. § 1441a(m), the FDIC functions as the exclusive manager of RTC, *see* 12 U.S.C. § 1441a(b)(1)(C), and the members of the FDIC board of directors serve as the board of directors of RTC, *see id.* § 1441a(b)(8)(A). RTC's directors therefore are not selected by private entities; they are ex officio members who were appointed to their respective positions at the FDIC by the President with the advice and consent of the Senate.[18]

The Oversight Board has ultimate oversight responsibility for RTC. 12 U.S.C. § 1441a(a).[19] It sets the "overall strategies, policies, and goals" of

[17] FIRREA describes RTC as "an instrumentality of the United States," declares that it is an "agency of the United States" for certain purposes, and states that, despite the fact "that no Government funds may be invested in the Corporation," it shall be treated, for purposes of the Government Corporation Control Act, "as a mixed-ownership Government corporation which has capital of the Government." 12 U.S.C. § 1441a(b)(1) & (2). At first blush, it might appear that these references to RTC as a government agency would alone resolve the question whether it is a federal agency within the meaning of the FFB Act. However, several of the corporations that Congress expressly intended to exclude from coverage under the FFB Act were also considered to be "instrumentalities" and "mixed-ownership Government corporations" for certain purposes. *See* 12 U.S.C. § 2011 (Supp. III 1973) (federal land banks were "federally chartered instrumentalities of the United States"); *id.* § 2071 (federal intermediate credit banks); *id.* § 2121 (banks for cooperatives); 31 U.S.C. § 856 (1970) (federal home loan banks, federal land banks, federal intermediate credit banks, and banks for cooperatives were "mixed-ownership Government corporations" for purposes of the Government Corporation Control Act).

[18] Section 2(a)(1) of the Federal Deposit Insurance Act, 12 U.S.C § 1812(a)(1), as amended by FIRREA, Pub. L. No. 101-73, tit. II, § 203, 103 Stat. 183, 188 (1989), provides that the board of directors of the FDIC consists of five members: the Comptroller of the Currency, the Director of the Office of Thrift Supervision, and three other individuals to be appointed by the President with the advice and consent of the Senate. The Director of the Office of Thrift Supervision is also a presidential appointee, *see* 12 U.S.C. § 1462a(c)(1), as is the Comptroller of the Currency, *see id.* § 2.

RTC. *Id.* § 1441a(a)(6). This authority includes the power to establish the general policies and procedures for RTC's handling of case resolutions, its management and disposition of assets, and its use of debt securities, as well as the power to establish RTC's overall financial goals and its budget. *Id.* § 1441a(a)(6)(A).

The Oversight Board also reviews all rules and regulations issued by RTC, and may, within certain limits, require modifications in these regulations. *Id.* § 1441a(a)(6)(C). The Oversight Board also periodically reviews the overall performance of RTC. *Id.* § 1441a(a)(6)(D). Moreover, under certain specified circumstances, the Oversight Board is authorized to remove the FDIC as exclusive manager of RTC and to appoint a new board of directors and chief executive officer. Thus, although the Oversight Board is not involved in RTC's day-to-day resolution of specific cases, *see id.* § 1441a(a)(8)(A); H.R. Conf. Rep. No. 222, 101st Cong., 1st Sess. 410, *reprinted in* 1989 U.S.C.C.A.N. 432, 449, the Board's expansive authority over RTC's operations illustrates the substantial degree of federal governmental control over RTC.

Finally, FIRREA provides that the full faith and credit of the United States is pledged to the payment of any obligation issued by RTC, provided only that the obligation expressly states its principal amount and date of maturity. 12 U.S.C. § 1441a(j)(3).

RTC technically has not received capital contributions from the Treasury in exchange for RTC capital certificates. This alone, however, does not prevent RTC from being covered under the Act. First, other corporations that were clearly intended to be covered by the FFB Act, such as GNMA and TVA, had no outstanding stock owned by the United States. Second, although RTC issues "capital certificates" to REFCORP[20] in exchange for REFCORP's compulsory cash contributions, 12 U.S.C. § 1441a(b)(10)(M), these certificates do not confer many of the ordinary entitlements of corporate ownership. The certificates are nonvoting, pay no dividends, and do not provide REFCORP with any control over the management or operation of RTC.[21] Third, if REFCORP's possession of these certificates were alone considered sufficient to render RTC a wholly privately owned entity, it would be difficult to explain the need for two separate entities. REFCORP would

[19] The Oversight Board is comprised of five members: the Secretary of the Treasury (who serves as Chairman), the Chairman of the Board of Governors of the Federal Reserve System, the Secretary of Housing and Urban Development, and two other individuals appointed by the President with the advice and consent of the Senate. 12 U.S.C. § 1441a(a)(3).

[20] REFCORP is a private entity which is fully capitalized by the federal home loan banks, and which raises money for RTC by selling REFCORP bonds, which are not backed by the full faith and credit of the United States. 12 U.S.C. § 1441b(d)(3), (e), (f)(4) & (10). FIRREA, however, does establish a Financing Corporation Principal Fund, which consists of zero-coupon Treasury securities purchased with funds obtained from the federal home loan banks, to ensure principal payments on REFCORP bonds. FIRREA also provides that the Secretary of the Treasury shall provide funds for REFCORP bond interest payments that are not otherwise covered. *Id.* § 1441b(f)(2)(E)(i) & (g)(2).

[21] REFCORP does retain a residual claim on the net assets of RTC, if any, after RTC is terminated. At that point, RTC's assets and liabilities are transferred to the "FSLIC Resolution Fund," which, after selling the assets, transfers any net proceeds to REFCORP. 12 U.S.C. §§ 1441a(o)(2) & 1821a(e).

be unnecessary if it were merely a funding mechanism for another private corporation.

Because RTC receives substantial government funding, is subject to significant federal control, and issues obligations backed by the full faith and credit of the United States, we believe that it is a "corporation . . . established by the Congress which is owned in whole or in part by the United States," as that phrase is used in the FFB Act.[22] Accordingly, we conclude that RTC is a "Federal agency" within the meaning of the Act.[23]

B. *RTC is Authorized to Issue "Obligations" Within the Meaning of the FFB Act*

RTC must not only be a Federal agency, but also must be authorized to "issue, sell, or guarantee any obligation" within the meaning of the FFB Act to be eligible for FFB financing. Section 3(2) of the Act provides that the term "obligation" means

> any note, bond, debenture, or other evidence of indebtedness, but does not include Federal Reserve notes or stock evidencing an ownership interest in the issuing federal agency.

12 U.S.C. § 2282(2). The term thus is broadly defined to include virtually any paper evidencing indebtedness. As explained below, we conclude that RTC is authorized to issue "obligations" within the meaning of the FFB Act because FIRREA authorizes RTC to issue notes in connection with its case resolution duties.

No provision of FIRREA expressly grants RTC the authority to issue obligations. Subsection 21A(b)(4) of the Federal Home Loan Bank Act ("the FHLB Act") as added by FIRREA, however, provides that, subject to certain limitations, RTC "shall have the same powers and rights to carry out its duties with respect to [financial institutions subject to its resolution authority] as the [FDIC] has under sections 11, 12, and 13 of the Federal Deposit Insurance Act ["the FDI Act"] with respect to [depository institutions insured by the FDIC]." 12 U.S.C. § 1441a(b)(4). Section 13(c) of the FDI Act provides that the FDIC is authorized, among other things, to make loans or contributions to, or make deposits in, certain insured depository institutions or other companies under certain circumstances. *See* 12 U.S.C.

[22] Because we conclude that RTC comes within the corporation coverage clause, we need not address whether RTC might also be considered an "executive department" or an "independent Federal establishment" within the meaning of section 3(1).

[23] Our analysis of RTC is supported by the fact that the Fiscal Year 1991 Budget treats RTC, not as a privately owned government-sponsored enterprise, but as an independent federal agency. *See* Executive Office of the President of the United States, *Budget of the United States Government, Fiscal Year 1991* A-21 to A-23, A-140 to A-142, A-271, A-1181 to A-1182, A-1213 to A-1226 (1990). *See supra* note 15.

§ 1823(c). This broad grant of authority to provide financial assistance in case resolutions has been interpreted to include the authority to issue notes evidencing the FDIC's obligation to provide certain sums at a future time. *See infra* note 29. Since FIRREA provides that RTC shall have the same authority to provide assistance in case resolutions as the FDIC possesses under sections 11, 12, and 13 of the FDI Act,[24] it follows that RTC is authorized to issue obligations when providing financial assistance in case resolutions. Accordingly, we conclude that RTC has the authority under 12 U.S.C. § 1441a(b)(4) to issue "obligations."

There is really no doubt that Congress intended RTC to have such authority. There are repeated, explicit references throughout the statute to RTC's authority to issue obligations. Subsection 21A(b)(7) of the FHLB Act, as added by FIRREA, for example, provides that "*[RTC's] authority to issue obligations* and guarantees shall be subject to general supervision by the Oversight Board . . . and shall be consistent with subsection (j)." 12 U.S.C. § 1441a(b)(7) (emphasis added). Subsection (j)(1) even establishes a formula for calculating the maximum dollar amount of obligations that RTC may have outstanding at any given time. *Id.* § 1441a(j)(1).[25] In addition, the provision that requires RTC to submit periodic financing requests to the Oversight Board states that such requests must include "any proposed use of *notes, guarantees or other obligations*." *Id.* § 1441a(b)(13)(C) (emphasis added). Finally, FIRREA provides that "[t]he full faith and credit of the United States is pledged to the payment of *any obligation issued by [RTC]*, with respect to both principal and interest," if the obligation states its principal amount and its date of maturity. *Id.* § 1441a(j)(3) (emphasis added).

The legislative history of FIRREA affirmatively supports the conclusion that RTC has authority to issue obligations. In pressing for limitations on RTC's authority to issue obligations, Congressman Gonzalez, the Chairman of the House Banking Committee and the principal sponsor of FIRREA in the House, pointed out that:

> [U]nder this bill, the RTC will have all of the case resolution powers of the FDIC and the FSLIC as we have known them.

---

[24] *See, e.g.*, 135 Cong. Rec. 12,110 (1989) ("RTC will have all of the case resolution powers of the FDIC and the FSLIC *as we have known them*.") (emphasis added).

[25] Subsection (j)(1) provides that:

> Notwithstanding any other provision of this section, the amount which is equal to—
> (A) the sum of—
> (i) the total amount of contributions received from [REFCORP]; and
> (ii) the total amount of outstanding obligations of [RTC]; minus
> (B) the sum of—
> (i) the amount of cash each held by [RTC]; and
> (ii) the amount which is equal to 85 percent of [RTC's] estimate of the fair market value of other assets held by the Corporation, may not exceed $50,000,000,000.

12 U.S.C. § 1441a(j)(1). RTC thus may issue obligations up to the amount that is equal to $50 billion, plus its cash, plus 85% of its assets, less any amounts received from REFCORP.

> This broad grant of power includes the ability to provide financial assistance to acquirers of insolvent thrifts, *assistance such as notes.*

135 Cong. Rec. 12,110 (1989) (emphasis added).[26] Congressman Gonzalez and others even expressed concern over the extent to which FSLIC, in late 1988, had exercised its authority to issue notes, and emphasized that since RTC would have this same authority, an explicit limit on the dollar amount of such obligations was necessary. *See id.*; *see also id.* at 12,111 (statement of Rep. Price) ("Currently under both the House and the Senate bill, the RTC has the authority to issue notes or other obligations with no apparent limit."); *id.* at 12,112 (statement of Rep. Wylie) ("The administration recognizes the need to place a cap on the aggregate amount of RTC notes and obligations based on last year's FSLIC experience.").[27]

Finally, and significantly, FSLIC, which previously fulfilled RTC's case resolution role, had itself issued obligations under the authority of the case resolution powers conferred by 12 U.S.C. § 1729(f) (1988), *repealed by* FIRREA, Pub. L. No. 101-73, § 407, 103 Stat. 183, 363 (1989).[28] *See* 68 Comp. Gen. 14 (1988) (FSLIC has authority to issue notes in connection with case resolutions).[29] And, as noted previously, Congress intended RTC to have essentially the same case resolution powers that FSLIC had. *See supra* pp. 31-32.

---

[26] *See also Problems of the Federal Savings and Loan Insurance Corporation: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 101st Cong., 1st Sess., pt. II, at 590 (1989) ("*1989 Senate FSLIC Hearings*") (statement of Richard Darman, Director, Office of Management and Budget) (RTC may, like FSLIC, issue promissory notes in resolving cases).

[27] Congressman Gonzalez's amendment was adopted by the House, and its key provisions ultimately became subsection 21A(j) of the FHLB Act, 12 U.S.C. § 1441a(j).

[28] The text of former 12 U.S.C. § 1729(f)(1)-(4), which described FSLIC's authority to provide assistance in case resolutions, used virtually identical language as the statute describing the comparable authority of the FDIC, 12 U.S.C. § 1823(c)(1)-(4).

[29] In concluding that FSLIC had the authority to issue notes, the Comptroller General relied not only on FSLIC's statutory authority to provide assistance in case resolutions, but also upon an express statutory grant of authority "to issue notes, bonds, debentures or other such obligations." 68 Comp. Gen. at 16 (citing 12 U.S.C. § 1725(d) (1988), *repealed by* FIRREA, Pub. L. No. 101-73, § 407, 103 Stat. at 363). The absence of a similar provision in the FDI Act might be taken to suggest that Congress intended the FDIC to have less case resolution authority than FSLIC. It is clear, however, in this context that this was not Congress' intent. The FDIC's statutory authority to provide assistance, read together with other provisions of the FDI Act, which expressly recognize the power to issue obligations, *see, e.g.*, 12 U.S.C. § 1825(a) (discussing tax treatment of "notes, debentures, bonds, or other such obligations" issued by the FDIC); *id.* § 1825(c) (limits on FDIC's authority to issue notes); *id.* § 1826 (directing Secretary of Treasury to prepare "forms of notes, debentures, bonds, or other such obligations" for issuance by FDIC), is sufficiently broad to encompass the issuance of notes in connection with case resolutions. Moreover, the FDIC has issued such notes in case resolutions. *See 1989 Senate FSLIC Hearings* at 168 (statement of L. William Seidman, Chairman, Federal Deposit Insurance Corporation); Office of Management and Budget, *Budget of the United States Government, Fiscal Year 1990, Appendix* at I-Z24 (1989) (listing notes issued to acquiring banks as a liability of FDIC).

CONCLUSION

For the foregoing reasons, we conclude that RTC is a "Federal agency" authorized to issue "obligations," within the meaning of the FFB Act. Accordingly, section 6 of the FFB Act authorizes RTC "to issue or sell such obligations directly to the Bank," and further authorizes the Bank, in turn, to purchase such obligations. 12 U.S.C. § 2285. RTC is therefore authorized to issue directly to the Bank those promissory notes it would otherwise have issued to depository institutions or other companies in the course of resolving cases.

J. MICHAEL LUTTIG
Principal Deputy
Assistant Attorney General
Office of Legal Counsel

Congressional Request For Appointment Calendars of a Former GSA Official

Under General Services Administration records retention regulations, the appointment calendars of current and former GSA officials are personal records and personal property, rather than official records and government property. Accordingly, under the facts presented, the GSA should return a former GSA official's calendars to him. The former official, not the GSA, is responsible for responding to a congressional committee's request for the calendars.

February 15, 1990

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
GENERAL SERVICES ADMINISTRATION

You have asked for our opinion as to whether, for purposes of an oversight request received from the Senate Committee on Governmental Affairs ("the Committee"), the appointment calendars of a former official of the General Services Administration ("GSA") are government property or the official's personal property. As discussed below, we have concluded that in these circumstances the calendars are the official's personal property and should be returned to the official.[1]

I. Statement of Facts

On September 15, 1989, GSA accepted the resignation of a high-level official ("the former official").[2] The former official promptly began his departure activities, including consideration of the disposition of his files, records and other papers. At his request, his secretary, who had maintained his appointment calendars for him at her desk, delivered them to him so that he could take them with him.

Subsequently, by letter dated September 26, 1989, the Committee requested that GSA provide the Committee with certain specified information and documents, including the former official's appointment calendars. An agency official then asked the former official for the calendars so that GSA could produce them to the Committee. The former official complied with the

[1] In light of this conclusion, it is not necessary for us to address the question you raised as to the potential personal liability of agency officials who participate in a decision to produce the calendars to the Committee.

[2] This statement of facts is based on the information presented to this Office in your letter of October 24, 1989 and orally by your staff.

request and supplied the calendars to the GSA official. Before GSA had produced the calendars to the Committee, however, the former official, by means of an October 12, 1989 letter from his attorney, requested that the calendars be returned to him. In the letter he also objected to GSA producing the calendars to the Committee, on the grounds that the calendars were his personal property and disclosure to Congress in these circumstances would violate his rights.

After receiving the former official's letter, GSA advised the Committee that it was withholding the calendars pending review by GSA and this Office of the former official's position.

II. Discussion

The question presented is whether the former official's appointment calendars should be treated as government property or personal property for purposes of the Committee's oversight request. More specifically, the question is whether on September 26, 1989 -- the date the Committee requested the calendars -- they were government property (with respect to which GSA was responsible for responding to the Committee) or the former official's personal property (with respect to which the former official was responsible for responding to the Committee).

Under GSA's records retention regulations, only "official records" (as defined in the regulations) are government property: "All Federal employees must understand that official records belong to the Government, not to any individual . . . ." GSA Order entitled "GSA Records Maintenance and Disposition System," Order OADP1820.2CHGE76, ch. 2, § 1 (Aug. 12, 1985). The section of the regulations entitled "Distinction between official and personal records" makes it clear that appointment calendars are personal records rather than official records:

> Personal calendars, appointment books, schedules, and diaries showing meetings, appointments, trips, and other activities of a high-level official solely for the convenience of the high-level official in managing his or her time are personal records. Documents such as these may be disposed of at the discretion of the official.

Id., ch. 2, § 4(b)(3).

Thus, the appointment calendars of high-level GSA officials are not government property. Rather, they are "personal records . . . [that] may be disposed of at the discretion of the official." *Id.* In our view, the actions the former official took, prior to the Committee's request, to dispose of the calendars by taking them with him when he departed the agency clearly

constituted the exercise of the official's right under the GSA regulations to treat the calendars as personal property and dispose of them as he wishes.

We therefore conclude that at the time the Committee requested the calendars they were the personal property of the former official and not government property. Accordingly, in these circumstances the former official and not GSA is responsible for responding to the Committee's request for the calendars. They should be returned to the former official.[3]

LYNDA GUILD SIMPSON
Deputy Assistant Attorney General
Office of Legal Counsel

[3] These conclusions are unaffected by the fact that after the Committee's request was received the former official supplied the calendars to the agency for production to the Committee. The calendars were his personal property at the time of the request, and any apparent consent to permit GSA to produce the calendars to the Committee was clearly retracted by the October 12, 1989 letter from the official's attorney.

Issues Raised by Foreign Relations Authorization Bill

Provision in foreign relations authorization bill conditioning an authorization for appropriations on the requirement that an entity controlled by the legislative branch be included at Conference on Security and Cooperation in Europe negotiations would unconstitutionally infringe on the President's exclusive authority to conduct negotiations on behalf of the United States abroad and unconstitutionally deprive the President of his constitutionally-mandated control over the disclosure of the content of negotiations.

The unconstitutional condition may be severed from the remainder of the provision authorizing appropriations and the rest of the bill.

At least in the context of legislation that infringes on the separation of powers, the President has the constitutional authority to refuse to enforce a statutory provision that he believes is unconstitutional. Because this unconstitutional requirement is severable, the President may enforce the remainder of the provision, while refusing to enforce the unconstitutional portion.

February 16, 1990

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

This memorandum is in response to your request for this Office's opinion on several issues raised by section 102(c) of H.R. 3792*, the foreign relations authorization bill for fiscal years 1990 and 1991. Specifically, you asked whether section 102(c)(2) is unconstitutional; whether it is severable from the rest of H.R. 3792; and whether the President may decline to enforce it. As set forth in greater detail below, we believe that section 102(c)(2) is plainly unconstitutional. We further believe that it is severable from section 102(c)(1) and the rest of H.R. 3792. Under the circumstances, we believe that if the President chooses to sign H.R. 3792, he would be constitutionally authorized to decline to enforce section 102(c)(2).

Analysis

1. *Section 102(c)(2) Unconstitutionally Infringes on the President's Exclusive Authority to Conduct Negotiations on Behalf of the United States*

Section 102(c) provides:

> (c) INTERNATIONAL CONFERENCES AND CONTINGENCIES. — (1) There are authorized to be appropriated for "International Conferences and Contingencies", $6,340,000 for the fiscal year 1990 and $7,300,000 for the fiscal year 1991 for the Department of State to carry out the authorities, functions, duties, and responsibilities in the conduct of the foreign affairs of the United States with respect to international conferences and contingencies and for other purposes authorized by law.
>
> (2) None of the funds authorized to be appropriated under paragraph (1), may be obligated or expended for any United States delegation to any meeting of the Conference on Security and Cooperation in Europe (CSCE) or meetings within the framework of the CSCE unless the United States delegation to any such meeting includes individuals representing the Commission on Security and Cooperation in Europe.

The Commission on Security and Cooperation in Europe (the "Commission") is an entity controlled by the legislative branch. The Commission consists of twenty-one members, eighteen of whom are drawn from the houses of Congress, three of whom are appointed by the President. 22 U.S.C. § 3003(a). The Commission is deemed to be a standing committee of Congress for the purpose of receiving disbursements of foreign currencies, *see id.* § 3007(b), and Commission employees are considered congressional employees, *id.* § 3008(d).

It is abundantly clear that section 102(c)(2), by purporting to require the President to include "individuals representing the Commission" as part of a delegation charged with conducting international negotiations, is unconstitutional.

The President possesses broad authority over the Nation's diplomatic affairs. That authority flows from his position as head of the unitary Executive and as Commander in Chief. *E.g.*, U.S. Const. art. II, §§ 1, 2 & 3; *Haig v. Agee*, 453 U.S. 280, 291-92 (1981); *Baker v. Carr*, 369 U.S. 186, 212, 213 (1962); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936). Article II, Section 2 of the Constitution also gives the President the specific authority to "appoint Ambassadors, other public Ministers and Consuls." These constitutional provisions authorize the President to determine the form and manner in which the United States will maintain relations with foreign nations, and further to determine the individuals who will conduct those relations. Section 102(c)(2) of the bill is thus clearly unconstitutional, on two specific and distinct grounds.

First, the courts, the Executive and Congress have all concurred that the President's constitutional authority specifically includes the exclusive authority to represent the United States abroad. As the Supreme Court held in *Curtiss-Wright*, speaking of the "federal power over external affairs":

> In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.

299 U.S. at 319 (emphasis omitted). The Court's opinion is directly applicable here: "the President *alone* has the power to speak or listen as a representative of the nation. . . . [H]e *alone* negotiates." *Id.* (emphases added). The Court went on to describe the President's authority in the realm of foreign affairs as

> the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for it's exercise an act of Congress . . . .

Id. at 320.

Such authority "in the field of international relations" must self-evidently include the President's power to select his subordinates, who will speak as the President's assistants or agents in the realm of foreign affairs. James Madison observed in the First Congress that: "No person can be forced upon [the President] as an assistant by any other branch of the Government." *The First Congress* 190 (Robert P. Williams ed. 1970).

Justice Nelson relied upon the President's primacy in foreign affairs in dismissing a civil action for damages brought against the commander of an American gun ship that had bombarded a town in Nicaragua where a revolutionary government had engaged in violence against American citizens and their property:

> As the executive head of the nation, the president is made the only legitimate organ of the general government, to open and carry on correspondence or negotiations with foreign nations, in matters concerning the interests of the country or of its citizens.

Durand v. Hollins, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (No. 4186). In *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir.), *rev'd on other grounds*, 444 U.S. 996 (1979), the Court of Appeals for the District of Columbia Circuit stated that: "The subtleties involved in maintaining amorphous relationships are often the very stuff of diplomacy -- a field in which the President, not Congress, has responsibility under our Constitution." *Id.* at 708. Section 102(c)(2) plainly conflicts with that fundamental constitutional command.

From the earliest days of the Republic the executive branch has made clear that it controls the representation of the foreign policy of the United States. In 1790, Secretary of State Thomas Jefferson made the point emphatically:

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

Opinion on the Powers of the Senate Respecting Diplomatic Appointments, April 24, 1790, *reprinted in* 16 *Papers of Thomas Jefferson* 378, 379 (Julian P. Boyd ed., 1961).

Jefferson made this point with even greater specificity in rebuking Citizen Genet for attempting to present a consul whose commission was addressed to the Congress of the United States. Jefferson emphatically declared that the President is

> the only channel of communication between this country and foreign nations, it is from him alone that foreign nations or their agents are to learn what is or has been the will of the nation, and whatever he communicates as such, they have a right and are bound to consider as the expression of the nation.

Jefferson to Edmond C. Genet, November 22, 1793, *reprinted in* 9 *The Writings of Thomas Jefferson* 256 (Albert E. Bergh ed. 1903).

In modern times Presidents have also asserted their authority to control negotiations. President Bush based his 1989 veto of the FS-X legislation in part upon his constitutional authority to control foreign negotiations:

> In the conduct of negotiations with foreign governments, it is imperative that the United States speak with one voice. The Constitution provides that that one voice is the President's.

II Pub. Papers George Bush 1042, 1043 (July 31, 1989). Other recent Presidents have taken the same view. *E.g.*, President Reagan's Statement on Signing H.R. 1777 into law, II Pub. Papers Ronald Reagan 1541, 1542 (Dec.

22, 1987) (invoking the President's "exclusive authority to determine the time, scope, and objectives" on any international negotiations); President Carter's Statement on Signing H.R. 3363 into law, II Pub. Papers Jimmy Carter 1434 (Aug. 15, 1979) ("decisions associated with the appointment of Ambassadors are acknowledged to be a constitutional prerogative of the President").

Congress has also repeatedly endorsed this understanding of the Constitution. John Marshall, when serving in Congress, described the President's primacy in the conduct of foreign negotiations by referring to the President as "the sole organ of the nation in its external relations, and its sole representative with foreign nations." 10 Annals of Cong. 613 (1800).[1] The Senate Committee on Foreign Relations reported to the Senate in 1816 in similar words:

> The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution. The committee consider[s] this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety.

Reports of the Senate Committee on Foreign Relations, S. Doc. No. 231, pt. 8, 56th Cong., 2d Sess. 24 (1901).[2]

These examples and authorities by no means exhaust the list of what could be cited in support of our conclusion. Nonetheless, they are clearly sufficient to demonstrate that the President has the constitutional responsibility to represent the United States abroad and thus to choose the individuals through whom the Nation's foreign affairs are conducted. That responsibility cannot be circumscribed by statute.[3] By requiring the President to conduct negotiations by means of certain individuals, section 102(c)(2) would impermissibly interfere with that specific authority over foreign negotiations and diplomatic appointments. Accordingly, the section is unconstitutional.

---

[1] Other congressmen contemporaneously recognized that communications with foreign governments was an exclusive presidential prerogative. For example, Representative James A. Bayard of Delaware noted that "the Constitution has placed the power of negotiation in the hands of the Executive only." 9 Annals of Cong. 2588 (1799); *see also id.* at 2677 (remarks of Rep. Isaac Parker); *id.* at 2494 (remarks of Rep. Roger Griswold).

[2] Both Marshall's and the Committee's statements were cited by the Supreme Court with approval in *Curtiss-Wright*, 299 U.S. at 319.

Second, section 102(c)(2) is also constitutionally offensive on the ground that the individuals illegitimately "appointed" by the section are to "represent" a legislative entity. Section 102(c)(2) thus seeks to inject legislative agents directly into the Executive's foreign relations negotiations, giving Congress regular and unsupervised access to privileged information. The role section 102(c)(2) thus envisions for the legislative branch—which would be "represented" on a negotiating delegation and presumably would receive reports on the conduct of negotiations from their "representative"—would deprive the President of his constitutionally-mandated control over the disclosure of the content of negotiations.[4] That control—a necessary and recognized element of executive authority—would be impaired by section 102(c)(2).

That the Constitution mandates Presidential control over the disclosure of negotiations was an essential element of the Founders' vision. As John Jay wrote in *The Federalist*:

> It seldom happens in the negotiation of treaties, of whatever nature, but that perfect *secrecy* and immediate *dispatch* are sometimes requisite. There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives; and there doubtless are many of both descriptions who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular assembly. The convention [has] done well, therefore, in so disposing of the power of making treaties that although the President must, in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest. . . . So often and so essentially have we heretofore suffered from the want of secrecy and dispatch

---

[3] Nor can section 102(c)(2) be viewed as a legitimate exercise of congressional power over the appropriation of public funds. Congress may not use that power

> to attach conditions to executive branch appropriations requiring the President to relinquish his constitutional discretion in foreign affairs. . . . [T]he President cannot be compelled to give up the authority of his Office as a condition of receiving the funds necessary to carrying out the duties of his Office.

Constitutionality of Proposed Statutory Provision Requiring Prior Congressional Notification for Certain CIA Covert Actions, 13 Op. O.L.C. 258, 261-62 (1989) (footnote omitted).

[4] That participatory role in ongoing negotiations is also completely divorced from the Framers' intentions with respect to the activities and authority of the legislative branch. As Alexander Hamilton explained:

> The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society; while the execution of the laws and the employment of the common strength, either for this purpose or for the common defense, seem to comprise all the functions of the executive magistrate.

The Federalist No. 75, at 450 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

> that the Constitution would have been inexcusably defective if no attention had been paid to those objects.

The Federalist No. 64, at 392-93 (John Jay) (Clinton Rossiter ed., 1961). Similarly, James Madison, while serving in Congress, observed that "the Executive had a right, under a due responsibility, also, to withhold information, when of a nature that did not permit a disclosure of it at the time." 5 Annals of Cong. 773 (1796).

Moreover, the executive branch has repeatedly objected to requirements for mandatory disclosure of information to Congress about international negotiations. At the same time, where possible, all Presidents have provided broad information to Congress about international negotiations.[5] The conduct of international negotiations is a function committed to the President by the Constitution, see *supra*, and he must have the authority to determine what information about such international negotiations may, in the public interest, be made available to Congress and when such disclosure should occur. As the Supreme Court observed in *Curtiss-Wright*:

> [C]ongressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries . . . . He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in

---

[5] This balanced view of the President's responsibilities with respect to the disclosure of negotiations has been the consistent position of the executive branch since 1792, when President Washington received a request from the Congress for all "persons, papers, and records" relating to the failure of Major General St. Clair's military expedition against the Indians. 2 Annals of Cong 493 (1792). Secretary of State Jefferson's notes reflect that President Washington thereafter convened the Cabinet to determine the proper response. 1 *The Writings of Thomas Jefferson* 303 (Andrew A. Lipscomb ed., 1903). The President and the Cabinet concluded that "the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public." *Id.* at 304. The President ultimately decided to produce the requested documents. He directed Secretary Jefferson to negotiate an agreement with Congress that acknowledged the President's right to protect state secrets, the public disclosure of which he determined could adversely affect national security. Jefferson's efforts were successful, and on April 4, 1792, the House resolved

> [t]hat the President of the United States be requested to cause the proper officers to lay before this House *such papers of a public nature*, in the Executive Department, as may be necessary to the investigation of the causes of the failure of the late expedition under Major General St. Clair.

3 Annals of Cong. 536 (1792) (emphasis added).

Similarly, in 1794, the Senate requested correspondence between the U. S. Minister to France and the Republic of France, and between the Minister and the State Department. Senate Journal, 3d Cong., 1st Sess. 42 (1794). President Washington submitted certain of the correspondence requested, but withheld "those particulars which, in my judgment, for public considerations, ought not to be communicated." 1 James D. Richardson, *Messages and Papers of the Presidents* 152 (1896).

> respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty — a refusal the wisdom of which was recognized by the House itself and has never since been doubted.

299 U.S. at 320.[6] *Curtiss-Wright* thus clearly establishes that the President has the authority to determine what information about international negotiations may, in the public interest, be made available to Congress and when, if at all, such disclosure should occur. Section 102(c)(2), however, would subvert the President's control over the disclosure of negotiations by inserting a "representative" of the legislative branch into diplomatic negotiations.[7]

Again, the examples and authorities offered do not exhaust those that could be invoked in support of our conclusion. Nonetheless, we believe that the historical record is clear that the President has the constitutional authority to control disclosure of the content of negotiations to Congress. It follows, equally clearly, that a provision that purports to place a "representative" of a legislative entity upon an executive negotiating team is inconsistent with that authority, and is unconstitutional.

2. Section 102(c)(2) is Severable

The unconstitutional requirement that representatives of the Commission be included at the CSCE negotiations may be severed from the authorization for appropriations. Because the condition is severable, the President may enforce the remainder of the provision, disregarding the condition contained in section 102(c)(2).

A presumption in favor of the severability of unconstitutional provisions exists so long as what remains of the statute is capable of functioning independently. *See, e.g., Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality opinion); *Alaska Airlines, Inc. v. Donovan*, 766 F.2d 1550, 1560 (D.C. Cir. 1985), *aff'd sub nom. Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987). As the Supreme Court has explained on many occasions, "[u]nless it is evident that the Legislature would not have enacted those provisions which

[6] The Court in *Curtiss-Wright* specifically endorsed President Washington's refusal to provide the House with information it requested about treaty negotiations, even after the negotiations had been concluded. 299 U.S. at 320-21. A fortiori, the President has constitutional authority to withhold such information during the negotiations.

[7] The effect of this provision would also be to vitiate the President's authority to determine not to disclose particular information because such disclosure would jeopardize national security. *See United States v. Nixon*, 418 U.S. 683, 710-11 (1974); *Assertion of State Secrets Privilege in Civil Litigation*, 3 Op. O.L.C. 91 (1979).

are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Champlin Ref. Co. v. Corporation Comm'n*, 286 U.S. 210, 234 (1932), *quoted in Alaska Airlines*, 480 U.S. at 684. This presumption may be overcome by evidence that, absent the unconstitutional provision, the statute will not function "in a *manner* consistent with the intent of Congress." *Alaska Airlines, Inc. v. Brock*, 480 U.S. at 685.

The authorization contained in section 102(c)(1) functions independently of the provision in section 102(c)(2). Accordingly, the unconstitutional condition in section 102(c)(2) may be severed from the remainder of the provision unless there is evidence that Congress would not have enacted the authorization absent the condition.[8]

There is no such evidence. Nothing in the debates concerning the condition suggests that Congress would not have enacted the authorization if the requirement of Commission representation was invalidated. The condition was added in the House as an amendment to the existing authorization provision. *See* 135 Cong. Rec. 6265 (1989). Its purpose was to enable members of the Commission to continue their previous participation in the CSCE negotiations. *See* 135 Cong. Rec. 14,787 (1989) (statement of Sen. Fowler); *id.* (statement of Sen. D'Amato); *id.* (statement of Sen. DeConcini). No one, however, indicated that they would disapprove funding for the negotiations if the Commission access requirement were deleted. The chairman of the House subcommittee said only that "[i]t is an okay amendment." 135 Cong. Rec. 6265 (1989) (statement of Rep. Dymally).

That Congress early desired to impose the condition on the authorization does not mean that Congress would not have authorized the funds without the condition. The Supreme Court declined to make this assumption in *FCC v. League of Women Voters*, 468 U.S. 364 (1984), where the court held that an appropriations law's prohibition on editorializing by public broadcasting stations violated the First Amendment, but did not even consider whether the invalidity of the condition should result in the invalidity of the entire

[8] We reject any argument that the conditional clause "unless the United States delegation to any such meeting includes individuals representing the Commission on Security and Cooperation in Europe" is the relevant language to be severed from the provision. It is merely an accident of grammar that this clause can be deleted without making nonsense of section 102(c)(2) as a whole Moreover, with this clause deleted section 102(c)(2) would deny the President funding for a particular type of negotiations. For the reasons discussed above, this would in itself raise serious constitutional questions as an interference with the President's authority to conduct diplomacy as he sees fit. There is obviously no reason to prefer a severability analysis that presents the same constitutional questions that gave rise to the analysis in the first place. *Cf. Edward J. DeBartolo Corp v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (statutes should be construed to avoid constitutional questions). Section 102(c)(2) in its entirety is naturally understood as the condition regarding the CSCE negotiations, and the proper question is whether that whole section is severable.

appropriation.[9] Indeed, we are aware of no instance in which the Supreme Court has ever invalidated an appropriation because a condition on the use of the appropriation was held unconstitutional.

We are also reluctant to attribute to Congress an intent to preclude the United States from engaging in the CSCE negotiations. Congress was keenly aware of the significance of the negotiations concerning conventional military forces in Europe. The care with which Congress considered the negotiations illustrates their importance to Congress. We cannot believe that Congress would have preferred no participation by the United States in the CSCE negotiations to participation by a delegation that does not include representatives of the Commission.

3. The President May Refuse to Enforce Section 102(c)(2)

The final issue we address is whether the President may refuse to enforce an unconstitutional provision such as section 102(c)(2).[10] The Department of Justice has consistently advised that the Constitution provides the President with such authority. Both the President's obligation to "take Care that the Laws be faithfully executed" and the President's oath to "preserve, protect and defend the Constitution of the United States" vest that conflict with the highest law, the Constitution. We emphasize, however, that there is little judicial authority concerning this question, and the position remains controversial.

The President's authority to refuse to enforce a law that he believes is unconstitutional derives from his duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3 and the obligation to "preserve, protect and defend the Constitution of the United States" contained in the President's oath of office. U.S. Const. art. II, § 1. The Constitution is the supreme law that the President has a duty to take care to faithfully execute.[11] Where a statute enacted by Congress conflicts with the Constitution, the President is placed in the position of having the duty to execute two conflicting "laws": a constitutional provision and a contrary statutory

[9] Justice Stevens, dissenting alone, said that there was a "serious question . . . whether the entire public funding scheme is severable from the prohibition on editorializing and political endorsements." *FCC v. League of Women Voters*, 468 U.S. at 411 n.3 (Stevens, J., dissenting).

[10] The analysis of this question does not depend on whether the President signed the bill or not. As the Supreme Court has observed, "it is not uncommon for Presidents to approve legislation containing parts which are objectionable on constitutional grounds." *INS v. Chadha*, 462 U.S. 919, 942 n.13 (1983) That the President has signed the bill in no way estops his ability to assert the bill's unconstitutionality, in court or otherwise. *See id.*

[11] It is generally agreed that the Constitution is a law within the meaning of the Take Care Clause. *See, e.g., Constitutionality of GAO's Bid Protest Function: Hearings Before the Subcomm. of the House Comm. on Government Operations*, 99th Cong., 1st Sess. 23 (1985) (*"Bid Protest Hearings"*) (statement of Professor Mark Tushnet) ("the President is required faithfully to execute the laws of the United States, which surely include the Constitution as supreme law"); Letter for Secretary of Education Shirley M. Hufstedler from Attorney General Benjamin R. Civiletti at 12 (June 5, 1980) ("the Executive's duty faithfully to execute the law embraces a duty to enforce the fundamental law set forth in the Constitution as well as a duty to enforce the law founded in the Acts of Congress, and cases arise in which the duty to the one precludes the duty to the other").

requirement. The resolution of this conflict is clear: the President must heed the Constitution—the supreme law of our Nation.

Moreover, the Take Care Clause does not compel the President to execute unconstitutional statutes. An unconstitutional statute is not a law. Alexander Hamilton explained:

> There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.

The Federalist No. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961). John Marshall stated the same position in *Marbury v. Madison*:

> Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that *an act of the legislature, repugnant to the constitution, is void.*

5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added).[12]

The President's oath of office is the other constitutional provision authorizing the President to refuse to enforce a law. The Constitution requires the President to take an oath in which he promises to "preserve, protect and defend the Constitution of the United States." U.S. Const. art II, § 1. As Chief Justice Chase asked, "How can the President fulfill his oath to preserve, protect, and defend the Constitution, if he has no *right* to *defend* it against an act of Congress sincerely believed by him to have been passed in violation of it?" Letter from Chief Justice Chase to Gerrit Smith, Apr. 19, 1868, *quoted in* J. W. Schuckers, *The Life and Public Services of Salmon*

[12] Even though the Constitution provides that a measure enacted pursuant to the procedure described in U.S. Const. art. I, § 7 "shall become a Law," the fact that a law was adopted consistently with the constitutional process will not save it. Only laws "made in Pursuance" of the Constitution "shall be the supreme Law of the Land." U.S. Const. art. VI; *see also Marbury v. Madison*, 5 U.S. (1 Cranch) at 180. A law that is not in pursuance of the Constitution is not the supreme law of the land — indeed, it is not law. And if an unconstitutional law is void, then the President has no obligation to enforce it. *See, e.g.*, Letter from Chief Justice Chase to Gerrit Smith, Apr 19, 1868, *quoted in* J. W. Schuckers, *The Life and Public Services of Salmon Portland Chase* 577 (1874) ("Nothing is clearer to my mind than that acts of Congress not warranted by the Constitution are not laws "); 11 Op. Att'y Gen. 209, 214 (1865) ("If any law be repugnant to the Constitution, it is void; in other words, it is no law.").

Portland Chase 578 (1874) ("Letter from Chief Justice Chase"). Chief Justice Chase concluded that the President's obligation to defend the Constitution of the United States authorizes him to decline to enforce statutes which he believes are unconstitutional.[13] The President's obligation to defend the Constitution permits him to decline to enforce a statute which is unconstitutional. Just as the Take Care Clause requires the President to faithfully execute the laws, including the Constitution as the supreme law, the oath to defend the Constitution allows the President to refuse to execute a law he believes is contrary to the supreme law, the Constitution.

Indeed, the Framers of the Constitution anticipated the question of the President's authority to refuse to enforce unconstitutional laws and indicated that the Constitution affords the President the authority to refuse to enforce unconstitutional legislation. James Wilson, one of the key drafters and advocates of the Constitution, addressed this question before the Pennsylvania convention that was debating whether to ratify the proposed Constitution. He stated:

> [I]t is . . . proper to have efficient restraints upon the legislative body. These restraints arise from different sources. I will mention some of them. . . . I had occasion, on a former day . . . to state that the power of the Constitution was paramount to the power of the legislature, acting under that Constitution. For it is possible that the legislature, when acting in that capacity, may transgress the bounds assigned to it, and an act may pass, in the usual *mode*, notwithstanding that transgression; but when it comes to be discussed before the judges -- when they consider its principles and find it to be incompatible with the superior power of the Constitution, it is their duty to pronounce it void. . . . *In the same manner, the President of the United States could shield himself and refuse to carry into effect an act that violates the Constitution.*

2 *The Documentary History of the Ratification of the Constitution* 450 (Merrill Jensen ed. 1976) (statement of James Wilson on Dec. 1, 1787) (second emphasis added).

---

[13] Chief Justice Chase answered his question by endorsing President Johnson's decision to refuse to enforce the law:

> To me, therefore, it seems perfectly clear that the President had a perfect right, and indeed was under the highest obligation, to remove Mr. Stanton, if he made the removal not in wanton disregard of a constitutional law, but with a sincere belief that the Tenure-of-Office Act was unconstitutional and for the purpose of bringing the question before the Supreme Court. Plainly it was a proper and peaceful, if not the only proper and peaceful mode of protecting and defending the Constitution.

Letter from Chief Justice Chase at 578. Similarly, this Office has opined that "the President's duty to uphold the Constitution carries with it a prerogative to disregard unconstitutional statutes." Memorandum for Robert J. Lipshutz, Counsel to the President, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel at 16 (Sept. 17, 1977) ("Harmon Memorandum").

This understanding comports with the Framers' profound structural concern about the threat of legislative encroachments on the Executive and the judiciary. As Madison observed, "The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex." *The Federalist* No. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961). As Chief Justice Burger more recently admonished, "[t]he 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. at 951. In particular, presidential decisions not to enforce a statute which violates the separation of powers have been justified by the need to resist legislative encroachment. For example, in 1860 Attorney General Black advised President Buchanan that the President could refuse to enforce an unconstitutional condition in a law:

> Congress is vested with legislative power; the authority of the President is executive. Neither has a right to interfere with the functions of the other. Every law is to be carried out so far forth as is consistent with the Constitution. . . . You are therefore entirely justified in treating this condition (if it be a condition) as if the paper on which it is written were blank.

9 Op. Att'y Gen. 462, 469-70 (1860).[14]

For the reasons discussed above, the Department of Justice in modern times has also consistently advised that the Constitution authorizes the President to refuse to enforce a law that he believes is unconstitutional. *See, e.g.*, Letter for Congressman Peter W. Rodino, Jr., from Attorney General William French Smith at 3 (Feb. 22, 1985) ("Attorney General Smith Letter") (the decision not to enforce the Competition in Contracting Act was based upon "the duty of the President to uphold the Constitution in the context of the enforcement of Acts of Congress" and the President's "oath to 'preserve, protect and defend' the Constitution"); Letter for Congressman Thomas P. O'Neill, Jr., from Attorney General Benjamin R. Civiletti (Jan. 13, 1981); Harmon Memorandum at 16 ("the President's duty to uphold the Constitution carries with it a prerogative to disregard unconstitutional statutes"). The Department has given the same advice whether or not the President signed the law which he intends not to enforce. *See, e.g.*, Attorney General Smith Letter; Harmon Memorandum.

---

[14] *See also* Raoul Berger, *Executive Privilege: A Constitutional Myth* 309 (1974) ("Agreed that a veto exhausts presidential power when the issue is the *wisdom* of the legislation. But the object of the Framers was to prevent '*encroachment*'; and they were too practical to limit the President's power to 'defend' the Constitution against a breach of its very essence: the separation of powers. . . . I would therefore hold that the presidential oath to 'protect and defend the Constitution' posits both a right and a duty to protect his own constitutional functions from congressional impairment.").

We, too, conclude that at least in the context of legislation that infringes the separation of powers, the President has the constitutional authority to refuse to enforce unconstitutional laws. The opinions of the Department of Justice have long recognized the President's authority to refuse to enforce a statutory provision that interferes with the President's exercise of his constitutional powers. *See, e.g.*, Attorney General Smith Letter at 3 (the decision not to enforce the Competition in Contracting Act was justified by the President's "constitutional duty to protect the Presidency from encroachment by the other branches"); *Recommendation that the Department of Justice not Defend the Constitutionality of Certain Provisions of the Bankruptcy Amendments and Federal Judgeship Act of 1984*, 8 Op. O.L.C. 183, 195 (1984) (describing the historical practice of the President "under which the President need not blindly execute or defend laws enacted by Congress if such laws trench on his constitutional power and responsibility"). James Wilson's statement, quoted above, provides further evidence of the constitutional authority of the President to shield himself from unconstitutional legislation by refusing to enforce such laws. We therefore advise that the President has the constitutional power to refuse to enforce laws that violate the separation of powers.

We recognize that opponents of presidential authority to refuse to enforce an unconstitutional statute attempt to draw support for their views in the same constitutional texts cited by proponents of such authority. The Take Care Clause is often quoted as providing self-evident proof that the President may not refuse to enforce a law which he believes is unconstitutional.[15] This reading of the provision denies the President any discretion to refuse to enforce a law that is unconstitutional. *See, e.g.*, *Bid Protest Hearings* at 88 (Letter from Professor Eugene Gressman).

We reject this reading of the Take Care Clause because it rests on two faulty premises concerning the nature of the "laws" which the President must enforce: first, that the President will never be faced with a conflict between a statute and the Constitution, and second, that an unconstitutional law is truly "law" for the purposes of the Take Care Clause. As explained above, both of these premises are invalid. Statutes do conflict with the Constitution, and unconstitutional statutes are not laws the President must faithfully execute.

We are also aware that others have argued that the President may not refuse to enforce a law because the executive branch is not the institution within the federal government that is authorized to determine whether a law is unconstitutional. We have ourselves testified that "until a law is adjudi-

[15] *See, e.g.*, *Lear Siegler, Inc., Energy Prods. Div. v. Lehman*, 842 F.2d 1102, 1124 (9th Cir. 1988) ("To construe this duty to faithfully execute the laws as implying the power to forbid their execution perverts the clear language of the 'take care' clause . . . ."), *withdrawn in relevant part*, 893 F.2d 205 (9th Cir. 1989); Arthur S. Miller, *The President and Faithful Execution of the Laws*, 40 Vand. L. Rev. 389, 396 (1987) ("To say that the President's duty to faithfully execute the laws implies a power to forbid their execution is to flout the plain language of the Constitution.").

cated to be unconstitutional, the issue of enforcing a statute of questionable constitutionality raises sensitive problems under the separation of powers." *Bid Protest Hearings* at 318-19 (statement of Acting Deputy Attorney General D. Lowell Jensen). We reject, however, the argument that the President may not treat a law as invalid prior to a judicial determination but rather must presume it to be constitutional. It affects a subtle, but fundamental transformation from the position, established in *Marbury*, that in deciding a case or controversy the judiciary ultimately decides whether a statute is constitutional to the position that a law is unconstitutional *only* when the courts say it conflicts with the Constitution. Professor Levinson has explained why this cannot be so:

> If one believes that the judiciary "finds" the [law] instead of "creating" it, then the law is indeed "unconstitutional from the start." Indeed, the judicial authority under this view is derived from its ability to recognize the constitutionality or unconstitutionality of laws, but, at least theoretically, the constitutional status is independent of judicial recognition. To argue otherwise is ultimately to adopt a theory that says that the basis of law — including a declaration of unconstitutionality — is the court's decision itself. Among other problems with this theory is the incoherence it leads to in trying to determine what it can mean for judges to be faithful to their constitutional oaths.

Bid Protest Hearings at 67.

Still others have argued that the veto power is the only tool available to the President to oppose an unconstitutional law. We agree that the veto power is the primary tool available to the President. We disagree, however, with the contention that the Framers intended it to be the only tool at the President's disposal. James Wilson's statement, quoted above, demonstrates that the idea that the President has the authority to refuse to enforce a law which he believes is unconstitutional was familiar to the Framers. The Constitution qualifies the President's veto power in the legislative process, but it does not impose a similar qualification on his authority to take care that the laws are faithfully executed.

Finally, we emphasize that this conclusion does not permit the President to determine as a matter of policy discretion which statutes to enforce. The only conclusion here is that he may refuse to enforce a law which he believes is *unconstitutional*. Obviously, the argument that the President's obligation to defend the Constitution authorizes him to refuse to enforce an unconstitutional statute does not authorize the President to refuse to enforce a statute he opposes for policy reasons. Thus, instances in which courts

have rejected the claims of general presidential discretion to refuse to enforce a statutory command are irrelevant to the question of whether the President may refuse to enforce a law because he considers it unconstitutional.[16]

Conclusion

For the reasons given above, we conclude that section 102(c)(2) is unconstitutional. We also conclude that it is severable, and that the President may constitutionally decline to enforce it.

WILLIAM P. BARR
Assistant Attorney General
Office of Legal Counsel

[16] In *Kendall v. United States*, 37 U.S. (12 Pet.) 524 (1838), the Postmaster General refused to comply with a statute that ordered him to pay two contractors for mail carrying services. The Court, although denying that the President was making such an argument, said, "To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible." *Id.* at 613. *Kendall*, however, did not involve a claim by the President that he was being ordered to enforce an unconstitutional law, and thus the Court had no occasion to examine the unique considerations presented by such a claim.

President Nixon's decision to impound funds appropriated by Congress is another example of an executive refusal to enforce a federal law, but there, too, President Nixon did not contend that the law was unconstitutional. Assistant Attorney General Rehnquist acknowledged that "it seems an anomalous proposition that because the Executive branch is bound to execute the laws, it is free to decline to execute them." He added, however, that "[o]f course, if a Congressional directive to spend were to interfere with the President's authority in an area confided by the Constitution to his substantive direction and control, such as his authority as Commander-in-Chief of the Armed Forces and his authority over foreign affairs, a situation would be presented very different from the one before us." Memorandum *Re: Presidential Authority to Impound Funds Appropriated for Assistance to Federally Impacted Schools* at 11 (Dec. 1, 1969) (citation omitted).

Application of Federal Advisory Committee Act to Editorial Board of Department of Justice Journal

An outside advisory or editorial board for a new Department of Justice publication would be subject to the Federal Advisory Committee Act if it deliberated as a body in order to formulate recommendations, but would not be subject to FACA if each individual member reviewed submissions to the journal and gave his or her own opinion about publication.

March 27, 1990

MEMORANDUM FOR THE EXECUTIVE ASSISTANT
TO THE ATTORNEY GENERAL

You have asked whether an outside advisory or editorial board for a new publication of the Department would be subject to the Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. §§ 1-15. We believe that the board would be subject to FACA if it deliberated as a body in order to formulate recommendations, but would not be subject to FACA if each individual member reviewed submissions to the journal and gave his own opinion about publication.[1]

I.

The definition of "advisory committee" under FACA covers, among other things, "any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . which is . . . established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for . . . one or more agencies or officers of the Federal Government." 5 U.S.C. app. § 3(2). An advisory board—a committee that collectively reviews drafts of articles, makes recommendations about publication, and suggests editorial policy—would

[1] We assume that the editorial or advisory board would not perform operational functions with respect to the publication. If the board actually made the final decisions about what to publish or how to run the journal, additional legal questions would be raised. *See, e.g.*, 41 C.F.R. § 101-6.1004(g); 5 U.S.C. app. § 9(b); *Public Citizen v. Commission on the Bicentennial of the U.S. Constitution*, 622 F. Supp. 753 (D.D.C. 1985).

probably come within FACA. It would be "established" by the Department, "in the interest of obtaining advice or recommendations" for the Department. 5 U.S.C. app. § 3(2). As the legislative history of FACA shows, the term "established" is to be interpreted in its "most liberal sense, so that when an officer brings together a group by formal or informal means, by contract or other arrangement, and whether or not Federal money is expended, to obtain advice and information, such group is covered by the provisions" of the Act. S. Rep. No. 1098, 92d Cong., 2d Sess. 8 (1972). In view of this broad meaning, the advisory or editorial board would come within FACA if it deliberated as a body.[2]

Furthermore, FACA would apply even though the advisory board, as we understand, could include some members who are full-time government officers or employees. Under the statute, the definition of "advisory committee" excludes "any committee which is composed wholly of full-time officers or employees of the Federal Government." 5 U.S.C. app. § 3(2)(iii). By implication, a committee that is not "wholly" composed of government employees or officers comes within the statute. *See Center for Auto Safety v. Tiemann*, 414 F. Supp. 215, 225 n.10 (D.D.C. 1976) (committee of state and federal employees is covered by FACA), *remanded on other grounds sub nom. Center for Auto Safety v. Cox*, 580 F.2d 689 (D.C. Cir. 1978); S. Rep. No. 1098 at 8 (FACA motivated by abuses involving committees "whose membership in whole or in part" comes from outside the government).

Although some courts have put limiting constructions on the meaning of "advisory committee," we do not believe that such a limiting construction could be justified here, if the editorial or advisory board deliberated as a body in order to make its recommendations. The definition of "advisory committee," if read as broadly as the language permits, is expansive. *See, e.g.*, *Nader v. Baroody*, 396 F. Supp. 1231, 1232 (D.D.C. 1975), *vacated as moot*, No. 75-1969 (D.C. Cir. Jan. 10, 1977). The language could extend to instances where application of FACA—with its requirements of balanced membership, open meetings, and public availability of documents—would unconstitutionally intrude on the exercise of the President's authority. Courts have construed the statute to avoid such outcomes. *See Public Citizen v. United States Dep't of Justice*, 491 U.S. 440 (1989) (FACA does not apply to American Bar Association's committee on judicial selection); *Nader v. Baroody*, 396 F. Supp. at 1234-35 (FACA does not apply to casual, day-to-day meetings by which the President gathers information and views); *see*

[2] On occasion, in determining whether a group is an "advisory committee," OLC has relied upon limiting draft guidelines for FACA that were published in the Federal Register, 28 Fed. Reg. 2306 (1973), but not adopted, 39 Fed. Reg. 12,389 (1974). These guidelines, OLC has stated, are an early administrative interpretation of FACA and thus entitled to some weight. *See* Memorandum for Irving P. Margulies, Deputy General Counsel, Department of Commerce, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: President's Private Sector Survey on Cost Control* at 6-7 (Dec. 15, 1982). Even under these guidelines, a group that has "all or most" of five "characteristics" would probably apply to the proposed board (fixed membership, establishment by federal official, defined purpose of providing advice on particular subjects, and regular or periodic meetings), and the last characteristic might also apply (an organizational structure, such as a group of officers, and a staff).

also National Anti-Hunger Coalition v. Executive Comm. of the President's Private Sector Survey on Cost Control, 557 F. Supp. 524, 530 (D.D.C.) (FACA, if read broadly, could violate separation of powers), *aff'd and remanded*, 711 F.2d 1071 (D.C. Cir.), *amended*, 566 F. Supp. 1515 (D.D.C. 1983). However, no constitutional issues would be raised by applying FACA to the contemplated editorial or advisory board. The business of such a board would not touch on any "constitutionally specified task committed to the Executive," *Public Citizen v. United States Dep't of Justice*, 491 U.S. at 460, nor would regulating the board's activities under FACA interfere with the President's discharge of his duties.

II.

We believe that the Act would not reach an advisory board if the Department sought only the views of individuals rather than the views of the board as a whole. FACA applies by its terms to "advisory committees." "Advisory committee" is a term that connotes a body that deliberates together to provide advice. Therefore, as a matter of statutory construction, we believe that FACA does not apply to a group which simply acts as a forum to collect individual views rather than to bring a collective judgment to bear.

GSA regulations confirm the commonsense notion of what differentiates a "committee" from a collection of individuals.[3] The regulations state that FACA does not cover:

> Any meeting initiated by a Federal official(s) with more than one individual for the purpose of obtaining the advice of individual attendees and not for the purpose of utilizing the group to obtain consensus advice or recommendations. However, agencies should be aware that such a group would be covered by the Act when an agency accepts the group's deliberations as a source of consensus advice or recommendations . . . .

41 C.F.R. § 101-6.1004(i). Although this provision is not entirely clear, it appears to mean that FACA does not cover a collection of individuals who do not perform a collegial and deliberative function and whose views are considered individually rather than as part of a "sense of the committee."

[3] In *Public Citizen v. United States Dep't of Justice*, the Court held that the GSA regulations were entitled to "diminished deference" because they were not issued until ten years after FACA was passed and because FACA, while empowering GSA to issue "administrative guidelines and management controls," 5 U.S.C. app. § 7(c), did not expressly authorize GSA to fill in the definitions of the statutory terms. 491 U.S. at 463 n.12. *But see* 491 U.S. at 477-81 (Kennedy, J., concurring in the judgment). Nevertheless, the Court did not view the regulations as wholly without weight.

The clearest example of such a collection of individuals would be a group of experts, each of whom reviews submissions in his own area of expertise. Nevertheless, even if each member of the editorial board reviews every article and sends his comments to the Department, the arrangement would still appear to fall outside FACA, because a collective judgment would not be sought. Indeed, since the regulation permits a meeting at which individual views are offered, it would, a fortiori, permit the solicitation of individual views of board members who are not at a meeting. The board members would merely be acting in the same way as individual contractors who offer consulting services to the government. *Cf.* H.R. Rep. No. 1017, 92d Cong., 2d Sess. 4 (1972) ("The term advisory committee does not include any contractor or consultant hired by an officer or agency of the government, since such contractor would not be a 'committee, board, commission, council . . ., or similar group . . . .'") (alteration in original). We caution, however, that this regulation has not been directly tested in the courts.

While the regulation also permits a group to meet without having to comply with FACA, as long as only individual views are offered, such an arrangement would be open to legal challenge. As a practical matter, the dynamics of such a gathering are likely to lead to members exchanging, analyzing, and debating the views presented, and it would be difficult to argue, in that event, that the members were offering only discrete, individual opinions.

If the editorial or advisory board is set up as a vehicle for the presentation of individual views, it may be prudent to leave the board without any formal structure, such as officers or staff. One opinion in a case under FACA could be read to suggest that such "indicia of formality" may be relevant to whether the principle recognized in the GSA regulation would apply. *See Natural Resources Defense Council, Inc. v. Herrington*, 637 F. Supp. 116, 120 (D.D.C. 1986).

WILLIAM P. BARR
Assistant Attorney General
Office of Legal Counsel

Presidential Authority to Extend Deadline for Submission of an Emergency Board Report Under the Railway Labor Act

The President may require an Emergency Board under the Railway Labor Act to submit its report before the statutory deadline, but he may not extend that thirty-day deadline unless the parties involved have entered into a side agreement extending the status quo period during which they refrain from self-help.

There is substantial doubt as to whether a court would conclude that such a side agreement between the parties not to resort to self-help is equitably enforceable under the Norris-LaGuardia Act.

The President does not have the authority to impose a second status quo period by convening a second Emergency Board or reconvening the original Board.

March 13, 1990

MEMORANDUM OPINION FOR
THE ASSOCIATE COUNSEL TO THE PRESIDENT

This memorandum responds to your request for our views as to the extent of the President's power to alter the length of the thirty-day time period within which an Emergency Board appointed under section 10 of the Railway Labor Act ("RLA"), 45 U.S.C. § 160, must submit its report to the President. As explained more fully below, we conclude that, because the filing of the report has specific legal consequences, the President does not have the authority to unilaterally extend the statutory deadline. He may, however, shorten the time for filing a report. We also conclude that the President may grant an extension in situations where the parties involved have agreed to extend the period during which they will refrain from self-help. Given the lack of case authority, however, it is difficult to determine whether a court would equitably enforce such an agreement. In our view, there is no more than an even chance that a court would conclude that such agreements are equitably enforceable despite the Norris-LaGuardia Act, and there remains a substantial litigation risk that a court would reach a contrary conclusion. Finally, we conclude that the President does not have the authority

to impose a new status quo period creating a second Emergency Board.

I. Background

We understand that under National Mediation Board ("NMB") auspices, the National Railway Labor Conference and seven of the affected railway labor organizations (collectively "the parties")[1] have agreed to an extended two-phase Emergency Board procedure for addressing all of the unresolved issues in the current round of national bargaining. Under the contemplated procedure, the National Mediation Board would proffer arbitration to the parties on all of the outstanding issues, and the parties would decline the proffer, thus triggering a thirty-day "cooling-off" period. *See* 45 U.S.C. § 155 First.

The NMB would then promptly recommend that the President appoint an Emergency Board under section 10 of the RLA, 45 U.S.C.§ 160. Although the Emergency Board would be established to address all issues involved in the collective bargaining dispute, it would produce two separate reports, with the first addressing the health and welfare issues and the final report addressing the wages and rules issues. As soon as the health and welfare report was issued, the NMB would, at the request of the parties, engage in further intensive emergency mediation on the wages and rules issues. In order to allow the Emergency Board sufficient time to prepare its reports, the parties have agreed to an extension of the deadline for submission of the Emergency Board's final report to the President. Specifically, the parties have requested that all reports and recommendations of the Emergency Board be issued by September 15, 1990, and the parties have agreed to any reasonable request for an extension of time of the Emergency Board to allow ample time for hearings, mediation and formulation of recommendations. The parties have also agreed not to resort to self-help until after the expiration of the thirty-day RLA statutory 'cooling-off' period following the report by the Emergency Board on the Wage and Rules issues, and then only if Congress is in session.

We understand that this proposal is only one of several under consideration. Accordingly, this memorandum discusses general principles concerning the limits on altering the RLA procedures, rather than analyzing the particulars of any specific proposal.

II. Discussion

Section 10 of the Railway Labor Act provides that, once created, an Emer-

[1] We are informed by the NMB that there are other labor organizations that have yet to agree to this procedure.

gency Board "shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation." 45 U.S.C. § 160. Section 10 further provides that "[a]fter the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose." *Id.* Thus, on its face the statute appears to contemplate a status quo period of no more than sixty days after creation of an Emergency Board.

A. President's power to alter deadline for submitting report

1. *President may not unilaterally extend deadline*

We believe that the President may not unilaterally extend the deadline for submission of the Emergency Board report. First, the language of the statute does not provide for any extension in the thirty-day time period within which the Emergency Board must submit its report. Moreover, the legislative history indicates a fairly clear intent not to permit extensions of the reporting deadline and the subsequent start of the thirty-day cooling-off period. Indeed, Congress, in enacting the RLA, specifically rejected an amendment that would have authorized unilateral presidential extensions of the reporting deadline.

In the House hearings on the bill, Congressman Burtness questioned representatives of both labor and management about the adequacy of the thirty-day time period. Mr. Richberg, the counsel for the organized railway employees, stated that thirty days would be adequate, that the Emergency Board provision had been the subject of very difficult negotiation, and that because of the status quo provision, the parties did not want an Emergency Board that would "operate indefinitely after a controversy has gone to this stage." *Railroad Labor Disputes: Hearings on H.R. 7180 Before the House Comm. on Interstate and Foreign Commerce*, 69th Cong., 1st Sess. 100 (1926) ("*House Hearings*").[2] Mr. Thom, the General Counsel of the Association of Railway Executives, testified to the same effect, explaining that the thirty-day period was the result of a compromise between labor and management, that this was a significant concession, and that the parties involved did not want "anything but a prompt method of dealing with the situation in the case of an emergency board." *Id.* at 128.

Apparently not satisfied with these responses, Congressman Burtness offered an amendment on the floor of the House that would have provided that "the President may in his discretion extend such time in which the report is

[2] The Supreme Court has repeatedly noted that, because the RLA was frankly acknowledged to be "an agreement worked out between management and labor, and ratified by the Congress and the President," the "statements of the spokesmen for the two parties made in the hearings on the proposed Act are entitled to great weight in the construction of the Act." *Chicago & N.W. Ry. v. United Transp. Union*, 402 U S 570, 576 (1971).

to be made an additional period of not to exceed thirty days." Staff of Subcomm. on Labor, Senate Comm. on Labor and Pub. Welfare, 93d Cong., 2d Sess., *Legislative History of the Railway Labor Act, As Amended* 453 (Comm. Print 1974) (reprinting congressional debates). Congressman Burtness argued that thirty days would often not be sufficient time and that there would be no danger in allowing the President to have this discretion to extend the deadlines. *Id.* The amendment was rejected with little debate. *Id.*

We recognize that it might be argued that an extension is permissible because the thirty-day period is meant merely to be directory rather than mandatory. *Cf. United States v. Air Florida, Inc.*, 534 F. Supp. 17, 20 (S.D. Fla. 1982) (thirty-day time period in which NMB, under section 2 Ninth of the RLA, must certify conclusions of representational dispute, was "directory rather than mandatory;" accordingly, failure of NMB to meet deadline did not invalidate its investigation and subpoena request); *see also System Fed'n No. 40, Ry. Employees Dep't v. Virginian Ry.*, 11 F. Supp. 621, 627 (E.D. Va. 1935), *aff'd*, 84 F.2d 641 (4th Cir. 1936), *aff'd*, 300 U.S. 515 (1937). In light of the legislative history of the provision, however, it would be difficult to conclude that the thirty-day statutory deadline was merely meant to be directory, rather than mandatory. Indeed, were the deadline read to be merely directory, the President could unilaterally extend the reporting date, thus effectively extending the status quo period. An Emergency Board would be able to achieve the same result simply by delaying the submission of its report. Either of these conclusions would directly contradict the intent of the RLA drafters as expressed in the legislative history.

Our conclusion is not altered by the general rule of construction that a "statutory time period is not mandatory unless it *both* expressly requires an agency or public official to act within a particular time period *and* specifies a consequence for failure to comply with the provision." *Thomas v. Barry*, 729 F.2d 1469, 1470 n.5 (D.C. Cir. 1984) (quoting *Fort Worth Nat'l Corp. v. FSLIC*, 469 F.2d 47, 58 (5th Cir. 1972)); *see also St. Regis Mohawk Tribe v. Brock*, 769 F.2d 37, 41 (2d Cir. 1985) (collecting cases), *cert. denied*, 476 U.S. 1140 (1986); *Usery v. Whitin Machine Works, Inc.*, 554 F.2d 498, 501 (1st Cir. 1977). The statutory time table at issue defines a narrow exception to the parties' rights to use self-help. General rules of construction cannot be used to defeat these specific restrictions and create a unilateral, discretionary ability to derogate from these rights. Furthermore, we question whether this general rule of construction could be applied to contradict "clear indications of congressional intent that the limitations are to be strictly enforced." *Usery*, 554 F.2d at 501.

In any event courts would likely hold that application of this rule indicates that the deadline in section 10 is mandatory. Section 10 expressly requires the Emergency Board to submit its report "within thirty days from the date of its creation." 45 U.S.C. § 160. Moreover, although on its face the RLA does not specify the consequences of the late filing of an Emergency Board report, it seems clear from the above discussion of the legislative

history that the RLA effectively penalizes late reports by failing to toll the start of the statutory cooling-off period, thus refusing to extend the status quo period beyond sixty days.

Finally, as discussed more fully below, we believe that courts would likely give significant weight to any construction of the Act that was supported by long-established administrative practice. In this regard, we are not aware of any instance in the sixty-four years of practice under the RLA where the President unilaterally extended the time for report over the objection of the parties.[3] The information supplied to us by the NMB indicates that extensions have generally been made only upon the request of the parties, who generally made a separate side agreement extending the status quo.

Accordingly, we conclude that the thirty-day deadline for the submission of the report is mandatory, and that it may not be extended by the President or by an Emergency Board.

2. *President's power to shorten deadline*

An Emergency Board is appointed by the President and is within the executive branch. Nothing in the language of the statute even purports to limit the President's constitutional authority to supervise the board. Indeed, the legislative history of the Act appears to contemplate that the board would function at the direction and control of the President.[4] Accordingly, we believe that the President may alter the deadline within which an Emergency Board must submit its report, so long as the new deadline is within the statutory thirty-day time period. The President may therefore require the board to submit its report in *less* than thirty days.

B. Extension of report deadline with the consent of the parties

We note that research by the NMB staff indicates that at least fifty Emergency Boards created since 1960 have submitted their reports more than thirty days after their creation. With apparently few exceptions[5], these extensions were the result of requests by the parties or the board that an extension be granted by the President, accompanied by an agreement by the parties to abide by an extended status quo period (usually until thirty days

[3] The NMB has informed us that Emergency Board No. 209 submitted its report four days late without obtaining the consent of the parties. We are not aware, however, whether the Emergency Board obtained a formal presidential extension, or simply submitted its report just a few days late.

[4] In this regard, we note that the legislative history places considerable emphasis on the fact that an Emergency Board is a *presidential* board. *See, e.g.*, Staff of Subcomm. on Labor, Senate Comm. on Labor and Pub. Welfare, 93d Cong., 2d Sess., *Legislative History of the Railway Labor Act, As Amended* 294 (Comm. Print 1974) (reprinting congressional debates) (statement of Rep. Newton) (stating that parties would cooperate with an Emergency Board because "[n]either party would defy the President of the United States"); *id.* at 229 (statement of Rep. Cooper) (Emergency Board is backed by "the power and prestige of the President").

[5] The NMB has indicated that Emergency Board No 209 submitted its report four days late without any agreement by the parties to abide by an extension. *See* note 3 *supra*.

after the late report is submitted). The Department of Labor has informed us that the total number of such extensions since the enactment of the RLA is more than seventy. The Labor Department also reports that, up to the present time, no party has ever reneged on a side agreement to forbear from self-help. Of course, as noted below, this perfect track record means that the legally binding character of these extensions has never been subject to litigation.

1. *Legality of an extension granted with parties' consent*

We believe that, despite our earlier conclusions concerning unilateral extensions, several arguments can be made that an extension granted with the consent of the parties would not violate section 10 of the RLA. First, and most importantly, the granting of extensions when the parties have agreed to extend the status quo period is supported by a long and consistent administrative practice under the Act. This practice would presumably be entitled to considerable weight in the construction of the statute. *See, e.g., Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (noting that the Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer"); *see also North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982) ("Where 'an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.'") (quoting *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979)).[6] Indeed, this office, in an earlier opinion approving the use of extensions with the consent of the parties, placed considerable weight on this past practice, noting that "this is a point upon which 'a page of history is worth a volume of logic.'" Memorandum for Laurence H. Silberman, Deputy Attorney General, from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, *Re: President's Power to Extent [sic] in which Emergency Board Under Railway Labor Act Must Submit its Report* at 2 (June 19, 1974) (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)).

Second, we note that the existence of an enforceable[7] side-agreement between the parties extending the status quo period would have the effect of removing all consequences of late submission of the report. By binding the parties to refrain from the use of self-help until after a specified period, the side agreement renders the running of the statutory clock irrelevant. There

[6] Given the frequency of the practice, and Congress' occasional statutory intervention into the resolution of particular disputes, it cannot seriously be doubted that Congress has been fully aware of the use of extensions. We are not aware of any congressional attempts to limit such practices.

[7] We discuss the issue of enforceability below. *See infra* pp. 63-66.

would thus be no consequences to a failure to meet the section 10 deadline, and, in these circumstances, it might fairly be said that the import of the thirty-day deadline was merely "directory" rather than "mandatory." *See Thomas*, 729 F.2d at 1470 n.5 (statutory time period is not mandatory unless it expressly requires action within a particular time period *and* specifies consequences for a failure to comply). In short, when failure to comply with the deadline is completely without practical effect, there is no reason why the deadline may not, in those circumstances, be treated as directory.

Finally, we note that nothing in the legislative history is inconsistent with these conclusions. The legislative history discussed above indicates that the drafters were concerned with the delays that might be caused by *unilateral* presidential or board action. *See supra* pp. *59-60*; *see also House Hearings* at 100 (statement of Mr. Richberg) (stating that indefinite extensions for an Emergency Board's report were undesirable because "there is always a great interest on the part of one person to have delay and on the part of the other person not to have delay.") By contrast, where the parties have themselves agreed to extend the status quo period, the drafters' concerns are fully satisfied. Indeed, permitting an extension in such circumstances would be consistent with the RLA's declared purposes of avoiding interruptions to commerce and of providing for the "prompt and orderly settlement" of disputes between carriers and employees. 45 U.S.C. § 151a. Of course, given the President's power to insist upon the report within the statutory time frame, *see supra* p. 61, the President may refuse to grant an extension despite the parties' agreement to refrain from self-help and despite their request that he permit the extension.

2. *Enforceability of an agreement to refrain from self-help during extended Emergency Board proceedings*

We believe that the issue of whether any side agreement by the parties would be equitably enforceable under the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 is a difficult one, give the lack of judicial authority on this question.[8] We believe that there is no more than an even chance that a court would enforce such an agreement given the consistent past practice, over a long period of time, of using these agreements to facilitate the RLA dispute settlement processes. Nevertheless, a significant argument can be made that these agreements are, strictly speaking, outside the process mandated by the RLA, and there is thus a substantial litigation risk that they would be declared to be equitably unenforceable.

Among other things, section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, provides:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in

[8] In this regard, we note that the Labor Department has advised us that the enforceability of such side agreements has never been subject to litigation.

> any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from . . . [c]easing or refusing to perform any work or to remain in any relation of employment . . . .

The Supreme Court has held that, despite the broad reach of this language, the Norris-LaGuardia Act "does not deprive the federal court[s] of jurisdiction to enjoin compliance with various mandates of the Railway Labor Act." *Burlington N.R.R. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429, 445 (1987) (quoting *International Ass'n of Machinists v. Street*, 367 U.S. 740, 772-73 (1961)). The Court emphasized, however, that "[t]his exception is necessarily a limited one," and that, even when a party seeking injunctive relief is able to show a violation of a duty imposed by the RLA, "[c]ourts should hesitate to fix upon the injunctive remedy . . . unless that remedy alone can effectively guard the plaintiff's right." *Id.* at 446 (quoting *International Ass'n of Machinists*, 367 U.S. at 773).

The key issue is whether a breach of the side agreement would violate any of the "various mandates of the Railway Labor Act." We believe that a persuasive argument can be made that any breach of the side agreement would violate section 2 First of the RLA, 45 U.S.C. § 152 First, which provides:

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce . . . .

In *Chicago & N.W. Ry. v. United Transp. Union*, 402 U.S. 570 (1971), the Supreme Court held that, notwithstanding the provisions of the Norris-LaGuardia Act, a federal court has jurisdiction in appropriate circumstances to enjoin a strike, even during the self-help period, where the union has failed to satisfy its section 2 First obligation to use every reasonable effort to settle the dispute.

The precise scope of this duty, and of the exception to the anti-injunction provisions of the Norris-LaGuardia Act that it creates, is difficult to discern. In *Trans Int'l Airlines, Inc. v. International Bhd. of Teamsters*, 650 F.2d 949, 962 (9th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981), the court held, per Judge (now Justice) Kennedy, that a breach of a contractual promise not to strike during the self-help period was an enjoinable violation of the section 2 First duty only if there is a substantial relationship between the breach and

the RLA dispute resolution procedures: "Absent a substantial nexus with statutory dispute settlement mechanisms or an agreement to arbitrate, an injunction may not issue to prevent a plain breach of a no-strike clause by a union." Applying this standard, the court concluded that the contract at issue, which flatly prohibited strikes against certain flights, was not equitably enforceable. The contract regulated *conduct during the self-help period*, when the parties had fully exhausted the RLA dispute resolution procedures, and therefore the "RLA plan for avoiding disruption [was] not threatened by the . . . strike." *Id.* at 963. *Chicago & N.W. Ry.* was distinguished on the grounds that, in that case, "the union had failed to use reasonable efforts to comply with the mandatory disputes settlement mechanisms that lie at the heart of the Act," and that the injunction in that case therefore protected the "integrity" of the RLA processes. *Trans Int'l Airlines*, 650 F.2d at 963.

We believe that the best argument for enforcing such side agreements is that they have a "substantial nexus with [the] statutory dispute settlement mechanism[]." *Id.* at 962. Given the long-established practice of entering into side agreements to facilitate the production of the statutorily required reports by the Emergency Board, we believe that these agreements are arguably part of the dispute resolution process. At a minimum, it would appear that they indeed have a "substantial nexus" to that process.[9]

There is, however, a potential counterargument. As our earlier discussion shows, these side agreements regulate conduct that is, strictly speaking, outside the statutory status quo period. Accordingly, their "nexus" to the statutory scheme might be questioned, especially if a court were to read *Trans Int'l Airlines* as broadly prohibiting any injunctions once the strict statutory deadlines had passed.

It might also be argued in support of enforcing the agreement that a strike called before the expiration of the extended period specified in the side agreement is a violation of the status quo provisions of section 10.[10] We believe, however, that this argument is untenable in light of our earlier conclusion that late submission of the report will not toll the running of the *statutory* status quo period. Indeed, the possibility of an extension being granted at all hinges upon the parties' willingness, by private contract, to

---

[9] Indeed, it might also be argued that the union's conduct in agreeing to an extension of the status quo period, with its consequent effects in altering the normal RLA process, is a breach of the section 2 First duty where, as is likely to be the case, the union intended all along to abide only by the strict statutory definition of the status quo period. Such a case would closely resemble *Chicago & N.W. Ry.*, which authorized an appropriate injunction, *during the self-help period*, where the union failed to use reasonable efforts to settle the dispute during the RLA dispute settlement procedures. Indeed, a union's actions in causing the delay of the submission of the report, with the intent to take full advantage of the strict statutory deadline, would arguably "threaten" the "RLA plan for avoiding disruption," and an appropriate injunction against the ensuing strike would "protect" the "integrity of these mechanisms." *Trans Int'l Airlines*, 650 F.2d at 963. The availability of this argument, however, would appear to turn on the union's intent at the time of entering into the side agreement.

[10] It is clear that a federal court has jurisdiction to enforce compliance with the status quo provisions of section 10. *See, e.g., Pan American World Airways, Inc. v. Flight Eng'rs' Int'l Ass'n*, 306 F.2d 840, 846 (2d Cir. 1962).

extend the status quo period beyond that specified in the statute.[11] Accordingly, we conclude that, although a union might violate the side agreement by calling a strike outside the sixty-day statutory period, it does not thereby violate section 10.[12]

Lastly, it might be argued that, to the extent that there is any ambiguity in the side agreement concerning the extent of the restrictions on self-help, the necessary interpretation of the agreement raises a "minor" dispute that must be resolved under the compulsory arbitration provisions of the RLA, *see* 45 U.S.C. § 153. The Supreme Court has held that, pending the resolution of these minor dispute resolution procedures, the parties have an equitably enforceable obligation to refrain from self-help. *See Brotherhood of R.R. Trainmen v. Chicago River & I.R.R.*, 353 U.S. 30 (1957). This argument may be unavailing for two reasons. First, if *Trans Int'l Airlines* is correct in holding that agreements to regulate conduct during the self-help period are not equitably enforceable, it is unclear how there can be any need for arbitration to determine to what *extent* the side agreement limits self-help; the agreement will be equitably unenforceable regardless of the extent of its restrictions.[13] Second, the availability of this argument hinges on the precise wording of the restrictions in the side agreement drafted by the parties, a factor that is not within the control of the executive branch. If the restrictions are clearly worded, no minor dispute can arise, and no equitable relief will be available under this theory.

C. Presidential power to reconvene emergency boards

We do not believe that the President possesses power to impose a second status quo period by convening a second Emergency Board or by reconvening the original board. Neither the text nor the legislative history of the RLA provide any support for such a power. Indeed, the legislative history's emphasis on the need for a prompt resolution of the board's activities, within a fixed period of time, affirmatively undercuts the notion that the President may extend the status quo period simply by reconvening or reappointing the board.

Nor do we believe that past practice under the Act provides any support for such a power. The NMB has informed us that there appears to have been

---

[11] Moreover, because the possibility of an extension depends upon the parties' private contract, there is arguably no reason why the parties may not agree to extend the status quo period until ten or twenty (rather than thirty) days after the Emergency Board's late submission of the report. It would be difficult to argue that such an "extension plus ten days" period is equivalent, for purposes of the RLA and the Norris-LaGuardia Act, to the statutory period described in section 10.

[12] We reach this conclusion despite the fact that the statute states that the cooling-off period comprises the "thirty days after such board has made its report to the President." As discussed above, the wording of this section was based on the drafters' assumption that the thirty-day deadline would be strictly complied with.

[13] It might be argued, however, that interpretation of the agreement would still be necessary in order to determine the extent of entitlement to other forms of relief, such as damages.

only two such reconventions in the last forty-one years.[14] The information that we have been given concerning such reconvention indicates the fairly narrow circumstances under which boards have been reconvened. Thus, both of the two boards that were reconvened between 1950 and 1987 were reconvened only after the parties had requested this action and only for the purpose of clarifying an ambiguous point in the board's original report. *See* Letter from H. Witt, Member, NMB to the President (Sept. 8, 1986) (reconvening of Emergency Board No. 211); Letter from Emergency Board No. 187 to the President (Nov. 26, 1975) (report of reconvened board). These very limited precedents provide no support for the view that the President may impose a new status quo period by reconvening an Emergency Board over the objections of the parties or to deal with completely different issues.[15]

CONCLUSION

We conclude that the President may grant an extension for filing a report by an Emergency Board appointed under section 10 of the Railway Labor Act only if the parties consent to the extension by making a side agreement that extends the status quo period. As a practical matter, the effectiveness of any such extension of the status quo period depends upon the equitable enforceability of the side agreement, a matter concerning which there is substantial doubt. Furthermore, although the President may not unilaterally extend the thirty day deadline for filing a report, he may shorten it. Finally, any subsequent boards appointed by the President (whether by reconvening an Emergency Board or appointing a new one) cannot bind the parties to status quo without their consent.

JOHN O. McGINNIS
Deputy Assistant Attorney General
Office of Legal Counsel

[14] The NMB has stated that there may have been as many as four reconventions in the first twenty-four years, but it does not as yet have information on the circumstances of the reconventions.

[15] Of course, the President may choose to consult with the members of the former board about any issue relating to the dispute, but this would not be an action taken under the RLA, and it would not have the effect of imposing a new status quo period.

Authority to Use Funds from Fiscal Year 1990 Appropriation to Cover Shortfall from Prior Award Year's Pell Grant Program

The Pell Grant Program's lump sum appropriation for fiscal year 1990 may be used to pay the deficiencies in the program's funding for the 1989-90 award year.

March 29, 1990

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF EDUCATION

This memorandum responds to your request for advice concerning a dispute between the Department of Education ("the Department") and the Office of Management and Budget ("OMB") over the funding of the Pell grant program, 20 U.S.C. §§ 1070-1070f.[1] The question presented is whether Pell grant funds appropriated in the Departments of Labor, Health and Human Services, and Education and Related Agencies Appropriations Act, 1990 ("FY 1990 Appropriations Act"), Pub. L. No. 101-166, 103 Stat. 1159 (1989), may be used to cover Pell grant program expenses for both the 1989-90 and 1990-91 "award years," and in particular whether the program's projected shortfall for the 1989-90 award year can be met by using appropriated funds in excess of the $131,000,000 that the FY 1990 Appropriations Act states "shall be available only for unfinanced costs in the 1989-90 award year Pell Grant program." Pub. L. No. 101-166, 103 Stat. at 1181. We conclude that the lump sum appropriation in the FY 1990 Appropriations Act may be used to pay the deficiencies in the program's funding for the 1989-90 award year.

I. Background

Title IV of the Higher Education Act of 1965, as amended, authorizes the Pell grant program and declares that its purpose is "to assist in making available the benefits of postsecondary education to eligible students." 20 U.S.C. § 1070a. The basic grants provided under the program are intended,

[1] *See* Letter for William P. Barr, Assistant Attorney General, Office of Legal Counsel, from Edward C. Stringer, General Counsel, Department of Education (Jan. 12, 1990) ("Stringer Letter"), and accompanying Memorandum of Law (Nov. 13, 1989) ("Education Memorandum").

within statutory limits, to meet up to sixty percent of an eligible student's cost of attendance. *Id.* § 1070a(b)(1), (3). The statute also sets forth criteria of eligibility, expected family contributions, and the amount of each grant. *Id.* §§ 1070a to 1070a-4.

Congress has funded the Pell grant program with appropriations that are available for obligation over a period of two fiscal years. The federal government's fiscal year begins on October 1 and ends on the following September 30. *See* 31 U.S.C. § 1102. An "award year" is defined at 20 U.S.C. § 1070a-6(3) as "the period of time between July 1 of the first year and June 30 of the following year." Thus, a Pell grant award year begins three months before the start of a fiscal year and runs through the first nine months of that fiscal year. Generally, Pell grant appropriations have been justified in budget submissions to Congress for the *next* award year, *i.e.*, the award year that will begin nine months *after* the start of the first fiscal year covered by the appropriation. *See* Stringer Letter at 1; Letter for Lynda Guild Simpson, Deputy Assistant Attorney General, Office of Legal Counsel, from Rosalyn J. Rettman, Associate General Counsel for Budget, Office of Management and Budget at 9 (Feb. 6, 1990)("Rettman Letter").

Budget estimates of the cost of the Pell grant program for a future award year depend on several variables, including the number of eligible students and the extent of family contributions, that are difficult to predict. There is also a substantial time lag between the submission of a budget request to Congress based on estimates of funds that will be needed, and the completion of the award year for which appropriations have been made, when the actual costs of the program can finally be known. *See* Education Memorandum at 3, 4. Thus, the amounts appropriated for the program in a given fiscal period and the program's actual cost in the corresponding award year almost inevitably fail to match. The authorizing statute provides methods for handling these mismatches. Section 1070a(h) of title 20, U.S. Code provides for the disposition of excess funds, and section 1070a(g) provides for the Department to make program cuts by applying a "linear reduction" formula to certain grants if appropriations for any fiscal year do not suffice to satisfy fully all entitlements.[2]

The Pell grant program has suffered from recurring funding deficiencies that began in the late 1970s. Congress usually addressed these deficiencies

[2] 20 U.S.C. § 1070a(g) provides as follows:

(1) If, for any fiscal year, the funds appropriated for payments under this subpart are insufficient to satisfy fully all entitlements, as calculated under subsection (b) of this section, the amount paid with respect to each entitlement shall be—

(A) the full amount for any student whose expected family contribution is $200 or less, or

(B) a percentage of that entitlement, as determined in accordance with a schedule of reductions established by the Secretary for this purpose, for any student whose expected family contribution is more than $200.

(2) Any schedule established by the Secretary for the purpose of paragraph (1)(B) of this subsection shall contain a single linear reduction formula in which the percentage reduction increases uniformly as the entitlement decreases and shall provide that if an entitlement is reduced to less than $100, no payment shall be made.

by providing, in annual appropriations acts between 1979 and 1987, that the lump sum appropriation would first be available to meet any deficiency from the award year that was in progress when the fiscal year began. For example, the FY 1979 Appropriations Act, Pub. L. No. 95-480, 92 Stat. 1567, 1579 (1978), provided that "amounts appropriated for basic opportunity grants shall first be available to meet any insufficiencies in entitlements resulting from the payment schedule . . . published by the Commissioner of Education during the prior fiscal year." This language was slightly altered beginning with a FY 1983 Appropriations Act, Pub. L. No. 97-377, 96 Stat. 1897 (1982), which stated that "amounts appropriated for Pell Grants shall be available first to meet any insufficiencies in entitlements resulting from the payment schedule for Pell Grants published by the Secretary of Education for the 1981-1982 academic [*i.e.*, award] year."[3] During this period, the "Budget Justifications submitted by the Executive Branch reflect a fairly, consistent view that the provisions were added to *permit* use of the appropriations for the prior award year." Education Memorandum at 8.

In 1987, Congress changed this practice by enacting a $287,000,000 supplemental appropriation. *See* Pub. L. No. 100-71, 101 Stat. 391, 421 (1987) ("Supplemental Appropriation Act, 1987"). This supplemental appropriation forestalled any need to state in the FY 1988 Appropriations Act that FY 1988 funds were to be first available to retire the shortfall from the award year then in progress. Moreover, no such language was contained in the FY 1989 Appropriations Act.[4]

Before the beginning of FY 1990, the Administration forecast a shortfall for the award year 1989-90 of some $331,000,000. OMB informed Congress that the Administration would impose the linear reductions mandated by 20 U.S.C. § 1070a(g) unless Congress appropriated sufficient funds to cover the projected deficiency. Congress, however, relied on the cost estimates calculated by the Congressional Budget Office, which suggested a funding shortfall of not more than $131,000,000. *See* H.R. Conf. Rep. No. 274, 101st Cong., 1st Sess. 40-41 (1989); *see also* Pub. Papers of George Bush 1373 (Oct. 21, 1989) (President's veto message on H.R. 2990, noting that legislation underfunded Pell grant program). In light of that lower estimate, Congress provided in the FY 1990 Appropriations Act that the Secretary would have an "additional" $131,000,000 to be "available only" for the anticipated shortfall. In relevant part, the statutory language reads:

> For carrying out subparts 1, 2, and 3 of part A and parts C, D, and E of title IV of the Higher Education Act, as amended,

---

[3] *See* Stringer Letter at 3; Education Memorandum at 2, 7 and Attachment B (quoting relevant language from appropriations acts); Rettman Letter at 2-3.

One exception to this pattern should be noted. Language similar to that quoted from the FY 1979 appropriation appeared in the proposed bill, H.R. 7998, 96th Cong., 2d Sess. (1980), for the FY 1981 appropriation, but not in the final enactment. *See* Education Memorandum, Attachment B at 2.

[4] *See* Pub. L. No. 100-202, 101 Stat. 1329-1 (1987) ("FY 1988 Appropriation Act); Rettman Letter at 3-4.

> $6,044,097,000 *together with an additional $131,000,000 which shall be available only for unfinanced costs in the 1989-90 award year Pell Grant program . . . .*

Pub. L. No. 101-166, 103 Stat. at 1181 (emphasis added).

The Department currently expects a 1989-90 award year shortfall of $265,000,000 over and above the $131,000,000 earmarked by the FY 1990 Appropriations Act. You have advised us that unless the Department can draw on additional funds from the FY 1990 appropriations to meet this shortfall, its only practicable recourse will be "to discontinue all further awards or payments to schools (and, indirectly, to students) or to announce a reduced payment schedule." Stringer Letter at 3.

II. Analysis

As a general proposition, "the absence in the terms of an appropriations act of a prohibition against certain expenditures under that appropriation implies that Congress did not intend to impose restraints upon an agency's flexibility in shifting funds among activities or functions within a particular lump sum account." 4B Op. O.L.C. 701, 702 (1980); *see also* General Accounting Office, *Principles of Federal Appropriations Law* at 5-95 (1982) (restrictions on a lump sum appropriation contained in an agency's budget request or in legislative history are not binding unless they are specified in the appropriations act itself). Thus, lump sum appropriations available to an agency in a given fiscal year can generally be used to meet any program expenses that are incurred within the same fiscal year. Presumptively, then, expenses incurred in the operation of the Pell grant program within FY 1990 — including program expenses incurred in the nine months of the 1989-90 award year that occur in FY 1990 — can be paid out of the Department's FY 1990 appropriation, unless Congress has determined otherwise.[5] The central question therefore is whether Congress has restricted the Department's presumptive authority to draw on the FY 1990 lump sum appropriation to meet the shortfall for the 1989-90 award year. We conclude that Congress has imposed no such restriction.

[5] This view accords with prior Congressional understanding of the Pell grant appropriation. Thus, the appropriation for the program in FY 1978 was found on later estimates to exceed the expenses required for the 1978-79 award year. This left some $561,000,000 still available at the end of the 1978-79 award year in June, 1979. The legislative history to Pub. L. No. 96-123, 93 Stat. 925 (1979), reflects that Congress understood that that money remained available for obligation until September 30, 1979, *i.e.*, the end of FY 1978. Accordingly, Congress understood that that amount could be spent before September 30, 1979, to pay grant awards for the 1979-80 award year. As the Senate Report on H.R. 4389, a predecessor of Pub. L. No. 96-123, stated, *see* S. Rep No. 247, 96th Cong., 1st Sess. (1979), "[i]n other words, all funds will be obligated during the fiscal years for which they were appropriated. The only difference is that they will be used by students in different school [*i.e.*, award] years than was originally planned. Both HEW and the Office of Management and Budget agree that this can be done." *Id.* at 116.

A. The FY 1990 Appropriations Act

Our starting point is, of course, the language of the FY 1990 Appropriations Act itself. *See supra* pp. 70-71 (quoting statute). That language does not in terms limit the Department's authority to use the lump sum funds only for program expenses for the upcoming 1990-91 award year. The language makes an appropriation of $6,044,097,000 for Pell grant program expenses without limiting the use of those funds to program costs arising in any single award year. The language then provides "an additional $131,000,000 to the specific purpose of paying off the 1989-90 award year deficiency; it does not, however, limit the use of the lump sum appropriation, nor does it state that the $131,000,000 which shall be available only for unfinanced costs in the 1989-90 award year Pell Grant program." In effect, this proviso limits the use of the $131,000,000 to the specific purpose of paying off the 1989-90 award year deficiency; it does not, however, limit the use of the lump sum appropriation, nor does it state that the $131,000,000 is the only amount that may be used for retiring the deficiency. Thus, we see nothing in the express language of the FY 1990 Appropriations Act that prohibits the Department from using the lump sum appropriation to cover a prior award year's deficiency if the $131,000,000 earmarked for that purpose proves insufficient.

Such a construction of the FY 1990 Appropriations Act accords with its legislative history. The Conference Report details the background to the FY 1990 appropriation, including the Administrations's revised estimate of a $331,000,000 deficiency for award year 1989-90, OMB's warning to Congress that the Administration would seek to recover program funds from individual grantees if additional funds to meet the deficiency were not provided in FY 1990, and the Congressional Budget Office's counter-estimate of a deficiency "of not more than $131 million." H.R. Conf. Rep. No. 274 at 40. The Report then states:

> Based on this information, the conferees have provided an immediate appropriation of $131 million to cover the funding shortfall for the 1989/1990 academic year. Although the conferees have provided explicit legislative authority for the use of funds for the 1989 shortfall, the conferees do not necessarily concur in OMB's view that this language is necessary in order for funds to be used for this purpose. The conferees note that OMB's policy differs substantially from previous Administration practice in handling the financing of current year shortfalls. As a result of this 1989 appropriation and some 1989 savings achieved through the provisions cited below [6], the conferees consider any attempt to impose a linear

[6] The "1989 savings" that the conferees expected to achieve were to come from the bill's changes in Pell grant funding, specifically the facts that it "limit[ed] the discretion of student aid administrators in

Continued

> reduction of Pell Grant awards in the current academic year to be both unacceptable and unnecessary.

H.R. Conf. Rep. No. 274 at 40-41.

Although this language is not free from ambiguity, we believe that it supports the Department's position. The Report clearly states that the conferees provided an "immediate" appropriation to be applied to the shortfall, but that they did not concur in the view that special language was necessary to achieve that purpose. Moreover, the Report notes that OMB's view was contrary to prior practice, in which the Department had drawn on the lump sum to prevent linear reductions from taking effect without obtaining a special appropriation earmarked for that purpose. These statements, in conjunction with the conclusion that the conferees would find linear reductions unacceptable, strongly suggest that the conferees believed the Department could, consistent with prior practice, also draw on the lump sum appropriation to prevent linear reductions if the $131,000,000 proved insufficient. The Report in no way demonstrates that Congress thought specific language, like that used in the past, was *necessary* for the lump sum to be used as the Department intends. At most, the Report does not address that issue squarely. Under those circumstances, the Department's presumptive ability to use the lump sum appropriation for any expenses incurred within the fiscal period applies.[7]

B. The FY 1979-1987 Appropriations Acts

OMB argues that the language Congress included in annual appropriations acts from FY 1979 through FY 1987, providing that moneys appropriated for the Pell grant program "shall first be available" to meet deficiencies in funding for the award year in progress, was required in order for the Department to have the authority to use the lump sum for that purpose. OMB argues that the absence of such language in the FY 1990 Appropriations Act prevents the Department from using the lump sum appropriation for FY 1990 to meet the 1989-90 award year deficiency. *See* Rettman Letter at 9;

---

[6](....continued)
adjusting Pell Grant awards at the campus level," that it "implement[ed] the Administration's proposal for the implementation of pro-rata refund policies at postsecondary institutions with loan default rates in excess of 30 percent," and that it "delay[ed] the eligibility of students attending on a less than half time basis for Pell Grant awards." H.R. Conf. Rep. No. 274 at 41

[7] Senator Harkin's floor statement explaining the purpose of the $131,000,000 appropriation also notes that this prior practice was to be preserved. *See* Stringer Letter at 2 n.4. Senator Harkin stated that "in reserving this amount for the shortfall, it was not intended that the Secretary of Education be precluded from using other available funds in the Pell grant appropriation, as done in previous years, to cover the unfinanced costs for the current academic year." 135 Cong. Rec. S15, 804 (daily ed. Nov. 16, 1989).

Of course, it is true that Congress' *primary* intention in appropriating a lump sum of $6,044,097,000 for the Pell grant program for FY 1990 was to fund the program's expenses for the 1990-91 award year.

Continued

Education Memorandum at 8. We reject that negative implication for two main reasons.

We believe the language of the prior appropriations acts did not provide "additional authority not otherwise available to the agency head." Rettman Letter at 9. Rather, the requirement that appropriated funds "shall first be available" to meet an outstanding deficiency establishes a priority use for funds that the Department otherwise would have had authority to allocate to any expenses incurred within the fiscal year for which the appropriation was made, regardless of the award year. *See* Education Memorandum at 8. The form of words chosen by Congress — requiring that the Pell grant appropriation *first* be available for paying a program deficiency from a pending award year — says that Congress wanted to ensure that the Department applied the appropriation to the deficiency before it expended funds for other purposes. In our view, the plain language of these provisions constitutes a limitation on existing authority, rather than an affirmative grant of new authority. Congress' underlying intent was apparently to prevent the Department from pursuing alternatives to a draw-down on the lump sum appropriation, such as imposing linear reductions.

The pattern of Congress' decisions from FY 1979 through FY 1987 is thus entirely consistent with its decision in FY 1990. In each of these appropriations, Congress appears to have wanted to prevent the hardship that would have been caused by imposing linear reductions. To that end, Congress consistently provided alternatives to the linear reduction procedure. In the early years, Congress *mandated* the first use of the lump sum appropriation to cover a shortfall, thus limiting the Department's discretion to spend the money for other purposes and impose linear reductions instead. In FY 1990, Congress achieved the same end by appropriating what it believed to be an ample sum for the specific purpose of retiring the shortfall.[8] Nevertheless, the conferees made clear that they did not approve of a deviation from the past practice of resorting to the lump sum rather than permitting linear reductions to take effect. Against this background, it is implausible to

---

[7](....continued)
See B-236667, Opinion of the Comptroller General, 1990 WL 277766, at *2 (Jan. 26, 1990) ("Each two-year appropriation provides funding intended primarily for the award year beginning nine months after its enactment."). However, the fact that Congress believed that the bulk of the lump sum appropriation would be applied to award year 1990-91 expenses does not preclude its availability to meet the award year 1989-90 deficiency.

[8]OMB notes that at the time of the FY 1986 appropriation, Senators Weicker and Proxmire disavowed Congress' prior practice of requiring mandatory draws against appropriations to cover current award year expenses. *See* Rettman Letter at 3; 131 Cong. Rec. 34,997 (1985) (remarks of Sen. Weicker); *id.* (remarks of Senator Proxmire). Senator Weicker stated that "the conferees direct that the Secretary take whatever steps are available to him under current statutory authority to ensure that 1986 program costs are reduced to a level consistent with the appropriation," thus implying that the mandatory draw-down would not be repeated in the FY 1987 appropriation, and that linear reductions should, if necessary, be imposed on the 1986-87 award year Pell grants. *Id.* Senator Proxmire agreed and stated that "[i]f there is any unanticipated shortfall in 1986 program costs, in spite of the $3.5 billion included in the conference report, then the Secretary of Education can make the necessary reductions consistent with existing law." *Id.* Despite these warnings, however, the FY 1987 appropriation again included mandatory draw-down language similar to that of prior years. *See* Pub. L. No. 99-591, 100 Stat. 3341-287 (1986).

maintain, as does OMB, that the FY 1990 appropriation *compels* the imposition of linear reductions and *forbids* the draw-down of lump sum funds.

C. *Section 411(g) of the Higher Education Act*

Section 411(g) of the Higher Education Act, codified as section 1070a(g) of title 20, provides for the Department to apply "linear reduction[s]" to specified classes of grants if, "for any fiscal year, the funds appropriated for payments under this subpart are insufficient to satisfy fully all entitlements, as calculated under subsection (b) of this section [providing means of calculating grants for the award year]." *See supra* note 2 (quoting statute).[9] OMB construes section 411(g) to require the imposition of linear reductions whenever a deficiency arises near the end of an award year (here, the 1989-90 award year), thus preserving the current appropriation (the FY 1990 appropriation) for use in the next award year (the 1990-91 award year). It maintains that this "linear reduction" authority is "that which makes Pell grants a discretionary program, since it provides a statutory tool permitting the program to operate at any given appropriation level." Rettman Letter at 2. The Department argues that neither the FY 1990 Appropriations Act nor section 411(g) in terms requires that lump sum appropriations be restricted to use in a *single* award year. Hence, the Department concludes, it has the discretion to allocate such funds between two award years within the same fiscal year period of availability. *See* Education Memorandum at 5. We agree with the Department's view.

The literal language of section 411(g) does not require the imposition of linear reductions on previously awarded Pell grants whenever a deficiency arises within an award year, even in cases where funds are available within an applicable fiscal year period to meet such a deficiency. The section states only that linear reductions shall be made "[i]f, for any fiscal year, the funds appropriated for payments under this subpart are insufficient to satisfy fully all entitlements." 20 U.S.C. § 1070a(g). The statutory reference to "entitlements" does not, by its terms, refer only to grants for the *following* award year. Nothing in the linear reductions provisions, in fact, indicates which award year's entitlements are to be reduced. It states only that entitlements must be reduced whenever funds appropriated for any *fiscal* year — not award year — are insufficient. As matters now stand, the funds available for expenditure in FY 1990 for program costs are *not* "insufficient to satisfy fully all entitlements" that now must be covered for the remainder of the 1989-90 award year. To be sure, a draw-down of $265,000,000 from the FY 1990 lump sum appropriation to cover the 1989-90 award year deficiency may eventually cause the lump sum appropriation to be "insufficient to satisfy fully all entitlements" pertaining to the 1990-91 award year. But at the moment, the funds available to be expended for current Pell grant

[9] The FY 1990 Appropriations Act does not restrict or repeal section 411(g).

entitlements are more than sufficient, and the Department need not impose linear reductions to cover the 1989-90 award year shortfall.

OMB reads section 411(g) to mean that if an appropriation for an award year is insufficient to meet all entitlements within the same award year, linear reductions are mandatory. This construction assumes that the *sole* purpose of any Pell grant appropriation, unless otherwise stated, is to fund program expenses for a single award year. But the language of the FY 1990 Appropriations Act is not so limited. Moreover, as noted above, OMB's view implicitly substitutes "award year" for "fiscal year" in the text of the linear reduction provisions, with no basis for doing so. *See* Letter for Lynda Guild Simpson, Deputy Assistant Attorney General, Office of Legal Counsel, from Steven Y. Winnick, Deputy General Counsel for Program Service, Department of Education at 2 (Feb. 15, 1990). Even accepting OMB's point that the Higher Education Act contains other language showing that the Pell grant program is structured on an award year basis, *see* Rettman Letter at 8, the linear reduction provision is not so limited, and it does not follow that an appropriation for a given fiscal year period must not be used to pay off the current award year's arrearages that occur within that fiscal period.

We therefore conclude that the Higher Education Act does not prohibit the Department from using the FY 1990 lump sum appropriation to pay off the deficiency from the 1989-90 award year.

D. The Anti-Deficiency Act

OMB also argues that the Anti-Deficiency Act supports its view. It contends that the Department's analysis

> would allow the possibility of increasing debts rolling forward each year into the next fiscal year, resulting in a possible violation of the Anti-Deficiency Act: if the Department is permitted an indefinite draw on one year's appropriation to pay for shortfalls in the prior award years, then the funds available for the current award year will be that much more insufficient, increasing the underfunding of the current year -- with no fiscal accountability and with Congress coerced into appropriating that deficiency at some point in the future.

Rettman Letter at 4-5.

The Anti-Deficiency Act, 31 U.S.C. § 1341,[10] is intended in part "to keep

[10] The pertinent provisions of that Act, 31 U.S.C. § 1341(a)(1), read as follows:

An officer or employee of the United States Government . . . may not—

(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or

(B) involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

all the departments of the Government, in the matter of incurring obligations for expenditures, within the limits and purposes of appropriations annually provided for conducting their lawful functions, and to prohibit any officer or employee of the Government from involving the Government in any contract or other obligation for the payment of money for any purpose, in advance of appropriations made for such purpose." 55 Comp. Gen. 812, 823 (1976) (quoting 42 Comp. Gen. 272, 275 (1962)).[11]

We do not believe that by drawing on the FY 1990 lump sum appropriation to pay off the remainder of the 1989-90 award year deficiency, the Department would violate terms of the Anti-Deficiency Act.[12] The use of the FY 1990 appropriation to pay off the deficiency would not be "an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation," 31 U.S.C. § 1341(a)(1)(A), because, as explained above, the Department may expend the lump sum appropriation for any program costs incurred within the fiscal year period of availability. Nor would such action by the Department "involve [the] government in a contract or obligation for the payment of money before an appropriation is made." 31 U.S.C. § 1341(a)(1)(B). Even assuming that a draw of $265,000,000 from the FY 1990 appropriation would leave that appropriation insufficient to cover program expenses connected with the 1990-91 award year, that result would not in itself create an obligation to fund grant awards for that award year at the levels currently contemplated, or compel Congress to enact a supplemental appropriation to cover a deficiency for that award year. Congress may, at any time, decline to appropriate more funds. Under those circumstances, appropriated funds in a fiscal year *would* be insufficient to satisfy entitlements, and linear reductions would take effect.

Accordingly, we conclude that the Department would not violate the Anti-Deficiency Act if it paid the current award year shortfall out of the FY 1990 lump sum appropriation.

---

[11] *See also Hooe v. United States*, 43 Ct. Cl. 245, 260 (1908), *aff'd*, 218 U.S. 322 (1910) (Congress' specific appropriations must not be exceeded for any fiscal year); 39 Comp. Gen. 422, 425 (1959) ("The object of the statute was to prevent executive officers from involving the Government in expenditure or liabilities beyond those contemplated and authorized by the Congress."); 55 Comp. Gen. 768, 773-74 (1976) (current fiscal year funds cannot be applied either directly or through reprogramming to liquidate contract obligations incurred in prior fiscal years).

[12] Indeed, we do not understand OMB to argue that a *per se* violation would exist, since it merely claims that "a *possible* violation" would occur, *see* Rettman Letter at 4-5 (emphasis added), if deficiencies continued to roll forward from one fiscal year to the next indefinitely

Conclusion

We conclude that neither the FY 1990 Appropriations Act, the Higher Education Act, nor the Anti-Deficiency Act prevents the Department from using the lump sum appropriation in the FY 1990 Appropriations Act for paying deficiencies in excess of $131,000,000 in the Pell grant programs funding for the 1989-90 award year.

WILLIAM P. BARR
Assistant Attorney General
Office of Legal Counsel

Application of Conflict of Interest Rules to Members of Department of Health and Human Services Advisory Committee

Neither the law nor the Department of Health and Human Services' Standards of Conduct constrain a member of the Advisory Council on Social Security from lobbying the Department on behalf of private clients with respect to policy issues that are being addressed by the Council. Whether to retain the prudential restrictions barring such lobbying that have been imposed by the Department's ethics official is a discretionary issue for the Secretary.*

April 13, 1990

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF HEALTH AND HUMAN SERVICES

This responds to your request for advice on what ethics constraints apply to members of the Department of Health and Human Services' ("Department") 1989 Advisory Council on Social Security ("Council"). Specifically, you wish to know whether it is lawful for Council members to lobby the Department on behalf of private clients with respect to policy issues that are being addressed by the Council. We believe that it is. Neither the law nor the Department's Standards of Conduct constrain a member from lobbying the Department on policy issues that are subject of Council discussions. Whether to retain the prudential restrictions barring such lobbying that have been imposed by the Department's ethics official is a discretionary issue for the Secretary.

I. Background

The Council is a statutory federal advisory committee whose members are appointed by the Secretary. 42 U.S.C. § 907; 5 U.S.C. app. I. It is reviewing a wide range of Social Security programs, including the provision of old-age, disability and mandatory health insurance. Council members are special government employees since they will serve less than 130 days a year. 18 U.S.C. § 202(a).

* Editors Note: This opinion was originally written using an out-of-date version of sections 203 and 205 of title 18. This publication of the opinion reflects revisions based on the November 1989 amendments, but those amendments were minor and the substance of the opinion is unchanged.

One of the Council's members is a private sector lobbyist. Business clients hire her to present their views to the Department on many of the same policy issues that the Council is examining. You have asked whether the member may continue to lobby the Department on those policy issues notwithstanding her membership on the Council. We believe that, as a legal matter she may.

II. Analysis

There are two statutory provisions that govern the conduct of special government employees in this context — 18 U.S.C. §§ 203 and 205. Section 203 bars special government employees from receiving compensation for representational activities before an agency in relation to any particular matter involving a specific party or parties in which they have participated personally and substantially and in which the United States is a party or has a substantial interest. 18 U.S.C. § 203(c)(1).[1] Similarly, section 205 bars special government employees from acting as agents for claims against the United States or as agents in any particular matter pending before a department involving a specific party or parties in which they have participated personally and substantially and in which the United States is a party or has a direct and substantial interest.[2]

We do not believe that lobbying on policy issues, such as the position the Department should take on mandatory health care, involves a "particular

---

[1] Section 203 provides, in relevant part:

(a) Whoever, otherwise than as provided by law for the proper discharge of official duties

(1) . . . receives . . . any compensation for any services rendered or to be rendered either by himself or another —

. . . .

(B) . . . at a time when such person is an officer or employee of the United States . . . in relation to any . . . particular matter in which the United States is a party or has a direct and substantial interest, before any department [or] agency . . . shall be fined under this title or imprisoned for not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

(b) A special Government employee shall be subject to subsection (a) only in relation to a particular matter involving a specific party or parties —

(1) in which such employee has at any time participated personally and substantially as a Government employee or as a special Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise . . . .

[2] Section 205 states, in relevant part:

Whoever, being a officer or employee of the United States . . . otherwise than in the proper discharge of his official duties --

(1) acts as agent or attorney for prosecuting any claim against the United States, or

(2) acts as agent or attorney for anyone before any department . . . [on any] particular matter in which the United States is a party or has a direct and substantial interest —

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

A special Government employee shall be subject to the preceding paragraphs only in relation to a particular matter involving a specific party or parties (1) in which he has at any time participated personally and substantially as a Government employee or as a special Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise . . . .

matter involving a specific party or parties" as required by 18 U.S.C. §§ 203 and 205. General discussions between a lobbyist and a government employee of why one policy is preferable to another do not involve a specific party or parties.

This conclusion is supported by the interpretation of the same "particular matter involving a specific party or parties" language in 18 U.S.C. § 207, language which this Office views as identical in meaning to that in sections 203 and 205.[3] The Office of Government Ethics regulations interpreting this phrase in 18 U.S.C. § 207 state that discussions of policy matters do not constitute participation in a "particular matter involving a specific party or parties." 5 C.F.R. § 2637.201(c)(1). The regulations provide:

> Such a matter typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identifiable parties. Rulemaking, legislation, the formulation of general policy, standards or objectives, or other action of general application is not such a matter. Therefore, a former Government employee may represent another person in connection with a particular matter involving a specific party even if rules or policies which he or she had a role in establishing are involved in the proceeding.

Id. The examples given in the regulations illustrate that an employee's participation in the formulation of agency policy does not bar the employee from subsequently discussing the application of the policy with the agency after he or she has left the government. *Id.* If, as the regulations make clear, policymaking is not a "particular matter involving a specific party or parties," then 18 U.S.C. §§ 203 and 205 do not bar an employee from discussing with Department personnel a policy on which he or she has worked. We therefore believe that a Council member may participate in policy discussions on the Council and lobby the Department on those same policy issues without violating 18 U.S.C. §§ 203 or 205.

There are also Department regulations that impose additional constraints on members of advisory committees. *Standards of Conduct*, 45 C.F.R. pt. 73. The regulations require Department employees to make every effort to avoid negotiating with the Department for contracts or grants whose subject matter is related to the subject matter of his or her consultancy. *Id.*[4] This

---

[3] *See* Memorandum for the Solicitor of the Interior, from Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Scope of the Term "Particular Matter" Under 18 U.S.C. 208* (Jan. 12, 1987).

[4] The regulation states, in relevant part:

> To a considerable extent the prohibitions of sections 203 and 205 are aimed at the sale of influence to gain special favors for private businesses and other organizations and at the

Continued

regulation is inapplicable to the Council member's concern because she is not involved in negotiating grants or contracts with the Department. She simply wishes to bring the policy views of her clients to the Department's attention and to persuade the Department of their validity. As long as she limits herself to this function, we are not aware of any Department regulation that would prevent her from acting.

We have also reviewed the memorandum prepared for Council members by the Department's ethics official.[5] The DAEO Memorandum states:

> We have consistently counseled advisory committee members in the Department to refrain from representing others before any component of the Department on issues pending before their committees, commission or council. Where the committee's charge is extremely broad, such as that of the Advisory Council on Social Security, this advice may seem unduly restrictive in that it may require members to forego lobbying activities relating to a broad range of programs, including Medicare, Medicaid and other Social Security Act programs. However, this prohibition is necessary [to avoid any appearance of impropriety].[6]

This advice prohibits the Council member's proposed lobbying activity because she would be engaged in representational activities before various Department components regarding policy issues pending before the Council.

The Council member's lobbying of the Department policy issues pending before the Council is not prohibited by law or Department regulation. It is barred by the DAEO Memorandum, which seeks as a matter of policy to ensure that advisory committee members avoid any appearance of impropriety. Whether to continue this policy is a matter of discretion, to be exercised ultimately by the Secretary. He must decide, as a matter of judgment, whether the DAEO Memorandum is indeed unduly restrictive in its impact on advisory committee members. If he or his designee believes that the DAEO Memorandum is too broad, the Department is free to impose a less onerous

---

[4](....continued)

misuse of governmental position or information. In accordance with these aims, *a consultant, even when not compelled to do so by sections 203 and 205, should make every effort in his or her private work to avoid any personal contact with respect to negotiations for contracts or grants with the component of the department in which he or she is serving, if the subject matter is related to the subject matter of his or her consultancy or other service.*

45 C.F.R. § 73.735-1003(b)(2) (emphasis added).

[5] Memorandum for Members of the Advisory Council on Social Security, from Sandra H. Shapiro, Acting Designated Agency Ethics Official (Feb. 9, 1990) ("DAEO Memorandum").

[6] *Id.* at 2.

standard based simply on the law and existing regulations. Once a judgment has been made as to which standard to adopt, the decision can be conveyed to all advisory committee members, including those on the Council.

WILLIAM P. BARR
Assistant Attorney General
office of Legal Counsel

Prohibitions and Penalties Under Section 582 of the 1990 Foreign Operations, Export Financing, and Related Programs Appropriations Act

Section 582 of the 1990 Foreign Operations, Export Financing, and Related Programs Appropriations Act prohibits only the following: an explicit quid pro quo arrangement pursuant to which both the United States and another government or person that is to receive financial assistance from the United States agree that receipt of the assistance is expressly conditioned upon the recipient undertaking an action that the United States would be specifically prohibited by United States law from carrying out.

Neither violation of section 582, nor conspiracy to violate section 582, is punishable as a criminal offense.

April 16, 1990

MEMORANDUM OPINION FOR THE LEGAL ADVISER
DEPARTMENT OF STATE

This memorandum responds to your request for our opinion on (1) the scope of the prohibition in section 582 of Public Law No. 101-167, 103 Stat. 1195, 1251 (1989), the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1990, and (2) whether violation of or conspiracy to violate section 582 is punishable as a criminal offense. We conclude, as did your office,[1] that section 582 prohibits only an explicit quid pro quo arrangement pursuant to which both the United States and another government or person that is to receive financial assistance from the United States agree that receipt of the assistance is expressly conditioned upon the recipient undertaking an action that the United States would be specifically prohibited by United States law from carrying out. As to the second question, we also concur in your conclusion that Congress did not intend to punish criminally either violation of or conspiracy to violate section 582.

I.

The first version of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1990 ("the Act") passed by Congress

[1] Letter for William P. Barr, Assistant Attorney General, Office of Legal Counsel, from Abraham D. Sofaer, Legal Adviser, United States Department of State (Jan. 19, 1990).

was H.R. 2939, 101st Cong., 1st Sess. (1989). President Bush vetoed that measure on November 19, 1989, *see* 2 Pub. Papers of George Bush 1545 (Nov. 19, 1989), in large part because of constitutional concerns with the version of section 582 that appeared in that Act. *Id.* Two days later, on November 21, 1989, Congress passed that Act in its current form, specifically to address the Administration's concerns that had prompted the President's veto. *See, e.g.*, 135 Cong. Rec. S16,332 (daily ed. Nov. 20, 1989) (statement of Sen. Leahy); *id.* at H9088 (statement of Rep. Obey).

Section 582(a) of the Act provides as follows:

> None of the funds appropriated by this Act may be provided to any foreign government (including any instrumentality or agency thereof), foreign person, or United States person in exchange for that foreign government or person undertaking any action which is, if carried out by the United States Government, a United States official or employee, expressly prohibited by a provision of United States law.

103 Stat. at 1251. It is clear from this and the remaining provisions of section 582[2] that the section was intended to be only a narrow appropriation limitation, not a criminal prohibition. Congressman Edwards explained the purpose of the section in this way:

> What we prohibit in this bill is a quid pro quo which would allow the money we are appropriating here for the United States' foreign policy purposes to be provided to another government or person in exchange for that government or person agreeing to do something which, if it were done by an American citizen or by our Government, would be a violation of U.S. law. That is all it does. It prohibits a quid pro quo.

---

[2] Section 582(b) and (c) provides:

(b) For the purposes of this section the term "funds appropriated by this Act" includes only (1) assistance of any kind under the Foreign Assistance Act of 1961; and (2) credits, and guaranties under the Arms Export Control Act.

(c) Nothing in this section shall be construed to limit —

(1) the ability of the President, the Vice President, or any official or employee of the United States to make statements or otherwise express their views to any party on any subject;

(2) the ability of an official or employee of the United States to express the policies of the President; or

(3) the ability of an official or employee of the United States to communicate with any foreign country government, group or individual, either directly or through a third party, with respect to the prohibitions of this section including the reasons for such prohibitions, and the actions, terms, or conditions which might lead to the removal of the prohibitions of this section.

103 Stat. at 1251.

135 Cong. Rec. H9089 (daily ed. Nov. 20, 1989). By its terms, section 582(a) applies only to funds appropriated by the Act; unlike other similar provisions, section 582 does not purport to restrict in any manner funds that are appropriated by other acts.[3] Section 582 is further limited by the restrictive definition of "funds" in subsection (b) and the additional interpretive restrictions imposed by subsection (c). Thus, for example, subsection (c) -- despite the prohibition in subsection (a) — explicitly permits an employee of the United States to express the view to another government that it should undertake an action that would be prohibited by United States law, because "nothing" in section 582 "shall be construed to limit the ability of . . . [any] employee of the United States to . . . express their views to any party on any subject." And the restriction extends only through fiscal year 1990.[4]

Perhaps the most significant substantive term in the provision is "in exchange for" in subsection (a), and this term was the subject of considerable discussion in the legislative history. It is evident that this language was intended as a significant limitation on what otherwise might be read as prohibited under this section.

Senators Cystine and Rudman engaged in an extended colloquy to clarify the meaning of the phrase. Senator Rudman explained:

> It is not Congress' intent in approving this amendment to create a trap for the unwary. Accordingly, there is no intent to prohibit the provision of U.S. assistance where, coincidentally, the recipient undertakes an action that the United States itself is prohibited to carry out. Therefore, the words "in exchange for" in the [section] must be understood to require an agreement between the United States and the aid recipient under which, as an express condition for receiving the U.S. assistance, the recipient undertakes an action which the United States itself is prohibited to carry out.

135 Cong. Rec. S16,363 (daily ed. Nov. 20, 1989).

Notably, earlier the same day, Senator Kasten had introduced a substitute version of section 582(a) to clarify that the subsection was only to apply to

---

[3]*See, e.g.*, section 403 of Public Law No. 101-45, tit. IV, 103 Stat. 97, 128 (1989) ("No funds appropriated under this Act *or any other Act* shall be available to the Bureau of Alcohol, Tobacco and Firearms for the enforcement" of various laws.); section 303 of Public Law No. 98-396, 98 Stat. 1369, 1422 (1984) ("None of the funds made available to the United States Postal Service under this Act *or any other Act* may be used to restructure employee compensation practices as in effect under the most recently effective collective bargaining agreement. . . .") (emphasis added).

[4]Additionally, by its terms, the section is violated only where the specified funds are provided and the recipient government or person actually undertakes the action that would be prohibited under the law of the United States. Thus, a request by a United States official that the government or person undertake that action is, in itself, insufficient to implicate the prohibition of the section.

"an actual quid pro quo," "pursuant to an agreement under which, as an express condition for receipt of such assistance, the recipient is required to take the prohibited action." The proposed amendment provided:

> None of the funds appropriated for assistance by this Act may be provided to any foreign government (including any instrumentality or agency thereof), foreign person, or United States persons pursuant to an agreement under which, as an express condition for receipt of such assistance, the recipient is required to fund or carry out a military or foreign policy activity which is expressly prohibited by a provision of United States law.

Id. at S16,361. Following his colloquy with Senator Rudman clarifying that section 582(a) as drafted was indeed intended by Congress only to apply to such a narrow class of circumstances, Senator Kasten withdrew his amendment. *Id.* at S16,361-63.

Congressman Obey, the chairman of the House subcommittee responsible for the Act and one of the drafters of section 582, similarly stated that "the word 'exchange' should be understood to refer to a direct verbal or written agreement." *Id.* at H9231 (daily ed. Nov. 21, 1989). As noted above, Congressman Edwards, the ranking Republican member of the House subcommittee and another of the drafters of section 582, declared that section 582 was designed to prohibit only quid pro quo arrangements. *Id.* at H9089 (daily ed. Nov. 20, 1989). President Bush in his signing statement accompanying the Act also stated:

> I agree with the view expressed on the House and Senate floor that this section is intended only to prohibit "quid pro quo" transactions — that is, transactions in which U.S. funds are provided to a foreign nation on the express condition that the foreign nation provide specific assistance to a third country, which assistance U.S. officials are expressly prohibited from providing by U.S. law. As reflected both in Congressman Edwards' statements and in the explanatory colloquy between Senators Kasten and Rudman, a "quid pro quo" arrangement requires that both countries understand and agree that U.S. aid will not be provided if the foreign government does not provide the specific assistance.
>
> . . . .
>
> It is important to note that Section 582 does not affect the ability of the executive branch to urge any course of action upon a foreign government or any third party. In addition, the section applies only where there is a provision of U.S. law

that "expressly prohibits" the United States Government, or a U.S. official or employee, from undertaking a particular action, and thus would not apply to provisions that merely limit funding to undertake such an action.

In these and other key respects, Section 582 is substantially narrower than a related provision that prompted my veto of H.R. 2939 on November 19, 1989.

2 Pub. Papers of George Bush 1573-74 (Nov. 21, 1989).

It is clear from the foregoing that the term "in exchange for" was purposely chosen to ensure prohibition of only explicit quid pro quo arrangements pursuant to which both the United States and the recipient nation(s) intend and agree, verbally or in writing, that receipt of United States assistance is expressly conditioned upon the recipient undertaking an action that the United States would be specifically prohibited by United States law from carrying out. We believe that the section should be interpreted and applied consistently with this purpose.

II.

You also requested our opinion on whether either violation of section 582 or conspiracy to violate that provision could give rise to criminal penalties. We believe that it is clear that Congress intended that neither violation of nor conspiracy to violate the section would be punished criminally.

Section 582 contains no criminal penalties for its violation, nor does it incorporate by reference any penalties existing under criminal (or any other) law. If Congress had intended to render United States officials — including the President himself — potentially criminally liable under the section, it may fairly be assumed that this intention would have been evident from the face of the statute. *See, e.g.*, *United States v. Campos-Serrano*, 404 U.S. 293, 297 (1971) (a defendant "'is not to be subjected to a penalty unless the words of the statute plainly impose it,'" (quoting *Keppel v. Tiffin Savings Bank*, 197 U.S. 356, 362 (1905))). In fact, by Senate amendment, the State Department Authorization Act of FY 1990 that the President vetoed contained a leveraging provision that had expressly included criminal penalties.[5] Thus, there can be little question that when it passed section 582 without

[5] *See* H.R. 1487, 101st Cong., 1st Sess. § 109 (1989). Section 109 would have amended the Foreign Assistance Act of 1961 to provide in part:

(a) Prohibition. — (1) Whenever any provision of United States law expressly refers to this section and expressly prohibits all United States assistance, or all assistance under a

Continued

providing for criminal penalties, the Congress purposely chose not to criminally punish violations of section 582.

This intention is confirmed by the legislative history. Senator Rudman stated unequivocally that "[section 582] does not contain criminal penalties." 135 Cong. Rec. S16,362 (daily ed. Nov. 20, 1989); *id.* (section 582 "contains no criminal sanctions"). He observed: "If a criminal penalty were intended, it would have been provided on the face of the provision. In the absence of such a provision, it should be understood that Congress intends that no criminal penalties will apply to the [section]." *Id.* Senator Moynihan had introduced legislation similar to section 582 that would have *explicitly* provided for criminal penalties. *Id.* Accordingly, we conclude that Congress did not intend to, nor did it impose criminal penalties for violation of section 582.[6]

That Congress chose not to criminalize violations of section 582 does not necessarily mean that it did not intend to punish criminally, under 18 U.S.C. § 371,[7] a conspiracy to violate the provision. It is clear also, however, that

---

[5](....continued)

specified United States assistance account, from being provided to any specified foreign region, country, government, group, or individual for all or specified activities, then no officer or employee of the Executive branch may --

. . . .

(B) use any United States funds or facilities to assist any transaction whereby a foreign government (including any instrumentality or agency thereof), foreign person, or United States person provides any funds or property to any third party . . . .

if the purpose of any such act is the furthering or carrying out of the same activities, with respect to that region, country, government, group, or individual, for which United States assistance is expressly prohibited

. . . .

(b) Penalty. — Any person who knowingly and willfully violates the provision of subsection (a)(1) shall be imprisoned not more than 5 years or fined in accordance with title 18, United States Code, or both.

Senator Moynihan noted in debate on section 582 that section 109, the explicit criminal leveraging provision, "is not before us tonight. It is part of the State Department authorization bill. Should it not become law in this session . . . we will return to this matter in the next one." 135 Cong. Rec. S16,362 (daily ed. Nov. 20, 1989). This comment, coming immediately after Senator Rudman's statement that section 582 "does not contain criminal penalties," we believe is best understood as Senator Moynihan's acquiescence in what by that time appeared to be the Senate's conclusion that criminal penalties would not attach.

[6]Congressman Obey, the principal draftsman of section 582, never stated that violation of the provision would be punishable criminally. Even after attention had been focused on the specific question of possible criminal penalties under the provision, he commented only that the provision "is not an attempt to hamstring government officials in the course of their normal duties or to make them vulnerable to wayward or runaway prosecutors." 135 Cong. Rec. H9231 (daily ed. Nov. 21, 1989).

[7]Section 371 provides:

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

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

Congress did not intend for the general conspiracy statute to apply to conduct proscribed by section 582. In fact, Congress considered potential applicability of 18 U.S.C. § 371, and determined that it would not apply to violations of section 582. On November 20, 1989, Senators Kasten and Rudman specifically discussed on the floor of the Senate the fact that the general conspiracy statute would have no applicability to section 582:

> Mr. Kasten. I note that section 582 . . . does not provide a criminal penalty for violation of its leveraging prohibition. Does this indicate congressional intent that there be no criminal penalty for violation of section 582?
>
> Mr. Rudman. Yes Senator, that is my understanding. If a criminal penalty were intended, it would have been provided on the face of the provision. In the absence of such a provision, it should be understood that Congress intends that no criminal penalties will apply to the [section]. In particular, *it should be understood that the criminal conspiracy statute will not apply to the [section].*
>
> . . . .
>
> Mr. Kasten. I want the record to reflect that my support for section 582 is conditioned on the clarifications that [the] Senator has provided. I could not vote for this bill if I believed that section 582 could provide a basis for criminal liability . . . . I know that many Senators on my side of the aisle share this view.
>
> Mr. Rudman. I fully agree with this interpretation of section 582, and I know that the votes of many Senators are similarly conditioned.

135 Cong. Rec. S16,362-63 (daily ed. Nov. 20, 1989) (emphasis added). Immediately afterwards, Senator Dole concurred that section 582 should not be interpreted as giving rise to any criminal penalties:

> We cannot have lawful, but confident and creative, handling of our foreign policy — if every administration official hereafter is always looking over his shoulder to see if some aggressive special prosecutor — out to get his name in the headlines — might be concocting some fanciful charge based on vague language.

Id. at S16,363.[8] Senator Rudman explained the rationale for not imposing criminal penalties:

> The absence of a criminal penalty reflects the fact that the leveraging prohibition is to apply across-the-board to essentially all existing prohibitions on U.S. assistance. Without individually examining these prohibitions to determine whether, in the context of each prohibition, a criminal penalty for leveraging would be appropriate, it would be unwise for Congress to apply such a penalty across-the-board.

Id.

President Bush signed the bill into law on this understanding that neither violation of section 582, nor conspiracy to violate the section, would be criminally punishable:

> Consistent with the expressed intent of the Congress and to avoid constitutional problems, I intend to construe this section [section 582] narrowly . . . . The Senate record also makes clear that neither the criminal conspiracy statute, nor any other criminal penalty, will apply to any violation of this section. My decision to sign this bill is predicated on these understandings of Section 582.

2 Pub. Papers of George Bush 1573 (Nov. 21, 1989).[9] Thus, there appears to have been consensus agreement that the general conspiracy provisions of 18

---

[8] Consistent with the view that Congress did not intend violations of, or conspiracies to violate section 582 to be criminally punishable, Senator Leahy described section 582 as "a bipartisan revision [of the earlier version of section 582 vetoed by President Bush] done by Congressmen Obey and Edwards to make it more acceptable to the administration." 135 Cong. Rec. S16,332 (daily ed. Nov. 20, 1989). The Administration had earlier notified Congress that the predecessor version of section 582 was unacceptable, *inter alia*, precisely because the threat of criminal prosecutions under that version "would clearly have a negative impact on the conduct of foreign relations." Letter for Congressman Jaimie L. Whitten, Chairman, House Committee on Appropriations, from Carol T. Crawford, Assistant Attorney General, Office of Legislative Affairs, at 2 n.2 (Nov. 1, 1989). Senator Dole had also informed the Senate, prior to passage of the Act, that "Senior White House officials have told me that they would advise the President to veto the bill unless this matter [the scope of section 582, including the question of criminal penalties] is satisfactorily clarified." 135 Cong. Rec. S16,363 (daily ed. Nov. 20, 1989).

[9] The President's construction of section 582 in his signing statement is particularly important in this context. The President's interpretation of the section constitutes his instruction, as head of the executive branch, on implementation of the section -- an instruction with which this Department, charged with criminal law enforcement, must comply. Courts properly look to presidential signing statements to assist in the interpretation of statutes. *See, e.g., Berry v. Department of Justice*, 733 F.2d 1343, 1349-50 (9th Cir. 1984).

U.S.C. § 371 would have no applicability to section 582. Indeed, there is no evidence whatever to the contrary.[10]

In *United States v. Hutto*, 256 U.S. 524, 528-29 (1921), the Supreme Court held that a defendant could be indicted for criminal conspiracy to commit an offense against the United States[11] even where the predicate offense was not itself criminally punishable. There, the underlying offense was punishable by a civil penalty. It may be that conspiring to violate any federal law — even a law that itself contains no criminal or civil penalties — may be criminally punishable under 18 U.S.C. § 371 as a conspiracy to commit an offense against the United States.[12] We need not determine here, however, the full reach of the principle announced in *Hutto*. The availability of section 371 will always be a question of legislative intent. *See, e.g., United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952). Thus, where, as here, there is affirmative, uncontradicted evidence that Congress considered the question and intended that criminal penalties under section 371 not be available, that section may not be invoked to impose such a penalty.[13] Accordingly, we conclude that a conspiracy to violate section

---

[10] *Compare* 42 U.S.C. § 3795b (explicitly providing that the programs and projects in that chapter "shall be subject to the provisions of section 371 of Title 18").

[11] In *Hutto*, the defendants were charged with violation of section 37, Criminal Code, which was in substance identical to 18 U.S.C. § 371. Section 37 provided: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined . . . ." Act of Mar. 4, 1909, ch. 321, 35 Stat. 1096.

[12] We have found no case addressing the validity of an indictment or conviction under section 371, where the charge was conspiracy to commit an offense against the United States and the underlying offense that the defendants allegedly conspired to commit did not itself carry either criminal or civil penalties.

However, even if one could not be charged with or convicted of conspiring to commit an offense against the United States under these circumstances, it still could be that prosecution would be possible under section 371. Section 371 also criminalizes conspiracy to defraud the United States The offense of conspiracy to defraud the United States does not seem to depend upon the existence and character of a separate statutory or other prohibition, as does the offense of conspiring to commit an offense against the United States. *See, e.g., Haas v. Henkel*, 216 U.S. 462, 479-80 (1910) ("[A]ny conspiracy which is calculated to obstruct or impair [a governmental department's] operations and reports as fair, impartial and reasonably accurate would be to defraud the United States "); *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924) (to defraud the United States "means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest") Several cases have sustained either indictments or convictions for conspiracy to defraud the United States where there was not any specific prohibition of the allegedly fraudulent conduct. *Haas v. Henkel*, 216 U.S. 462 (1910); *United States v. Klein*, 247 F.2d 908 (2d Cir. 1957), *cert. denied*, 355 U.S. 924 (1958); *United States v. Anderson*, 579 F.2d 455 (8th Cir.) (*dicta*), *cert. denied*, 439 U.S. 980 (1978).

[13] That Congress explicitly considered and decided against the application of section 371 to conduct proscribed under section 585 distinguishes the circumstances herein discussed from those underlying the indictment of Oliver North and others in *United States v. Poindexter*, Crim. No. 88-0080 (D.D.C.). That indictment, while charging a conspiracy to violate several criminal statutes that themselves carry explicit penalties, also charged conspiracies to violate the so-called Boland Amendment, as well as more general prohibitions (*e.g.*, conspiracy to defraud the United States "by impeding, impairing, defeating and obstructing the lawful governmental functions of the United States, including . . congressional control of appropriations and exercise of oversight"). Congress did not explicitly consider the application of 18 U.S.C. § 371 to alleged violations of the Boland Amendment. There is similarly nothing to indicate that Congress intended to foreclose application of section 371 to the more general conspiracy violations with which the defendants were charged.

582 would not be punishable under 18 U.S.C. § 371.[14]

This is not to say that section 582 may be violated with impunity. The President has a constitutional duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. Moreover, it can be anticipated that Congress will seek to monitor executive branch compliance with the section, and that an intentional failure to comply may provoke any of a host of constitutional or political sanctions, if not remedial legislation. The State Department and other affected executive agencies therefore should, by means of appropriate directives, urge compliance with the prohibition.

CONCLUSION

We conclude for the reasons set forth above that section 582 prohibits only an explicit quid pro quo arrangement pursuant to which both the United States and another government or person that is to receive financial assistance from the United States agree that receipt of the assistance is expressly conditioned upon the recipient undertaking an action the United States would be specifically prohibited by United States law from undertaking. Additionally, we conclude that neither violation of section 582 of Public Law No. 101-167, nor conspiracy to violate section 582, is punishable as a criminal offense.[15]

J. MICHAEL LUTTIG
Principal Deputy
Assistant Attorney General
Office of Legal Counsel

[14] The fact that section 371 is unavailable in this context of course would not prevent prosecution for conduct violative of other criminal statutes.

[15] The Criminal Division of the Department of Justice concurs in these conclusions.

Constitutional Limits on "Contracting Out" Department of Justice Functions under OMB Circular A-76

Litigation on behalf of the United States must be conducted or closely supervised by officers of the United States who have been appointed in conformity with the Appointments Clause and who are under the supervision of the Attorney General and the President.*

Certain program analyst, program monitor and historical research support positions in the Department of Justice do not involve governmental authority that can only be exercised by officers of the United States, but instead involve information gathering and reporting duties which may constitutionally be performed by private parties on a contract basis.

April 27, 1990

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
JUSTICE MANAGEMENT DIVISION

You have asked for our advice concerning the constitutional limitations on employing private contractors or individuals to perform certain tasks now performed by Department of Justice employees. First, you have asked us to explore any constitutional questions raised by the contracting out of forty-eight program analyst and program manager positions responsible for grant activities in the Office of Juvenile Justice and Delinquency Prevention ("OJJDP") and the Bureau of Justice Assistance ("BJA"). According to the Department's notice in the January 8, 1990 Commerce Business Daily, the functions performed by these positions include, but are not limited to, the following:

> First, the development, monitoring, and promotion of criminal justice (including drug prevention), juvenile justice and delinquency prevention, and related programs administered by State and local government agencies and other public and nonprofit

* Editor's note: The Office of Legal Counsel has disavowed the interpretation of the Appointments Clause set forth in this opinion. *See* Memorandum for the General Counsels of the Federal Government, from Walter Dellinger, Assistant Attorney General, *Re: The Constitutional Separation of Powers between the President and Congress*, at 20-21 n.53 (May 7, 1996).

> organizations and institutions. (Congress sets certain requirements which these agencies must meet to qualify for federal assistance.) Second, the provision of technical assistance to State/local agencies in the form of short-term training on technical matters; dissemination of information (publications, institutes, conferences, seminars, etc.); provision of information to develop programs proposals; and preparation of program plans.

The notice also indicates that as a general matter, personnel holding these positions are "responsible for administering the Federal part of the state or local government's criminal justice or related programs." It is our understanding that employees in these positions presently monitor the programs of state and nonprofit grantees and report on their compliance with federal law and grant specifications. While these reports may form the basis for federal funding decisions made by the Administrator of OJJDP or the Director of BJA, no final decisions concerning program compliance or federal funding can be made by any of the forty-eight employees who presently occupy these positions. In addition, some of these employees may assist in the formation of program initiatives within the framework of overall policy goals set by the Administrator or the Director. Finally, some of these positions involve rendering non-binding advice to grantees concerning compliance with federal law. However, all final decisions as to actual compliance with federal law rest with the Administrator and the Director.

Second, you have asked our opinion concerning the contracting out of historical research support positions in the Office of Special Investigations ("OSI") of the Criminal Division. The work contracted out in this context would involve translation, research, and secretarial support services for OSI historians investigating individuals suspected of having committed war crimes during World War II.

Finally, you have expressed the need for more general guidance concerning the constitutional limitations on the application of OMB Circular A-76 to Department of Justice functions.[1] In particular, you have inquired whether we adhere to the views expressed in an opinion issued by this Office in 1983 that concludes that legislation providing for the use of private counsel to represent the United States in debt collection actions is constitutionally problematic. *See* Memorandum to Deputy Attorney General Schmults, from Assistant Attorney General Olson, Office of Legal Counsel (May 20, 1983).

[1] It appears to us that, absent presidential directives to the contrary, the Attorney General, as the head of the Department of Justice and the President's chief legal advisor, has the final authority to determine what positions within the Department of Justice are suitable to be considered for contracting out. *See* 5 U.S.C. § 301 ("The head of an Executive department . . . may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property."); *see also Olympic Fed. Sav. & Loan Ass'n v. Office of Thrift Supervision*, 732 F. Supp. 1183, 1197 (D.D.C. 1990) ("[T]he Attorney General is charged with responsibility for ensuring that only lawfully appointed officials act on behalf of the United States, and consequently his interpretation of law on this subject is entitled to great deference.").

II. Analysis

The Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America," and charges the President to "take Care that the Laws be faithfully executed." U.S. Const. art II, § 1, cl. 1; art. II, § 3. The very core of the executive power is the authority to pursue civil and criminal enforcement actions on behalf of the United States. *See Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (per curiam) ("A lawsuit is the ultimate remedy for a breach of the law, and it is to the President . . . that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'"); *Morrison v. Olson*, 487 U.S. 654, 691 (1988) ("no real dispute that the functions performed by the independent counsel are 'executive'"); *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928) (authority to enforce the laws and to appoint agents to do so are executive functions); *Myers v. United States*, 272 U.S. 52 (1926) (same). More generally, the executive power encompasses the interpretation and effectuation of all public law. *Bowsher v. Synar*, 478 U.S. 714, 733 (1986) ("Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law.").

Obviously, the President alone cannot assure the faithful execution of the laws, and the Appointments Clause provides the constitutional mechanism for the delegation of the executive power to a corps of federal officers under the President's control to assist him in executing the laws. *See Myers*, 272 U.S. at 133 ("Each head of a department is and must be the President's *alter ego* in the matters of that department where the President is required by law to exercise authority."); *see also In re Neagle*, 135 U.S. 1, 63 (1890) ("The Constitution, section 3, Article 2, declares that the President 'shall take care that the laws be faithfully executed,' and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and, by and with the advice and consent of the Senate, to appoint the most important of them and to fill vacancies.").

The Appointments Clause has both a "horizontal" and a "vertical" role to play in the separation of powers. Horizontally, it assures that executive power is not exercised by individuals appointed by, or subservient to, another branch of government. Vertically, the clause protects against the delegation of federal executive authority to private entities outside the constitutional framework.[2]

---

[2] The "vertical" protections of the Appointments Clause undergird the "horizontal" separation of powers. If the federal executive, legislative, and judicial powers could be granted to private entities to be wielded outside of constitutional strictures, the careful separation and intermingling of powers in the Constitution itself would be rendered a paper gesture. *Cf. Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982) (holding unconstitutional delegation of Article III duties to judges not appointed in conformity with the Appointments Clause); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (federal legislative power may not be delegated to private parties). In addition, the "vertical" or "nondelegation" aspect of the Appointments Clause ensures that the President, through a unitary executive branch, can be held politically accountable for his execution of the laws.

The Appointments Clause, Article II, Section 2, Clause 2, provides that:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, 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; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Head of Departments.

In *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), the Supreme Court examined the reach and requirements of the Appointments Clause in the context of a constitutional challenge to the composition of, and authority wielded by, the Federal Election Commission. The Commission was composed of six voting members. The President *pro tempore* of the Senate, the Speaker of the House, and the President each appointed two of the voting members. None of the voting members of the Commission was nominated by the President and confirmed by the Senate in accordance with the Appointments Clause.

By statute the Commission was charged with what the Supreme Court viewed as three distinct types of tasks. First, the Commission was to gather, organize, and make available to the public data concerning campaign spending and the administration of elections. The Court characterized these as "recordkeeping, disclosure, and investigative functions." *Id.* at 110. Second, the Commission was granted extensive power to issue binding administrative rules, to "formulate general policy" concerning the enforcement of applicable statutes, and to issue advisory opinions concerning election law requirements. *Id.* at 110-11. Finally, the Commission was granted what the Court characterized as "direct and wide ranging" enforcement powers. *Id.* at 111. The Commission was authorized to institute civil actions to enforce statutory requirements, to sue for the return of campaign "matching funds" to the United States Treasury, and to issue "findings" of failure to file expenditure reports. *Id.*

The Court began its analysis by rejecting the notion that the locution "Officers of the United States" in the Appointments Clause was merely a creature of "etiquette or protocol." Instead, the Court viewed the term as a reference to those persons who may exercise "significant authority" under the laws of the United States. The Court stated:

> We think that the term "Officers of the United States" as used in Art. II, defined to include "all persons who can be said to hold an office under the government" in *United States v.*

> *Germaine*, [99 U.S. 508 (1879)], is a term intended to have substantive meaning. We think its fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an "Officer of the United States," and must, therefore, be appointed in the manner prescribed by § 2, cl. 2 of that Article.

Id. at 125-26.

While the *Buckley* Court did not offer a comprehensive definition of what constitutes "significant authority" for purposes of the Appointments Clause, the Court's treatment of the various powers and duties conferred upon the Federal Election Commission offers significant guideposts. First, the Court made clear that "vesting in the Commission primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights, violate[s] Art. II, § 2, cl. 2, of the Constitution." *Id.* at 140. The Court indicated that "[s]uch functions may be discharged only by persons who are 'Officers of the United States' within the language of that section." *Id.*

The Court also held that the Commission's "broad administrative powers: rulemaking, advisory opinions, and determinations of eligibility for funds and even for federal elective office itself," constituted "significant authority" that could only be executed by properly appointed officers of the United States. *Id.* at 140, 141-42. The Court indicated that "each of these functions also represents the performance of a significant governmental duty exercised pursuant to a public law." *Id.* at 141.[3]

Finally, the Court held that the Commission, as then constituted, could exercise powers of "an investigative and informative nature, falling in the same general category as those powers which Congress might delegate to one of its own committees." *Id.* at 137. These information gathering duties were, in the Court's view, "sufficiently removed from the administration and enforcement of the public law as to permit their being performed by persons not 'Officers of the United States.'" *Id.* at 139.[4]

---

[3] It should be noted that the "advisory" opinions of the Federal Election Commission were so in name only. The statute provided that any individual who acted in good faith on the basis of such an opinion "shall be presumed to be in compliance" with federal election law "notwithstanding any other provision of law." *Buckley*, 424 U.S. at 110-11.

[4] The constitutional concerns expressed by the *Buckley* Court are themselves reflected in OMB Circular A-76. The Circular recognizes that "[c]ertain functions are inherently Governmental in nature," defined as functions "which require either the exercise of discretion in applying Government authority or the use of value judgment in making decisions for the Government." OMB Circular No. A-76 §§ 5b, 6e (Rev. Aug. 4, 1983). Listed examples include "criminal investigations, prosecutions and other judicial functions; management of Government programs requiring value judgments," and "selection of program priorities." *Id.* § 6e(1). The Circular indicates that it is the policy of the United States to "[r]etain Governmental [f]unctions [i]n-house," and that these functions "shall be performed by Government employees." *Id.* § 5(b).

Buckley thus makes it clear that the exercise of rulemaking or policymaking functions requires proper authority under the Appointments Clause. *See also Olympic Fed. Sav. & Loan Ass'n. v. Office of Thrift Supervision*, 732 F. Supp. 1183 (D.D.C. 1990) (Director of the Office of Thrift Supervision exercises significant rulemaking and regulatory authority and thus under *Buckley* must be appointed in accordance with the Appointments Clause). On the other hand, information gathering, investigative, and advisory functions that do not involve final actions affecting third party rights may be performed by private parties or "independent" contractors. Similarly, purely ministerial and internal functions, such as building security, mail operations, and physical plant maintenance, which neither affect the legal rights of third parties outside the Government nor involve the exercise of significant policymaking authority may be performed by persons who are not federal officers or employees.

Applying these criteria to the two types of functions at issue here, we conclude that both the forty-eight program analyst and program monitor positions and the historical research support positions do not involve the exercise of "significant authority pursuant to the laws of the United States," as that phrase is used in *Buckley*. We emphasize that under *Buckley* private individuals may not determine the policy of the United States, or interpret and apply federal law in any way that binds the United States or affects the legal rights of third parties. Nor can any private individuals make funding decisions. *See* Letter for Marshall J. Breger, Chairman of the Administrative Conference of the United States, from Deputy Attorney General Burns at 4 (Nov. 10, 1986) ("Burns Letter") ("[W]e do not believe that individuals who are not officers of the government may commit or dispose of the property of the United States."). Properly appointed federal officials must maintain both legal and effective control over the direction of United States policy in this area as well as control over the allocation of federal funds.

As we understand it, however, the program analysts and monitors involved here simply study and make recommendations concerning the compliance of various state and local programs with federal funding requirements. While the employees who presently occupy these positions may advise and assist in policy formation, they cannot determine the final policy of the Department of Justice. Nor can these employees take any independent action on behalf of the United States affecting the rights of grantees. The prior opinions of this Office indicate that such "study and report" functions need not be performed by officers of the United States within the meaning of the Appointments Clause. *See, e.g.*, Memorandum for the Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Enrolled Bill S. 118, "To Provide for the Establishment of a Commission on the Bicentennial of the Constitution"* (Sept. 29, 1983) (Commission on the Bicentennial of the Constitution); Memorandum for Robert A. McConnell, Assistant Attorney General, Office of Legal Affairs, from Ralph W. Tarr, Deputy Assistant Attorney General, Office of Legal

Counsel, *Re: Enrolled Bill H.R. 1900* (Apr. 6, 1983).[5]

We also conclude that under *Buckley*, the duties of the historical research support positions may be performed by private persons. As a general matter, the investigation of criminal activity is an inherently governmental function performed exclusively by federal officers within the executive branch. Thus, we have no doubt that the authority to seek and execute search warrants, or to make arrests in the name of the United States is "significant authority" under *Buckley*. However, as we understand it, the historical research support personnel at issue here conduct background research and translation under the direction of the OSI historians who are properly appointed federal officers. These support personnel have no authority to take or authorize any legal action on behalf of the United States. Rather, they are simply charged with library research, translation, and collation of data. The functions to be performed by these individuals are more akin to those of an expert witness or consultant than they are to those of an FBI agent or a federal prosecutor. Such purely informational tasks may be performed by private individuals. *See* Memorandum for Richard C. Stiener, Chief, United States National Central Bureau, INTERPOL, from Larry Simms, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Establishment of an Interpol Subbureau in Puerto Rico* (Jan. 19, 1984) (information gathering and sharing functions of United States National Central Bureau of INTERPOL may be performed by persons not officers of the United States); *id.* at 12 n.11 (noting that "[e]ven private citizens can be an important source of information in the cause of law enforcement").

As a general matter, we also reaffirm the consistent position of this Office and the Department of Justice that the authority to direct litigation on behalf of the United States may not be vested in persons who are not officers of the United States appointed in the proper manner under Article II, Section 2, Clause 2 of the Constitution. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Appellees at 17, *Morrison v. Olson*, 487 U.S. 654 (1988) (No. 87-1279) ("[T]he duty of the President to 'take Care' means that *he*, with the help of the Senate in certain cases and acting on his own or through his heads of departments in others, is responsible and accountable to the people for selecting those persons who will exercise significant authority in executing the law."); Burns Letter at 2 ("[A]ny broad delegation of authority to private persons to conduct litigation in the name of the United States is likely to raise constitutional problems.").

This position is dictated both by the Supreme Court's decision in *Buckley* and by the broader separation of powers concerns underlying the Supreme Court's Appointments Clause jurisprudence. *See Buckley*, 424 U.S. at 139 ("[A]ll such suits [civil and criminal], so far as the interests of the United

[5] It is quite possible that OMB Circular A-76's definition of inherently governmental functions covers a wider range of functions than those that entail the exercise of "significant authority" under *Buckley*. This opinion does not address that issue.

States are concerned, are subject to the direction, and within the control of, the Attorney-General.") (*quoting The Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458-59 (1869)); *see also United States v. San Jacinto Tin Co.*, 125 U.S. 273, 279 (1888) (the Attorney General "is undoubtedly the officer who has charge of the institution and conduct of the pleas of the United States, and of the litigation which is necessary to establish the rights of the government").[6] Thus, both the Appointments Clause and more general separation of powers concerns make it clear that the vesting of independent litigation authority in persons who are not federal officers or employees and who are not subject to executive branch discipline and control is unconstitutional. Were this not so, Congress could displace particular litigation authority from the executive branch and vest it in a private interest group or even in the House or Senate Counsel.

We note that the Department's support for the Debt Collection Act Amendments of 1986, Pub. L. No. 99-578, 100 Stat. 3305 (codified at 31 U.S.C. § 3718(b)), is fully consistent with this position. Those amendments authorized the Attorney General to retain private counsel to assist in the collection of non-tax debts owed to the United States. In signing that legislation into law, President Reagan stated:

> I am approving [the debt collection amendments] knowing that the Attorney General will take all steps necessary to ensure that any contact entered into with private counsel contains provisions requiring ongoing supervision of the private counsel so that all fundamental decisions, including whether to initiate litigation and whether to settle or compromise a claim, are executed by an officer of the United States, as required by the Constitution.

Pub. Papers of Ronald Reagan 1454 (1986).

The Department has issued regulations requiring the designation of "an Assistant U.S. Attorney to serve as the Contracting Officer's Technical Representative ("COTR") on the contracts with private debt collection lawyers

[6] We note that apart from the constitutional constraints examined in *Buckley* there is strong support in the statutes organizing the litigation authority of the executive branch for the proposition that only officers of the United States may conduct litigation in the name of the United States. Section 3106 of title 5 provides that, in general, agency and department heads "may not employ an attorney or counsel for the conduct of litigation in which the United States . . . is a party, or is interested, or for the securing of evidence therefor, but shall refer the matter to the Department of Justice." Within the Department of Justice itself, statutory structure reflects constitutional design. All litigation must be conducted by officers under the control and supervision of the Attorney General. *See, e.g.*, 28 U.S.C. § 515(b) ("Each attorney specially retained under the authority of the Department of Justice shall be commissioned as a special assistant to the Attorney General or special attorney, and shall take the oath required by law."); 28 U.S.C. § 516 ("[T]he conduct of litigation in which the United States . . . is a party . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General."); *see also* 28 U.S.C. §§ 519, 547.

in their respective districts." 28 C.F.R. § 11.2 (1989). Under the regulations, these COTRs "will be responsible for assisting the contracting officer by supervising the work of the private counsel in their respective districts and providing necessary approvals with respect to the initiation or settlement of lawsuits or similar matters." *Id.* In addition, the Department's Request for Proposals ("RFP"), issued pursuant to the debt collection amendments, makes it clear that the COTR must review all major pleadings in debt collection actions before they are filed by the private attorney. The Department has indicated that it considers this kind of close supervision of private attorneys "necessary to meet constitutional concerns and preserve the authority of the Attorney General over litigation." Burns Letter at 3.

Conclusion

In sum, we reaffirm the longstanding position of this Office and the Department that litigation on behalf of the United States must be conducted or closely supervised by properly appointed officers of the United States, officers who are themselves under the supervision of the Attorney General and the President. In addition, any significant policymaking duties under federal law or discretionary acts which affect the rights of citizens cannot be undertaken by private parties. On the other hand, advisory and information gathering functions, as well as purely ministerial and internal management matters, need not be performed by officers of the United States. We therefore conclude that the forty-eight program analyst and program monitor positions and the historical research support positions do not involve governmental authority that can only be exercised by officers, but instead involve information gathering and reporting duties which may constitutionally be performed by private parties on a contract basis.

WILLIAM P. BARR
Assistant Attorney General
Office of Legal Counsel

Pocket Veto Clause

The wording of the Pocket Veto Clause of the Constitution that a bill shall not become law if "the Congress by their Adjournment prevent its Return" by the President — expresses the assumption that adjournments ordinarily make the return of a bill impossible, but the clear structural rule established by the Clause applies to all adjournments in the constitutional sense, even if Congress has taken measures to make the return of a bill possible.

The drafting history of the Pocket Veto Clause shows an intent to avoid excessive periods of uncertainty about the fate of bills passed by Congress.

Ordinary legislation expressing Congress' view about the category of adjournments covered by the Pocket Veto Clause is inappropriate, because such legislation cannot change the meaning of the constitutional terms.

Presidents Ford and Carter may have purported to return bills that, under the Constitution, could only be pocket vetoed. Thus, the bills they believed they had return-vetoed may in fact have been pocket-vetoed instead. As far as we know, however, this has no practical effect.

Congress can avoid application of the Pocket Veto Clause during brief adjournments by scheduling presentment of bills so that the tenth day after presentment does not fall during an adjournment of either House that is longer than three days.

May 17, 1990

LETTER FOR A MEMBER OF THE HOUSE OF REPRESENTATIVES

The Department very much appreciates your interest in the Pocket Veto Clause. As I indicated at the hearing on last Wednesday, I would like to present more detailed answers to your thoughtful questions.

Your first question concerned the text of the clause, which provides that a bill becomes a law without the President's signature if he has not returned it to Congress with his objections after ten days (Sundays excepted) "unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a law." U.S. Const. art. I, § 7, cl. 2. Our position, as you know, is that all adjournments of Congress in the constitutional sense prevent the return of a bill. Your question was whether that is a natural reading of the

text; in particular, you asked whether if the Framers meant to say that they would simply have said "unless the Congress adjourn."

We think that the formulation that appears in the Constitution is a very natural way to express our understanding. In drafting the Pocket Veto Clause, the Federal Convention was primarily concerned with the situation in which Congress had made return impossible.[1] Adjournment was significant as the reason that return was impossible. If a drafter is referring to a particular cause but is principally interested in its effect, it is quite natural to refer to both together; indeed, it would be unnatural and confusing to refer only to the cause and not to mention the effect, where the effect is the primary concern. For example, consider a veterans benefit program open to all former service members except those who have lost their American citizenship through expatriation. One might refer to such persons as those who have been expatriated, but it is more informative and more natural to include the reference to loss of citizenship, because that is the reason expatriation is significant in this context.[2]

In addition, if a speaker presupposes that one event necessarily entails a consequence, it is quite normal to include that presupposition in the expression. Thus, in the example I gave at the hearings, a legal rule might require a husband to notify his wife of something, unless her death prevents the notification. The fact that the rule is phrased that way, and does not say that the husband must notify his wife unless she dies, would not lead us to imagine instances in which death might not prevent notification.

Moreover, our understanding of the text accords with the expectation that the Framers, in drafting the structural provisions of the Constitution, sought to establish brightline rules that are capable of mechanical application. *See INS v. Chadha,* 462 U.S. 919, 945 (1983). Clarity is all-important with respect to the law-making process itself. We think it unlikely that the Framers drafted an open-ended provision that would invite debate as to whether an adjournment was of the kind that prevents a return or not. On the contrary, their principles of Constitution writing require clearer rules than that, and our reading makes the Pocket Veto Clause clear and mechanical.

Next, you suggested a possible response to our argument based on the drafting history of the Pocket Veto Clause. We pointed out that the Committee on Detail of the Federal Convention considered a version of the clause under which, if Congress had adjourned after presenting a bill, the President would hold the bill until the next session of Congress. The Committee, however, rejected that form of the rule in favor of the Pocket Veto Clause as it appears in the Constitution. We suggest that this indicates that the Federal

---

[1] As we explain, that concern arose both because Congress might thereby seek to circumvent the veto and because if return is impossible so is prompt reconsideration.

[2] This reading is entirely consistent with the maxim that all the words of a text should have meaning. In our view, the Convention referred to both adjournment and prevention of return for greater clarity, not in order to limit the class of adjournments to which the Pocket Veto Clause applies. The maxim does not operate to require that drafters be as laconic as possible.

Convention was concerned, not only with the possibility that Congress might seek to evade the President's veto by passing laws and then adjourning, but also with excessive periods of uncertainty concerning the fate of a vetoed bill.[3] You suggest that the Convention may instead have wanted to avoid the situation in which one Congress passes a bill and the next Congress, with different personnel, decides whether to override the President's veto.

While that is a possible explanation of the Committee's decision, we think it less plausible than the one we suggest. The Constitution as the Convention approved it permits one Congress to override a veto that the President returned to the preceding Congress. If one Congress ends within ten days of the date on which the next Congress convenes, the President may return the bill with his objections to the new Congress, which then could conduct an override vote. This is not just a hypothetical possibility. In 1983, the 98th Congress convened less than ten days after the sine die adjournment of the 97th Congress; in a more extreme case, the 39th Congress adjourned sine die the morning of March 4, 1867, and the 40th Congress convened that afternoon. Had the Committee been concerned with this problem when they were drafting Article I, Section 7, they would have dealt with it in its primary manifestation as well as in the context of the pocket veto.

Third, you suggested that legislation such as H.R. 849, 101st Cong., 1st Sess. (1989), may be appropriate as a vindication of Congress' view of the Constitution. We agree wholeheartedly that all three branches have obligations to the Constitution and must interpret it in order to perform their functions. Naturally, Members of Congress should base their votes on their understanding of the Constitution. H.R. 849, however, is not an exercise of Congress' legislative power in the ordinary sense. The part of the bill to which we object is a pure statement of a proposition of constitutional interpretation that can have no independent legal effect: whether any adjournment or class of adjournments prevents the return of a bill depends on the meaning of the Pocket Veto Clause, and that meaning cannot be changed by ordinary legislation. Thus, the bill is a statement of congressional position rather than an actual legal rule. For that reason, we think it inappropriate for Congress to attempt to embody its view in a statute, thereby asking the President's assent to a legal conclusion with which he disagrees.

You also asked whether our interpretation of the Pocket Veto Clause undermines the accord that was reached under Presidents Ford and Carter, and indeed suggests that many bills may have become laws contrary to the understanding of President and Congress. As we understand it, the practice under Presidents Ford and Carter was to proceed as if the Pocket Veto Clause was applicable only after sine die adjournments of Congress, and to employ return vetoes in all other circumstances.

---

[3] Moreover, as you know, the Supreme Court has also stated that the opportunity for prompt reconsideration of a bill is one of the purposes of the Pocket Veto Clause. *The Pocket Veto Case*, 279 U.S. 655, 684-85 (1929).

Congress and the President cannot change the meaning of the Pocket Veto Clause by an understanding between themselves, and if they proceed on an incorrect premise as to the applicable constitutional rules their actions may not have the consequences they anticipate. When Congress is adjourned within the meaning of the Pocket Veto Clause on the tenth day after a bill has been presented, that bill is pocket vetoed unless the President signs it. Because the pocket veto operates automatically and not through any action of the President, this is true even if the President returns the bill to Congress in what he believes to be a return veto. The President cannot choose whether to use a return veto or a pocket veto; by definition, the Pocket Veto Clause operates only when a return veto is impossible. Moreover, the President's views as to the operation of the pocket veto do not affect the meaning of the Constitution. Therefore, if the position we take is correct, it is correct whether or not we take it, and the fact that the Department has espoused a particular reading of the Pocket Veto Clause will not effect the validity of any statute.

As a consequence, some bills that Presidents Ford and Carter believed they had return-vetoed may in fact have been pocket-vetoed instead. As far as we know, however, this has no practical effect. The only difference between a return veto and a pocket veto is that a return veto is subject to override. We know of no bill that ostensibly became a law through an override of a supposed return veto that under our reading of the Constitution was in fact a pocket veto.[4]

Finally, I would like to expand on what appears to have been some confusion during the hearing on the practical implications of our position for brief adjournments of Congress.

The Court explained in *Wright v. United States*, 302 U.S. 583 (1938), that Congress, considered as a bicameral body, is adjourned whenever either House is adjourned for more than three days. This does not mean, however, that a bill will be subject to the Pocket Veto Clause whenever Congress takes a brief adjournment while the bill is pending before the President. Rather, the pocket veto operates only if the *tenth day* after presentment falls during an adjournment. This is true because, once again, the pocket veto is not a power of the President that he exercises affirmatively. Rather, pocket vetoes happen automatically on the tenth day after presentment if the President has not signed the bill. Thus, the Court's reading of the Adjournment Clause requires, at most, attention to the scheduling of presentments, so that the tenth day after presentment does not fall during an adjournment of either House that is longer than three days.

JOHN O. McGINNIS
Deputy Assistant Attorney General
Office of Legal Counsel

[4] In addition, if Presidents Ford and Carter proceeded on an incorrect understanding of the Pocket Veto Clause, it is possible that bills may have been pocket vetoed when the President thought that they had become law without his signature. We know of no such instances, however.

Whether Agents of the Department of Justice Office of Inspector General are "Investigative or Law Enforcement Officers" Within the Meaning of 18 U.S.C. § 2510(7)

Agents of the Department of Justice Office of Inspector General are "investigative officers" within the meaning of 18 U.S.C. § 2510(7) and as such may be authorized to apply for and conduct court-authorized electronic surveillance regarding matters within that Office's investigative jurisdiction.

May 29, 1990

LETTER OPINION FOR THE ASSOCIATE UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK

This responds to your request for our opinion as to whether agents of the Department of Justice Inspector General ("DOJ/OIG") can be considered "[i]nvestigative or law enforcement officer[s]" within the meaning of 18 U.S.C. § 2510(7).[1] We have concluded that the DOJ/OIG falls within that statutory definition.

Your request arises from an application to the Criminal Division for court-authorized electronic surveillance pursuant to title III of the Omnibus Crime Control and Safe Streets Act ("OCCSSA"), Pub. L. No. 90-351, tit. III, § 802, 82 Stat. 197, 212 (1968) (codified at 18 U.S.C. §§ 2510-2520). During the drafting of that application, you considered the question whether agents of the DOJ/OIG were authorized to act as "[i]nvestigative or law enforcement officer[s]" who are permitted by OCCSSA to listen to intercepted communications. Because the question is one of first impression and involves the intersection of the OCCSSA and the Inspector General Act, the Office of Enforcement Operations of the Criminal Division recommended that you seek our advice.

Title III of OCCSSA was intended to "provide law enforcement officials with some of the tools thought necessary to combat crime without unnecessarily infringing upon the right of individual privacy."[2] In general, the statute prohibits surveillance of wire and oral communications without the consent

[1] *See* Letter for William P. Barr, Assistant Attorney General, Office of Legal Counsel, from Louis J. Freeh, Associate United States Attorney, Southern District of New York (Apr. 23, 1990).

[2] *Scott v. United States*, 436 U.S. 128, 130 (1978).

of at least one party to the communication, but creates certain specific exceptions for law enforcement purposes, subject to procedural and substantive requirements.[3] Most relevantly, section 2516 provides for interception of wire, oral, or electronic communications for law enforcement purposes pursuant to a court order based upon a showing and finding of probable cause. Under subsection 2516(1), the Attorney General and certain other officers within the Department of Justice may authorize the making of an application to a federal judge for an order "authorizing . . . the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made," if the underlying offense falls within one of several categories of federal crimes enumerated in section 2516. Under section 2518, each such application for a court order must be made in writing and include such information as "the identity of the investigative or law enforcement officer making the application." If the application is approved, the identified officer may listen to the intercepted communication. *Id.* § 2518(3)-(5).[4]

Subsection 2510(7), in turn, defines "[i]nvestigative or law enforcement officer" to mean

> any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses.

Because the definition is phrased throughout in the disjunctive — investigative *or* law enforcement officer, empowered to conduct investigations *or* to make arrests — it seems plain that Congress intended the term "investigative officers" to be broad enough to include officials who participate in investigations but do not have arrest authority. Moreover, the only discussion in the legislative history of the term "investigative officers" indicates that the term encompasses all officers who carry out any law enforcement duties relating to offenses enumerated in section 2516:

> Paragraph (7) defines "investigative or law enforcement officer" to include any Federal, State, or local law enforcement officer empowered to make *investigations of* or to make ar-

[3] *See* S. Rep. No. 1097, 90th Cong., 2d Sess. 27-28 (1968).

[4] Moreover, investigative or law enforcement officers, if authorized to intercept communications, may disclose the contents of the communications to other investigative or law enforcement officers, may use those contents to the extent that such use is appropriate to the proper performance of their official duties, may in suitable circumstances give testimony concerning those contents, and may disclose and use intercepted communications relating to offenses other than those specified in the court order if the former are obtained in the course of a court-authorized interception. *Id.* § 2517(1)-(3), (5). Further, investigative or law enforcement officers specially designated by an appropriate prosecutor may intercept wire or oral communications on an emergency basis, subject to later judicial review. *Id.* § 2518(7).

> rests for any of *the offenses enumerated in the proposed legislation.* It would include *law enforcement personnel carrying out law enforcement purposes.*

S. Rep. No. 1097, 90th Cong., 2d Sess. 91 (1968) (emphasis added).

Moreover, case law also interprets the term "investigative officer[s]" broadly to include all law enforcement officials involved in the investigation of the enumerated offenses, even if they lack the authority to make arrests.[5] Finally, this Office has previously opined that in light of the use of "the broad term 'investigatory' [sic]," FBI support personnel qualify as "investigative officers" within the meaning of section 2510(7).[6]

We believe DOJ/OIG agents qualify as "investigative officer[s]" under section 2510(7) as construed above, because these agents may make investigations of offenses enumerated in section 2516. Each Inspector General has the duty and responsibility to "provide policy direction for and to conduct, supervise, and coordinate audits and investigations" relating to the programs and operations "of [the] establishment" in which he functions. 5 U.S.C. app. 3, § 4(a)(1).[7] An Inspector General must also "conduct, supervise, or coordinate other activities carried out or financed by such establishment for the purpose of . . . preventing and detecting fraud and abuse in, its programs and operations." *Id.* § 4(a)(3). Inspector Generals also have responsibility "with respect to (A) . . . the prevention and detection of fraud and abuse in . . . programs and operations administered or financed by such establishment, [and] (B) *the identification and prosecution of participants in such fraud or abuse.*" *Id.* § 4(a)(4) (emphasis added). These responsibilities require an Inspector General to "report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law." *Id.* § 4(d).[8] Thus, the Inspector General Act entrusts the DOJ/OIG with investigative, auditing and other responsibilities

---

[5] *See United State v. Feekes*, 879 F.2d 1562, 1565-66 (7th Cir. 1989) (prison investigator within section 2510(7)); *In re Grand Jury Proceedings*, 841 F.2d 1048, 1054 (11th Cir. 1988) (House of Representatives Committee in impeachment proceeding against federal judge is an "investigative officer" within section 2510(7)); *United States v. Clark*, 651 F. Supp. 76, 79 (M.D. Pa. 1986), *aff'd*, 857 F.2d 1464 (3d Cir. 1988), *cert. denied*, 490 U.S. 1073 (1989) ("While prison employees may not be 'the FBI or others normally recognized as law enforcement officers,' . . . [they] fall within the category of investigative officers . . . ."); *Crooker v. Department of Justice*, 497 F. Supp. 500, 503 (D. Conn. 1980) (prison officials, even though lacking arrest authority for any of the offenses enumerated in section 2516(a), were investigators under section 2510(7)).

[6] Memorandum for William H. Webster, Director, Federal Bureau of Investigation, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Use of FBI Support Personnel to Monitor Title III Surveillance* at 20 (Oct. 31, 1984).

[7] Although the Inspector General Act originally did not provide for an Inspector General within the Department of Justice, a 1988 amendment to the Inspector General Act created the DOJ/OIG. *See* Pub. L. No 100-504, 102 Stat. 2515, 2520-21 (1988).

[8] The provisions relating specifically to the DOJ/OIG state that the Inspector General "shall be under the authority, direction, and control of the Attorney General with respect to audits or investigations, or the issuance of subpoenas, which require access of sensitive information" concerning specified areas of law enforcement. 5 U S C. app. 3, § 8D(a)(1).

relevant to the detection and prosecution of fraud and abuse within Justice Department programs or operations.[9]

In particular, we believe that the DOJ/OIG's investigative jurisdiction carries with it the power to investigate offenses enumerated in section 2516, should the DOJ/OIG discover evidence that Justice Department personnel, contractors or grantees are engaging in such offenses in connection with the Department's programs or operations. Among these offenses may be, for example, bribery of public officials and witnesses (18 U.S.C. § 201), influencing or injuring an officer, juror, or witness (*id.* §§ 1503, 1512, 1513), obstruction of criminal investigations (*id.* § 1510), wire fraud (*id.* § 1343), mail fraud (*id.* § 1341), and dealing in illegal drugs. *See id.* §§ 2516(1)(c), (e).

Accordingly, we conclude that DOJ/OIG agents (including special agents, auditors and investigators) are investigative officers within the meaning of 18 U.S.C. § 2510(7), and as such may be authorized by the appropriate officials within this Department to apply for and to conduct court-authorized electronic surveillance with regard to matters within the DOJ/OIG's investigative jurisdiction.

JOHN O. McGINNIS
Deputy Assistant Attorney General
Office of Legal Counsel

[9] Indeed, this Office has stated that it had "no doubt that the [Labor Department] Inspector General has criminal investigative authority . . . *within the scope* of his statutorily-granted investigative authority." *Inspector General Authority to Conduct Regulatory Investigations*, 13 Op. O.L.C. 54, 58 n.7 (1989).

Authority of the General Services Board of Contract Appeals to Order Reimbursement of the Permanent Judgment Fund for Awards of Bid Protest Costs

The General Services Board of Contract Appeals does not have the authority to order the Department of the Army to reimburse the permanent indefinite judgment fund for a Board award of bid protest costs under the Competition in Contracting Act.

May 29, 1990

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF THE ARMY

This memorandum responds to your office's request for the opinion of this Office on the authority of the General Services Board of Contract Appeals ("GSBCA" or the "Board") to order the Department of the Army ("Army") to reimburse the permanent indefinite judgment fund, 31 U.S.C. § 1304, for bid protest costs under the Competition in Contracting Act ("CICA"), Pub. L. No. 98-369, 98 Stat. 1175, 1182-84 (1984) (codified in relevant part at 40 U.S.C. § 759(f)(5)). *See* Letter to William P. Barr, Assistant Attorney General, Office of Legal Counsel, from Colonel William A. Aileo, Chief, Litigation Division, Office of the Judge Advocate General, United States Department of the Army (Jan. 30, 1990) (the "Army Letter"). We conclude that the Board does not have authority to order the Army to reimburse the judgment fund.

I. Background

Your inquiry was prompted by two GSBCA cases, *Julie Research Laboratories, Inc.*, 1989-1 B.C.A (CCH) ¶ 21,213 at 107,020 (Sept. 23, 1988), *appeal dismissed, United States v. Julie Research Laboratories, Inc.*, 881 F.2d 1067 (Fed. Cir. 1989), and *Bedford Computer Corp.*, 1990-1 B.C.A (CCH) ¶ 22,377 (Oct. 13, 1989). In both these cases, the Board awarded bid protest costs against the Army under section 2713 of CICA, 40 U.S.C. § 759(f)(5).

The Army disputes the Board's conclusion in the *Julie Research Laboratories* and *Bedford Computer* cases. It maintains that the Board has exceeded its authority under 40 U.S.C. § 759(f)(6)(C) by requiring it to reimburse the

judgment fund. Moreover, components of the federal government other than the Army, including the Department of the Air Force, the National Transportation Safety Board, and the General Accounting Office, are interested in the resolution of the issue. *See* Army Letter at 1.[1]

Section 759(f)(5)(C) provides that, when the Board makes a determination that a challenged agency action violates a statute or regulation or the conditions of any delegation of procurement authority issued pursuant to the section, the Board

> may, in accordance with section 1304 of title 31, further declare an appropriate interested party to be entitled to the costs of—
>
> (i) filing and pursuing the protest, including reasonable attorney's fees, and
>
> (ii) bid and proposal preparation.

Section 759(f)(5)(C) explicitly requires that the Board's awards of bid protest costs be made "in accordance with" 31 U.S.C. § 1304, the Automatic Payment of Judgment Act. That act created the permanent judgment fund. Section 1304 thus appropriates necessary amounts to pay final judgments, awards, settlements, and interest and costs specified in the judgments when the following three conditions are satisfied:

> (1) payment is not otherwise provided for;
>
> (2) payment is certified by the Comptroller General; and
>
> (3) the judgment, award, or settlement is payable . . . under a decision of a board of contract appeals.

Despite section 759(f)(5)(C)'s express reference to payments from the judgment fund, the Board in both *Julie Research Laboratories* and *Bedford Computer* cases required the Army to reimburse the permanent judgment fund for the award, thus effectively requiring the Army to pay the costs from its procurement appropriation. In *Julie Research Laboratories*,[2] the Board supported its decision to require the Army to reimburse the judgment fund as follows:

---

[1] A recent Report to Congress from the General Accounting Office has said that "there has been some confusion in making administrative and policy decisions" as a result of disagreements over the requirements of the law, and has called for corrective legislation. General Accounting Office, *ADP Bid Protests*, Report to the Chairman, Subcommittee on Federal Services, Post Office, and Civil Service, Committee on Governmental Affairs, U.S. Senate, at 33 (March, 1990) ("*GAO Report*").

[2] In *Julie Research Laboratories*, the Army's Missile Command had issued a solicitation for a multiyear procurement of automatic data processing equipment ("ADPE"). Julie Research Laboratories protested the solicitation and prevailed on a significant issue. It then applied for $25,754.88 in costs. The Board awarded it $20,986.13.

> Because this monetary award is inextricably connected with the true economic cost of the procurement, it is appropriate that the fund be reimbursed by the agency whose appropriations were used for the contract out of available funds or by obtaining additional appropriations for such purposes. Such reimbursement is consistent with the purpose underlying 41 U.S.C. § 612 (1982), *see* S. Rep. No. 1118, 95th Cong., 2d Sess. 33 (1978), and with our responsibility to "accord due weight to the policies of [the Brooks Act, [Pub. L. No. 89-306, 79 Stat. 1127 (1965)]] and the goals of economic and efficient procurement . . . ." 40 U.S.C. § 759(h)(5)(A) (Supp. III 1985) (to be recodified at 40 U.S.C. § 759(f)(6)(C). . . . Accordingly, we revise the delegation of authority to require the agency to make the reimbursement. 40 U.S.C. § 759(h)(5)(B) (Supp. III 1985).

Julie Research Labs., Inc. at 89-1 B.C.A ¶ 21,213 at 107,021. Administrative Judge Borwick dissented in part. He stated:

> [A]bsent a statutory requirement for reimbursement of the judgment fund in the Brooks Act, requiring agencies to reimburse the judgment fund is not appropriate. The majority relies on that portion of the Brooks Act which empowers the Board to order any additional relief which it is authorized to provide under statute or regulation. 40 U.S.C. § 759(h)(6)(C) (Supp. III 1985) (to be recodified at 40 U.S.C. § 759(f)(6)(C)). I do not believe that our broad authority to grant relief applies to this matter of fiscal and accounting policy which is purely a matter of statutory direction. There are sound policy reasons for the result reached by the majority as the reimbursement. However, if Congress had wished to adopt that policy, it would have specifically done so, as it did in the CDA [Contract Disputes Act, 41 U.S.C. §§ 609-613, Pub. L. No. 95-563, 92 Stat. 2388 (1978)]. As Congress has not, I would not revise the DPA [delegation of procurement authority] to require such reimbursement.

Id.

The Army then appealed this judgment to the Federal Circuit, which dismissed the appeal on the ground that the dispute was purely intragovernmental:

> [T]he government's obligation to pay Julie has been determined and Julie has received everything it could recover by receiving a decision on the merits in its favor which has not been appealed. A decision by this court of this intra-government dispute "cannot affect the rights of [the] litigants," *North Carolina v. Rice*, 404 U.S. [244,] at 246 [(1971)], and we must, therefore, conclude that the issue presented is not justiciable.

United States v. Julie Research Labs., Inc., 881 F.2d 1067, 1068 (Fed. Cir. 1989).

In *Bedford Computer*, the Board, citing *Julie Research Laboratories*, also ordered the Army to reimburse the judgment fund in the amount of its award of costs.[3] *Bedford Computer*, 1990-1 B.C.A ¶ 22,377 at 112,434 (Oct. 13, 1989). Concurring separately in *Bedford Computer*, Administrative Judge Hendley agreed that the judgment fund should be reimbursed. He added that in future settlements of protest costs, the respondent agency should pay directly "in accordance with the Federal Acquisition Regulation (FAR)." *Id.* Judge Hendley wrote:

> So long as agency funds are available, to seek to have the payment made from the judgment fund and then reimburse that fund, is economically inane and constitutes a pointless exercise in unnecessary paper shuffling. That an agency should pay such costs directly, and not through the conduit of the judgment fund, is clearly directed by FAR 33.105(f) [48 C.F.R. § 33.105(f) (1988)] which states:
>
> > (f)(1) The GSBCA may declare an appropriate interested party to be entitled to the cost of —
> > (i) Filing and pursuing the protest, including reasonable attorney's fees; and
> > (ii) Bid and proposal preparation.
> > (2) Costs awarded under (f)(1) above shall be paid promptly by the agency out of funds available to or for the use of [4] the acquisition of supplies or services.

[3] In *Bedford Computer* the Army conceded that it had failed to comply with certain procurement statutes and regulations. The Army and the protester decided to settle the protest. The Board found that the protestor has prevailed on a significant issue, and awarded it $75,000 in protest costs.

[4] Perhaps should read: "or."

> Although the FAR is couched in terms of payment of costs awarded by the Board in a case where those costs were contested, it would be sheer sophistry to contend that in those instances where the parties have settled their dispute, those same costs, reflected in their settlement, should not be paid from the agency's funds as well.

Id. at 112,434-35.

II. Analysis

We conclude that a Board award of costs under CICA is payable out of the judgment fund, and that the Board does not have the authority to order an agency to reimburse the judgment fund for having paid such an award.[5]

1. The only substantive question concerning the availability of the judgment fund to pay bid protest costs in the *Julie Research Laboratories* and *Bedford Computer* cases is whether the first of section 1304(a)(1)'s three conditions is met,[6] *i.e.*, whether payment of a Board award is "otherwise provided for" from some other appropriation. As a general rule, "agency appropriations are not available to pay judgments. Exceptions are recognized only where the appropriations or special funds for the activities out of which the cause of action arose expressly include provisions for the payment of judgments, or where other express provisions of law include such authority." *GAO Principles* at 12-3.

We are aware of no statutory authority — and none was cited in *Julie Research Laboratories* or *Bedford Computer* — that would require the Army either to pay Board awards of bid protest costs out of its own appropriations, or to reimburse the judgment fund for having paid such awards. There is no provision in either 40 U.S.C. § 759 or in 31 U.S.C. § 1304 which requires a procuring agency to reimburse the judgment fund when bid protest costs are

[5] This dispute between the Army and the Board, as the Federal Circuit held, is purely a disagreement within the Government and in no way affects the rights or remedies of parties (such as Julie Research Laboratories, Inc.) outside the executive branch. Consequently, as the court held, the dispute was not justiciable under Article III. *See United States v. Julie Research Labs., Inc.*, 881 F.2d at 1068. Because the dispute arises only between two components of the executive branch, this Office has jurisdiction to resolve it. *See* § 1-401 of Exec. Order No. 12146, 3 C.F.R. 409, 411 (1980), as amended by Exec. Order No. 12608, 3 C.F.R. 245 (1988) (Attorney General has authority to resolve interagency disputes). The Attorney General has delegated to this Office his authority to provide legal opinions and advice to the President and heads of the Executive and military departments. *See* 28 U.S.C. § 510 (Attorney General's authority to delegate); *id.* §§ 511-513 (duties of Attorney General); 28 C.F.R. § 0.25 (matters delegated to OLC); *see generally* Memorandum for Helen S. Lessin, Director, Federal Legal Council, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: OLC Policies Regarding Issuance and Release of Opinions* (Sept. 10, 1980).

[6] The second statutory requirement — the necessity for certification by the Comptroller General — imposes no substantive constraints on access to the judgment fund: the Comptroller General's certification follows from satisfaction of the other two requirements and completion of the necessary paperwork.

Continued

awarded against it.[7] We recognize that an award to a contractor by an agency board of contract appeals under the Contract Disputes Act ("CDA"), Pub. L. No. 95-563, 92 Stat. 2388 (1978) (codified at 41 U.S.C. §§ 609-613), when paid by the judgment fund, must thereafter be reimbursed by the procuring agency whose appropriations were used for the contract at issue. *See* 41 U.S.C. § 612(c). But CDA is inapplicable here because the awards at issue were not made under CDA, but under CICA, a wholly distinct enactment.[8] Hence, we conclude, Congress intended that Board awards of these bid protest costs be paid out of the judgment fund, rather than being statutorily subject to reimbursement.[9]

2. The remaining question is whether the Board exceeded its authority in ordering the Army to reimburse the judgment fund for having paid the awards. We conclude that the Board has exceeded its authority.

In *Julie Research Laboratories*, the Board majority relied on 40 U.S.C. § 759(f)(6)(C), which states:

> [N]othing contained in this subsection shall affect the board's power to order any additional relief which it is authorized to provide under any statute or regulation.

For two independent reasons, this provision does not, in our opinion, authorize the Board to require a procuring agency to reimburse the judgment fund for the payment of protest cost awards.

First, an order requiring the agency to reimburse the judgment fund would provide relief *at all* — still less "*additional* relief" — to the bid protester, since the protester's award has already been paid in full by the judgment fund. From the protester's point of view, it makes no difference whether the agency's procurement appropriation reimburses the judgment fund after the award is paid: the amount of the award is exactly the same. Thus, requiring that the amount of the award be taken from agency procurement appropriations

---

[6](....continued)

See Availability of the Judgment Fund for the Payment of Judgments or Settlements in Suits Brought Against the Commodity Credit Corporation Under the Federal Tort Claims Act, 13 Op. O.L.C. 362, 363-64 & n.1 (1989); *accord* General Accounting Office, *Principles of Federal Appropriations Law*, at 12-2 (1982) ("*GAO Principles*"). The third requirement -- that the award or settlement be payable "under a decision of a board of contract appeals" — is manifestly satisfied by awards issued by the Board.

[7] Section 1304(c) refers to a situation in which the judgment fund is available to pay a judgment or compromise settlement but must thereafter be reimbursed. The section is irrelevant here: it only concerns cases in which the judgment or settlement "arises out of an express or implied contract" made by the Army and Air Force Exchange Service, the Navy Exchanges, the Marine Corps Exchanges, the Coast Guard Exchanges, or the Exchange Councils of the National Aeronautics and Space Administration. *See* Pub. L. No. 91-350, 84 Stat. 449 (1970) (codified at 31 U.S.C. § 1304(c)).

[8] CICA, which gives the Board authority over ADPE protests, was not an amendment to CDA but to the Brooks Act, Pub. L. No. 89-306, 79 Stat. 1127 (1965) (codified at 40 U.S.C. § 759(f)). Hence the reimbursement requirement of section 612 of CDA does not apply to Board awards under the Brooks Act.

[9] This Office reached a similar conclusion in *Payment of Attorney Fee Awards Against the United States Under 28 U.S.C. § 2412(b)*, 7 Op. O.L.C. 180 (1983)(judgment fund available by statute to pay fee awards). *Accord* 63 Comp. Gen. 260, 263-64 & n.3 (1984) (citing Rose Memo).

and transferred to the permanent judgment fund is purely a matter of accounting and fiscal policy, not a question of the scope of relief.[10] Hence, 40 U.S.C. § 759(f)(6)(C) cannot provide authority for the Board to order the Army to reimburse the judgment fund for the cost of the award.

Second, subsection 759(f)(6)(C) is not, as the *Julie Research Laboratories* majority mistakenly implied, itself an affirmative grant of authority to the Board. The subsection merely states that nothing in it shall affect the Board's power to order "additional relief" which the Board is *otherwise* empowered to provide. Thus, even on the assumption (which we have rejected) that requiring the procuring agency to reimburse the judgment fund could constitute "additional relief," the Board would still need to be "authorized to provide" such relief under some "statute or regulation" *other* than 40 U.S.C. § 759(f)(6)(C) itself.

No other statute provides the needed authority. In *Julie Research Laboratories*, 1989-1 B.C.A. ¶ 21,213 at 107,021 (Sept. 23, 1988), the Board majority stated only that ordering reimbursement was "consistent with the purpose underlying 41 U.S.C. § 612" and with the Board's responsibility under 40 U.S.C. § 759(f)(5)(A) to "accord due weight to the policies of [the Brooks Act] and the goals of economic and efficient procurement." However, neither 41 U.S.C. § 612 nor 40 U.S.C. § 759(f)(5)(A) authorizes the Board to order reimbursement of the judgment fund.[11]

We recognize that, in *Bedford Computer*, the concurring opinion cited a regulatory source of authority. *See id.*, 1990-1 B.C.A. ¶ 22,377 at 112,435 (Hendley, A.J., concurring separately). The cited regulation, FAR 33.105(f)(2), 48 C.F.R. § 33.105(f)(2) (1988), states that protest costs awarded by the Board "shall be paid promptly by the agency out of funds available to or for the use of the acquisition of supplies or services."

We understand,[12] however, that this Federal Acquisition Regulation was *not* intended to mandate that Board awards of bid protest costs under the Brooks Act be paid from agency procurement appropriations rather than

---

[10] It appears that the decision of the Board majority in *Julie Research Laboratories* relied on an understanding of sound accounting policy. It stated that "[b]ecause this monetary award is inextricably connected with the true economic cost of the procurement, it is appropriate that the [judgment] fund be reimbursed by the agency whose appropriations were used for the contract out of available funds or by obtaining additional appropriations for such purposes." *Id.*, 1989-1 B.C.A. ¶ 21,213 at 107,021. However, as the dissent correctly pointed out, "our broad authority to grant relief [does not] appl[y] to this matter of fiscal and accounting policy which is purely a matter of statutory direction." *Id.*

[11] As explained above, 41 U.S.C. § 612 provides that a monetary award to a contractor by an agency board of contract appeals in a *CDA* case must be reimbursed to the judgment fund. No comparable provision exists for *Brooks Act* cases. Rather, 40 U.S.C. § 759(f)(5)(C) merely states that the Board may hold a bid protestor to be entitled to protest costs to be paid "in accordance with section 1304," the judgment fund statute.

Section 759(f)(5)(A) instructs the Board to take account of the policy of the Brooks Act and of the goals of economic and efficient procurement when "making *a decision on the merits* of protests brought under this section" (emphasis added). That language does not authorize the Board to decide, *after* making its decision on the merits, whether payment for an award of protest costs is to come from the judgment fund or from agency appropriations.

[12] Per telephone conversation with Mr. Jack Miller, Deputy Associate General Counsel, GSA.

from the judgment fund.[13] (Apparently, the draftsmen of the regulation overlooked the fact that protests costs in CICA cases, unlike CDA cases, were to be paid out of the judgment fund.) If the regulation were read to require agencies to pay such costs without any recourse to the judgment fund, we would find it invalid. The plain language of both the judgment fund statute, 31 U.S.C. § 1304, and of the Brooks Act provision that refers to it, 40 U.S.C. § 759(f)(5)(C), compels the conclusion that Board awards of bid protest cases are payable only out of the judgment fund, not out of the agency's appropriation.[14] Insofar as a regulation conflicts with the express provisions of a statute, the regulation is without effect. *See, e.g.*, *Dole v. United States Steelworkers of Am.*, 494 U.S. 26, 42 & n.10 (1990); *Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986); *Arizona Grocery Co. v. Atchison T. & S.F. Ry. Co.*, 284 U.S. 370, 387 (1932); 3 Op. O.L.C. 457, 459 (1979).

Accordingly, we conclude that the Board is not validly authorized by statute or by regulations to order reimbursement.

III. Conclusion

The General Services Board of Contract Appeals lacks the authority to order the reimbursement of the judgment fund from a procuring agency's appropriation where the judgment fund has paid a Board award of bid protest costs against the agency in a case decided under 40 U.S.C. § 759.

JOHN O. McGINNIS
Deputy Assistant Attorney General
Office of Legal Counsel

---

[13] Further, none of the three statutes — 40 U.S.C. § 486(c); 10 U.S.C. ch. 137; 42 U.S.C. § 2453(c) -- cited as authorities for the FAR regulation, *see* 50 Fed. Reg. 2270 (1985), expressly authorizes the General Services Administration to mandate, notwithstanding 40 U.S.C. § 759(f)(5)(C), that payment of GSBCA bid protest cost awards in Brooks Act cases be made directly from agency appropriations instead of from the judgment fund. Nor does any of those statutes allow the Board to order the judgment fund to be reimbursed from agency appropriations for having paid such awards.

[14] The GAO expressly agrees with the conclusion, observing that "while CICA requires that GSBCA payments be made from the Judgment Fund, the Federal Acquisition Regulation provides that these payments must be made from the agency's funds available for the acquisition of supplies or services. *The Federal Acquisition Regulation is inconsistent with CICA in this regard.*" *GAO Report* at 62 (emphasis added).

Lease or Loan of Aircraft to Foreign Countries for Assistance in International Narcotics Control Under Subsection 506(a)(2) of the Foreign Assistance Act of 1961

The federal government may lease or loan Department of Defense aircraft to foreign countries to assist in international narcotics control under the authority of subsection 506(a)(2) of the Foreign Assistance Act of 1961.

June 4, 1990

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

This memorandum responds to a request from David C. Miller, Jr., Special Assistant to the President and Senior Director, National Security Council, for our advice whether the federal government may lease or loan aircraft to foreign countries to assist in international narcotics control under the authority of subsection 506(a)(2) of the Foreign Assistance Act of 1961, as amended (the "FAA"), 22 U.S.C. § 2318(a)(2). For the reasons that follow, we conclude that aircraft may be leased to foreign countries to assist in international narcotics control under the authority of that provision.[1]

Discussion

Subsection 506(a)(2) of the FAA grants the President authority, inter alia, to draw down "defense articles" and "defense services" from the stocks of the Department of Defense "for the purposes and under the authorities of" sections 481 through 489 of the FAA, 22 U.S.C. §§ 2291-2291h, if he determines and reports to Congress that the provision of such assistance is "in the national interest." 22 U.S.C. § 2318(a)(2)(A)(i).[2] Sections 481 through 489 of the FAA relate to international narcotics control. In particular, subsection 481(a)(4) of the FAA authorizes the President, "[n]otwithstanding any other provision of law, . . . to furnish assistance to any country or international organization, *on such terms and conditions as he may determine*, for the control of narcotic and psychotropic drugs and other controlled substances." 22 U.S.C. § 2291(a)(4) (emphasis added).[3] The express grant of authority in

[1] Both the Department of State and the Defense Security Assistance Agency concur in this conclusion.

[2] Subsection 506(a)(2) of the FAA also grants the President authority to draw down "defense articles" and "defense services" from the stocks of the Department of Defense to provide international disaster assistance under 22 U.S.C. §§ 2292-2292q, or to meet refugee and migration needs under the Migration and Refugee Assistance Act of 1962, as amended, 22 U.S.C. §§ 2601-2606. 22 U.S.C. § 2318(a)(2)(A)(ii). The aggregate value of the articles and services drawn down under the authority of subsection 506(a)(2) is limited to $75 million per fiscal year. 22 U.S.C. § 2318(a)(2)(B).

subsection 506(a)(2) of the FAA to furnish assistance under subsection 481(a)(4) of the FAA is clearly broad enough to encompass leases or loans of defense articles such as aircraft to foreign countries to assist in international narcotics control. Indeed, the term "defense article" is defined in subsection 644(d)(1) of the FAA, 22 U.S.C. § 2403(d)(1), as including "any weapon, weapons system, munition, aircraft, vessel, boat or other implement of war."

Conclusion

We conclude that the federal government may lease or loan Defense Department aircraft to foreign countries to assist in international narcotics control under the authority of subsection 506(a)(2) of the FAA, 22 U.S.C. § 2318(a)(2).

J. MICHAEL LUTTIG
Acting Assistant Attorney General
Office of Legal Counsel

---

[3] Because subsection 481(a)(4) of the FAA authorizes the President to furnish assistance "[n]otwithstanding any other provision of law," we need not resolve the question whether the Arms Export Control Act (the "AECA") would otherwise prohibit the lease of defense articles such as aircraft under the FAA. Subsection 61(a) of the AECA specifically authorizes the President to "lease defense articles in the stocks of the Department of Defense to an eligible foreign country or international organization" if he "determines that there are compelling foreign policy and national security reasons" for such action. 22 U.S.C. § 2796(a). Under subsection 61(c) of the AECA, "lease[s] or loan[s]" of such articles may be made "only under the authority of this subchapter [22 U.S.C. §§ 2796-2796d] or chapter 2 of part II of the Foreign Assistance Act of 1961 [22 U.S.C. § 2311 et seq.]." 22 U.S.C. § 2796(c).

Subsection 506(a)(2) of the FAA, 22 U.S.C. § 2318(a)(2), is contained in "chapter 2 of part II of the [FAA]," *see* Pub. L. No. 87-195, 75 Stat. 424, 435-38 (1961), and thus subsection 61(c) does not appear on its face to prohibit the making of leases or loans under the authority of FAA subsection 506(a)(2). Nevertheless, we have been advised by Jerome H. Silber, General Counsel of the Defense Security Assistance Agency, that despite the plain language of subsection 61(c), there is some question as to whether subsection 61(c) was intended to permit the making of leases under the authority of the FAA. Mr. Silber agrees, however, that this issue need not be resolved here in light of the express grant of authority in subsection 481(a)(4) of the FAA to furnish assistance "[n]otwithstanding any other provision of law."

Applicability of Conflict of Interest Laws to Current and Former Executive Branch Employees Serving as Trustees in Bankruptcy Cases

Sections 203 and 205 of title 18 do not prohibit current executive branch employees from serving as bankruptcy trustees, if the United States is not a party to and lacks a "direct and substantial interest" in the particular bankruptcy proceeding. Otherwise, the sections bar current employees, except for United States Trustees and their employees, from serving as trustees in bankruptcy.

Subsections (a) and (b) of 18 U.S.C. § 207 do not prohibit former executive branch employees from serving as trustees, if the United States is not a party to and does not have a "direct and substantial interest" in the particular bankruptcy proceeding. Where the United States has such an interest, the subsections would prohibit a former executive branch employee from serving as a trustee in matters with respect to which he participated, or which fell under his supervision, while he was in government service.

The narrow class of former high-level executive officials covered by 18 U.S.C. § 207(c) may not serve as trustees where the matter involved is one pending before the official's former agency or is one in which that agency has a "direct and substantial interest."

June 7, 1990

MEMORANDUM OPINION FOR THE ACTING DIRECTOR
OFFICE OF GOVERNMENT ETHICS

This memorandum responds to your predecessor's request for our opinion on the applicability of the federal conflict of interest laws to current and former executive branch employees who serve as trustees in bankruptcy cases.[1] The restrictions of 18 U.S.C. §§ 203, 205, and 207 — the conflict of interest provisions that prompted this inquiry[2] — limit the representational activities of current and former executive branch employees.

[1] *See* Letter for Charles J Cooper, Assistant Attorney General, Office of Legal Counsel, from Frank Q. Nebeker, Director, Office of Government Ethics (Feb. 23, 1988).

[2] Since the time of that inquiry, Congress has enacted minor modifications to the relevant portions of sections 203 and 205. *See* Ethics Reform Act of 1989, Pub. L. No. 101-194, §§ 402 & 404, 103 Stat. 1716, 1748, 1750. We have based our analysis upon the text currently in force.

For the reasons set forth below, we conclude that the limitations upon current employees in 18 U.S.C. §§ 203 and 205 do not prohibit such persons from serving as trustees where the United States lacks a substantial interest in the particular bankruptcy proceeding. In cases where the United States does have such an interest, sections 203 and 205 do not prohibit United States Trustees or subordinates acting under their authority from acting as trustees; all other current employees, however, would be barred from serving as trustees. Pursuant to 18 U.S.C. § 207, former executive branch employees generally may serve as trustees unless the United States has a substantial interest in the particular bankruptcy proceeding.[3]

I. Background

The trustee in a federal bankruptcy case represents the estate as a whole, rather than the interest of any particular claimant upon the estate. *See* 11 U.S.C. § 323(a). *See also Bauer v. Commerce Union Bank*, 859 F.2d 438, 441 (6th Cir. 1988), *cert. denied*, 489 U.S. 1079 (1989); *In re Dominelli*, 820 F.2d 313, 316 (9th Cir. 1987). In this capacity, the trustee acts as

> a fiduciary to serve and protect the financial interests of all groups who have some claim upon the estate. The trustee is a fiduciary to protect the interests of all the classes of creditors including wage creditors, tax creditors, creditors holding secured claims, and creditors holding unsecured claims. *The trustee is a fiduciary for the debtor to protect the debtor's rights in exempt property and to the extent that the estate is solvent, to protect the debtor's rights to the surplus of the estate.* The trustee is a fiduciary, to the extent that reorganization value exists, for all equity security holders of an estate and to the debtor itself.

In re Nuckolls, 67 B.R. 855, 857 (Bankr. W.D. Va. 1986) (quoting *Collier's Handbook for Trustees and Debtors in Possession*, § 4.02 (L. King Ed. 1982) (emphasis added by court)). *Accord Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 355 (1985); *In re WHET, Inc.*, 750 F.2d 149 (1st Cir. 1984).[4]

The bankruptcy laws provide four methods for selection of a trustee. *See generally Cowans Bankruptcy Law & Practice*, §§ 2.4 & 2.10 (1989).

---

[3] A somewhat more complicated set of principles governs the class of former high-level executive branch employees whose activities are subject to 18 U.S.C. § 207(c). *See infra* pp. 125-26 .

[4] The trustee is deemed to be an officer of the bankruptcy court, *see, e.g., In re Beck Indus., Inc.*, 725 F.2d 880, 888 (2d Cir. 1984) (citing *King v. United States*, 379 U.S. 329, 337 n.7 (1964)), and the court may remove him for cause, 11 U.S.C. § 324(a).

He may be elected by the creditors of the estate. 11 U.S.C. § 702. He may be appointed by the bankruptcy court. *Id.* § 1104(a). He may be appointed by the United States Trustee from a panel of "private trustees" selected and overseen by the United States Trustee. 28 U.S.C. § 586(a)(1) & (3); 11 U.S.C. § 701(a)(1). Finally, the United States Trustee may serve as a trustee, 28 U.S.C. § 586(a)(2), 11 U.S.C. § 701(a)(2), as may his employees, 28 U.S.C. § 586(b).

II. Analysis

The conflict of interest laws distinguish between the activities of current executive branch employees and those of former employees.

A. Current Federal Employees

Section 205 of title 18 imposes criminal sanctions upon current federal employees who, "*other[] than in the proper discharge of [their] official duties*," act as "agent[s] or attorney[s] for anyone before any . . . court" in connection with any matter "in which the United States *is a party or has a direct and substantial interest.*" (Emphases added.) All bankruptcy trustees serve as fiduciaries of the estate as a whole before the bankruptcy court and, hence, clearly would come within the meaning of "agent[s]" in section 205.

Similarly, section 203(a) of title 18 imposes criminal sanctions upon current federal employees who, "otherwise than as provided by law for the proper discharge of official duties . . . demand[], seek[], receive[], accept[], or agree[] to receive or accept any compensation for any representational services, as agent or attorney or otherwise, rendered or to be rendered" in relation to any proceeding "in which the United States is a party or has a direct and substantial interest, before any . . . court." The activities of an employee acting as a trustee would implicate section 203, because trustees — other than United States Trustees and their employees[5] — receive compensation for their services from the court-supervised distribution of assets in the estate. *See* 11 U.S.C. § 326.

The activities of a current federal employee as trustee will fall outside the scope of sections 203 and 205 in two instances. First, sections 203 and 205 are inapplicable where the United States is not a party to and does not have a "direct and substantial interest" in the bankruptcy proceeding in question.[6] The determination of whether these two conditions obtain in a particular bankruptcy proceeding will turn upon a fact-specific inquiry. Whether the

[5] On the applicability of both sections 203 and 205 to such officials, *see infra* p. 124.

[6] In the event that sections 203 and 205 are inapplicable for this reason, there are also restrictions upon outside employment and income for a limited class of high-level executive employees who are not career civil servants and "whose rate of basic pay is equal to or greater than the annual rate of basic pay in effect for grade GS-16 of the General Schedule." *See* Ethics Reform Act of 1989, Pub. L. No. 101-194, § 601, 103 Stat. 1716, 1760-62 (adding 5 U.S.C app. §§ 501-502).

United States is a creditor of the estate or otherwise has a "direct and substantial interest" in the bankruptcy proceeding from the standpoint of tax liability are merely two examples of the considerations that may come into play.

Second, sections 203 and 205 are inapplicable where a current federal employee is engaged in "the proper discharge of official duties" in his capacity as trustee. This language permits a United States Trustee and his subordinates to serve as trustees in bankruptcy. The United States Trustee is an officer of the Department of Justice[7] and is expressly authorized to "serve as and perform the duties of a trustee in a case under title 11 when required under title 11 to serve as trustee in such a case." 28 U.S.C. § 586(a)(2). Thus, when a United States Trustee or an employee acting under his authority serves as a trustee pursuant to 28 U.S.C. § 586(a)(2), such representational activities constitute "official duties" under the statute and, hence, fall outside of sections 203 and 205.

Conversely, when the trustee is either (1) an individual drawn from the panel of private trustees by the United States Trustee or (2) an individual selected by the court or by the creditors, he does not perform official government duties; instead, he acts solely in the fiduciary capacity of trustee on behalf of a private estate. Given the multitude of potentially competing interests to which a trustee owes a fiduciary duty, we believe that a trustee who is not a United States Trustee or an employee acting under his authority cannot be said to be performing official duties, even when the United States happens to be among the creditors of the estate. Under such circumstances, the trustee must be viewed as "a representative of the estate, not an officer, agent, or instrumentality of the United States." *In re Hughes Drilling Co.*, 75 B.R. 196, 197 (Bankr. W.D. Okla. 1987).

These conclusions are consistent with advice we provided in 1977, in which we noted that Congress intended sections 203 and 205 to guard against the risk that federal employees might ally themselves with private interests in matters of concern to the Government. *See* 1 Op. O.L.C. 110, 111 (1977).[8] In light of this purpose, we concluded that neither section 203 nor section 205 prohibits an Assistant United States Attorney from temporarily exchanging duties with an Assistant Federal Public Defender: "Instead of acting as private individuals or affiliates of a nongovernmental organization, participating Assistant U.S. Attorneys would be assigned by th[e] Department [of Justice] to the Public Defender Office, *another Federal Government agency*, and would perform the official duties of that organization under its supervision." *Id.* (emphasis added).[9] By contrast, we noted that our analysis would

[7] The Attorney General has authority both to appoint and to remove United States Trustees. 28 U.S.C. § 581(a) & (c). In addition, the Attorney General supervises and provides assistance to United States Trustees. *Id.* § 586(c).

[8] The versions of section 203 and 205 then in force were virtually identical, in relevant part, to the current provisions.

[9] Attorneys employed by a Federal public defender organization are officers of the judicial branch. *See* 18 U.S.C. § 3006A(g)(2)(A).

not apply "to the assignment of Department of Justice attorneys to a *private* legal services organization." *Id.* at 111 n.4 (emphasis added).

Thus, under our 1977 opinion, United States Trustees and their employees who serve as trustees would not be subject to sections 203 and 205 because they would be performing their official duties required by statute. In contrast, other current federal employees who serve as trustees would not be performing official duties in that capacity absent express statutory authorization such as is found in the United States Trustee statute. Moreover, it cannot be said that such employees, when serving as trustees, are performing duties of some other federal agency empowered to undertake trustee activities. Rather, current federal employees who serve as trustees act solely as fiduciaries for private estates and, as such, are analogous to the government attorneys acting on behalf of private legal service organizations whom we noted would run afoul of sections 203 and 205.

B. Former Federal Employees

Section 207 of title 18 governs the representational activities of former executive branch employees. Under subsection (a) of section 207, a former executive employee may not "make[] any oral or written communication on behalf of any other person (except the United States) to . . . any department, agency, [or] court . . . of the United States" in connection with any matter "*in which the United States . . . is a party or has a direct and substantial interest*" and in which the employee "participated personally and substantially" during his government service. (Emphasis added.) Similarly, subsection (b) bars a former executive branch employee for two years from acting as "agent or attorney for . . . any other person (except the United States)" in connection with any matter "in which the United States . . . is a party or has a direct and substantial interest" and which was either "pending under [the employee's] official responsibility" within one year prior to his departure from the Government or in which the employee "participated personally and substantially."

Given that a trustee in bankruptcy would act as the fiduciary of an entity other than the United States, subsections (a) and (b) would prohibit a former executive branch employee from serving as a trustee in matters that were under his supervision or with respect to which the employee participated while in government service, unless the particular bankruptcy proceeding is one in which the United States is not a party and lacks a "direct and substantial interest." Again, the determination of whether the United States has such an interest will turn upon the facts of the particular case.

Finally, subsection (c) of section 207 forbids certain high-level executive branch officials for one year from communicating with their former departments or agencies on behalf of anyone other than the United States in any matter "pending before such department or agency *or* in which such department

or agency has a direct and substantial interest." (Emphasis added.) As noted above, we believe that a former employee acting as trustee does act on behalf of parties other than the United States. Thus, such an employee would be prohibited from acting as trustee for one year in any matter in which his former department or agency has a "direct and substantial interest" or which is currently pending before that department or agency.

III. Conclusion

We conclude that:

(1) Sections 203 and 205 of title 18 do not prohibit current executive branch employees from serving as bankruptcy trustees, if the United States is not a party to and lacks a "direct and substantial interest" in the particular bankruptcy proceeding. Otherwise, sections 203 and 205 bar current employees, except for United States Trustees and their employees, from serving as trustees in bankruptcy.

(2) Subsections (a) and (b) of 18 U.S.C. § 207 do not prohibit former executive branch employees from serving as trustees if the United States is not a party to and does not have a "direct and substantial interest" in the particular bankruptcy proceeding. Where the United States has such an interest, however, section 207(a) and (b) would prohibit a former executive branch employee from serving as a trustee in matters with respect to which he participated, or which fell under his supervision, while he was in government service. With respect to the narrow class of former high-level executive officials within subsection (c) of 18 U.S.C. § 207, such persons may not serve as trustees where the matter involved is one pending before the official's former agency or is one in which that agency has a "direct and substantial interest."

LYNDA GUILD SIMPSON
Deputy Assistant Attorney General
Office of Legal Counsel

Employment Status of the Members of the Board of Directors of the Federal Housing Finance Board

The Financial Institutions Reform, Recovery, and Enforcement Act of 1989, which created the Federal Housing Finance Board, permits the members of the Board of Directors of the FHFB to serve on a part-time basis.

July 11, 1990

MEMORANDUM OPINION FOR THE CHAIRMAN
FEDERAL HOUSING FINANCE BOARD

This memorandum responds to your request for a summary which could be made available to the Congress, of the reasoning underlying our January 31, 1990, opinion for the White House Counsel's Office regarding the service of the members of the Board of Directors of the Federal Housing Finance Board.

I. BACKGROUND

The Federal Housing Finance Board ("FHFB") was established by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, § 702(a), 103 Stat. 183, 413 (codified at 12 U.S.C. § 1422a(a)), for the purpose of overseeing and regulating the Federal Home Loan Banks. The Federal Home Loan Bank Board ("FHLBB") had previously supervised the Federal Home Loan Banks. The FHLBB also exercised regulatory supervision over federally insured savings and loan associations. *See* 12 U.S.C. §§ 1437, 1464-1470, & 1724-1730i (1988). FIRREA abolished the FHLBB and distributed its duties among several agencies. The Office of Thrift Supervision ("OTS") was assigned primary regulatory authority over the savings and loan industry, *see* 12 U.S.C. § 1462a(e), *as added by* FIRREA, § 301, 103 Stat. at 278-79, and the FHFB was given regulatory authority over the Federal Home Loan Banks. *See* 12 U.S.C. § 1422a & 1422b, *as added by* FIRREA, § 702(a), 103 Stat. at 413-14. Other functions previously performed by the FHLBB relating to the management of deposit insurance and the resolution of cases were transferred

respectively to the Federal Deposit Insurance Corporation ("FDIC") and the Resolution Trust Corporation ("RTC"). FIRREA, §§ 202 & 501(a), 103 Stat. at 188, 363-93, (codified at 12 U.S.C. §§ 1811 & 1441a).

The FHFB is to be managed by a Board of Directors comprising five members: the Secretary of Housing and Urban Development and four individuals appointed by the President with the advice and consent of the Senate. 12 U.S.C. § 1422a(b)(1).[1] The four directors appointed by the President are required to have, among other qualifications, "extensive experience or training in housing finance" or "a commitment to providing specialized housing credit." *Id.* § 1422a(b)(2)(A). At least one of these four directors must be chosen "from an organization with more than a 2-year history of representing consumer or community interests on banking services, credit needs, housing, or financial consumer protections." *Id.* § 1422a(b)(2)(B). These four directors may not hold any other appointed office or serve as an officer or director of a Federal Home Loan Bank or of any member of any such Bank, nor may they have any financial interest in any such member. *Id.* § 1422a(b)(2)(A) & (C).

II. DISCUSSION

No provision of FIRREA expressly or impliedly requires that the members of the Board of Directors of the FHFB serve on either a full-time or a part-time basis. Accordingly, the employment status of the members must be determined by construing the relevant provision of FIRREA, as a whole, in light of the Act's legislative history.[2]

There is little legislative history on this question. From the legislative history that does exist, however, it appears that Congress contemplated that members of the Board of Directors would serve on a part-time basis. The conference report and the Senate report on the bill that became law are silent on the part-time or full-time status of the members of Board of Directors. *See* H.R. Conf. Rep. No. 222, 101st Cong., 1st Sess. 423-24 (1989), *reprinted in* 1989 U.S.C.C.A.N. 432, 462-63; S. Rep. No. 19, 101st Cong., 1st Sess. 364-65 (1989) (discussing proposed "Federal Home Loan Bank

[1] Regardless of whether the directors serve on a part-time or a full-time basis, this scheme comports with the Appointments Clause of the Constitution, Article II, Section 2, pursuant to which the President appoints officers of the United States with the advice and consent of the Senate.

[2] We do not believe that the matter may be resolved by applying a presumption that Congress would have expressly specified part-time employment had it so intended. While such a presumption might be appropriate where the duties of the office are such that full-time employment must have been intended, that is not the case here. *See infra* pp. 128-29. Moreover, on a number of occasions Congress has been equally clear in expressly requiring *full-time* employment. *See, e.g.*, 16 U.S.C. § 831a(e) ("No member of the [Tennessee Valley Authority Board of Directors] shall, during his continuance in office, be engaged in any other business, but each member shall devote himself to the work of the Corporation."); 42 U.S.C. § 5841(e) ("No member of the [Nuclear Regulatory Commission] shall engage in any business, vocation, or employment other than that of serving as a member of the Commission."). Thus, there is no more reason in this context to indulge a presumption that Congress intended for the Directors to serve full-time, than there is that it intended for them to serve part-time.

Agency"). However, the House report on the bill reported by the House Banking, Finance and Urban Affairs Committee does address this issue, and there is no relevant difference between the applicable provisions in that bill and those contained in the bill that was enacted into law.[3] The House report unequivocally states that "members of the Board of Directors will not serve on a full-time basis." H.R. Rep. No. 54(I), 101st Cong., 1st Sess. 455 (1989), *reprinted in* 1989 U.S.C.C.A.N. 86, 251.

An analysis of the provisions of FIRREA that created the FHFB and defined its duties supports the conclusion that Congress expected that members of the FHFB Board of Directors may serve on a part-time basis. Although the members of the FHLBB served on a full-time basis, FIRREA divided the duties of the FHLBB among at least four different agencies and assigned the five members of the FHFB substantially fewer functions than had been performed by the three members of the FHLBB. In particular, the burdensome tasks of supervising thrift institutions and of managing case resolutions were assigned to OTS and RTC respectively, not to the FHFB. Also, oversight of deposit insurance was transferred to the Federal Deposit Insurance Corporation. The House report thus described the FHFB as "a small, effective and efficient governing body." H.R. Rep. No. 54(I), at 455, 1989 U.S.C.C.A.N. at 251. In light of the fact that the FHFB is to perform substantially fewer tasks with a greater number of members, it was fully reasonable for Congress to conclude that full-time service would not be essential for members of the FHFB Board.

We also note that FIRREA authorizes the FHFB to "employ, direct, and fix the compensation and number of employees, attorneys, and agents of the Federal Housing Finance Board." FIRREA, § 702(a), 103 Stat. at 414 (codified at 12 U.S.C. § 1422b(b)(1)). This provision permits the FHFB members to employ a staff to whom it may delegate various functions.[4] Congress'

---

[3] It has been argued that the proposed status of the Board changed from part-time to full-time when the proposed composition of the Board in the House bill was changed to eliminate the two Federal Home Loan Bank presidents. Not only is there no evidence that the proposed part-time status was attributable to the inclusion of these bank presidents; there is no evidence, affirmative or inferential, that Congress intended the status of the Board to change from part-time to full-time as a consequence of the recomposition. If anything, the evidence is to the contrary because the Secretary of Housing and Urban Development is one of the five members of the Board of Directors. 12 U S.C. § 1422a(b)(1)(A). Obviously, Congress did not expect the Secretary to serve full-time as a FHFB Director.

[4] In its May 9, 1990, memorandum on this subject, the American Law Division of the Congressional Research Service appeared to suggest that FIRREA generally prohibits the delegation of discretionary duties by the FHFB. This suggestion is incorrect. FIRREA merely states that "in no event shall the Board delegate any function to any employee, administrative unit of any Bank, or joint office *of the Federal Home Loan Bank System*" FIRREA, § 702(a), 103 Stat at 414-15 (codified at 12 U.S C. § 1422b(b)(1)) (emphasis added). Section 701 of FIRREA defines the term "Federal Home Loan Bank System" to mean "the Federal Home Loan Banks under the supervision of the Board" 103 Stat at 412 (codified at 12 U.S.C § 1422(2)(B)). Accordingly, the nondelegation provision only operates to prevent the FHFB from delegating discretionary supervisory duties to the Federal Home Loan Banks, their employees, or their offices -- the entities being regulated. It does not prohibit the FHFB from delegating functions to its own employees This construction of section 702 is confirmed by the comments on the Senate bill, from which this provision originated. *See* S. Rep. No. 19, at 364 ("The Agency [later renamed the FHFB] may not delegate any of its functions to any employee or administrative unit *of any FHL Bank*.") (emphasis added).

decision to empower the FHFB both to employ however many employees it needs and to delegate to those employees many of its functions is consistent with Congress' apparent belief that part-time service would be permissible. Accordingly, we conclude that the members of the Board of Directors may serve on a part-time basis. Indeed, the only available direct evidence is that Congress expected that the Directors would serve part-time.

We do not believe that any of the provisions of FIRREA are inconsistent with this conclusion. In particular, the fact that FIRREA provides for the Chairperson and other members of the Board of Directors to be compensated respectively at Levels III and IV of the Executive Schedule, *see* FIRREA, § 702(a), 103 Stat. at 415 (codified at 12 U.S.C. § 1422b(b)(1)), does not imply that these individuals must serve in a full-time capacity. This provision merely fixes the *rate* of compensation. Federal law provides the formula for calculating the salary of a part-time employee from the Executive Schedule if the annual rate of compensation is known. *See* 5 U.S.C. § 5505. Moreover, the original House bill established the same rates of compensation for these officials, *see* H.R. 1278, § 723, 101st Cong., 1st Sess. (as reported by the House Comm. on Banking, Finance and Urban Affairs), *reprinted in* H.R. Rep. No. 54(1), at 190, at the same time that the House report expressly acknowledged that these individuals would not serve full-time. *Id.* at 455, 1989 U.S.C.C.A.N. at 251.

Finally, we do not believe that the fact that FIRREA contains conflict-of-interest and incompatibility provisions applicable to the FHFB implies that the members of the Board of Directors must serve on a full-time basis. Section 702 of FIRREA provides that each of the appointed members of the Board of Directors of the FHFB may not "hold any other appointed office during his or her term as director" and may not "serve as a director or officer of any Federal Home Loan Bank or any member of any Bank" or "hold shares of, or any other financial interest, in, any member of any such Bank." 103 Stat. at 413 (codified at 12 U.S.C. § 1422a(b)(2)(A) & (C)). These provisions serve purposes that are wholly independent of the employment status of the Board of Directors and do not in any way suggest that Congress intended for these members to serve on a full-time basis. The purpose of the conflict-of-interest provisions is to ensure the impartiality and objectivity of the members of the Board. The incompatibility provision ensures the FHFB's status as an "independent agency in the executive branch," 12 U.S.C. § 1422a(a)(2), by forbidding the simultaneous appointment of, for example, a Treasury Department official to the Board of Directors of the FHFB.[5] The need for such restrictions exists regardless of whether the members serve full-time or part-time. Indeed, if anything, the need for these

[5] The legislative history indicates that Congress was concerned that the FHFB not come under the indirect control of other executive branch agencies. *See, e.g.*, H.R. Rep. No. 54(I), at 454, 1989 U.S.C.C.A.N. at 250 ("The Treasury Department's oversight and direction of the Director of the Office of Thrift Supervision shall not extend, directly or indirectly, to the Federal Housing Finance Board . . . ").

provisions is *greater* when members serve on a part-time basis and therefore have more time available to engage in the kind of activities that Congress wished to foreclose. The House report appears to have recognized as much when it stated that "[a]lthough members of the Board of Directors will not serve on a full-time basis, no appointive member of the Federal Housing Finance Board may hold any other federally appointive office." H.R. Rep. No. 54(I), at 455, 1989 U.S.C.C.A.N. at 251.

CONCLUSION

Construing the relevant provisions of FIRREA in light of the Act's legislative history, we conclude that the members of the Board of Directors of the FHFB may serve on a part-time basis. Indeed, the House report expressly states that the members would not serve full-time service. Part-time service appears fully consistent with the reduced duties and increased membership of the FHFB as compared with its predecessor, the FHLBB.

J. MICHAEL LUTTIG
Acting Assistant Attorney General
Office of Legal Counsel

Reimbursing Justice Department Employees for Fees Incurred in Using Private Counsel Representation at Congressional Depositions

The Department of Justice may reimburse its employees for legal fees they incur in using private counsel representation at congressional depositions in circumstances where the Department was planning to provide Department counsel for official capacity testimony but the congressional committee refused to permit Department counsel to be present.

The Department should make individualized inquiries to determine whether the representation of particular employees includes representation of purely personal interests that should not be reimbursed.

September 27, 1990

MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL

You have asked for our opinion as to whether the Department may reimburse Department employees for legal fees they incur in using private counsel representation at depositions that are part of the investigation by the House Judiciary Committee into the Department's automated data processing procurement practices.[1] For the reasons set forth below, we conclude that the Department may reimburse the employees. You have not asked us to make the individualized inquiries necessary to determine whether the representation of particular employees includes representation of purely personal interests that should not be reimbursed. We do note, however, that we are unaware at this time of any such interests. The Civil Division concurs in the analysis and conclusions contained in this opinion.

I. Background

The House of Representatives Committee on the Judiciary is conducting an extensive oversight investigation into the Department's automated data processing ("ADP") procurement practices, with particular attention to the Inslaw and Project Eagle procurements.[2] Early in its investigation, the Committee requested interviews of Department employees concerning the

[1] This opinion does not apply to the special circumstances of a former Department employee who is currently the subject of an Inspector General investigation.

[2] Because the principal focus of the investigation is on the Inslaw procurement, we will refer to the investigation as the "Inslaw investigation."

Departments handling of these procurements. In light of the oversight purpose of the interviews (*i.e.*, to obtain information from the Department in order to determine what legislative action, if any, Congress should take with respect to the Department's ADP procurement practices), the Department determined that it was in the Department's interests to make the employees available for the interviews.

For the same reasons, the Department treated the interviews as being given in the employees' official rather than individual capacities and applied its longstanding policy that when Department employees are asked in their official capacities to give oral testimony for a congressional investigation (whether at a hearing, interview or deposition), a Department counsel or other representative will normally accompany the witness. When the Department informed the Committee of its interest in having Department counsel present during the interviews, the Committee objected, stating that the Department presence would represent a conflict of interest and it might discourage the employees from speaking candidly or otherwise have a "chilling effect" on them.

After a period of discussion, the Committee and the Department reached agreement on the conditions of the employee interviews, with the Department acquiescing to the committee's insistence that the interviews take place without Department counsel being present. The Department made it clear that its agreement to make an exception to the longstanding Department policy was based on the specific circumstances of the Inslaw investigation and that these interviews should not be viewed as precedent for future oversight investigations of the Department by the Committee. The Committee staff proceeded to interview the employees without Department (or any other) counsel present.

Subsequently, the Committee informed the Department of its intention to conduct depositions of certain Department employees. The depositions were to differ in form from the previously conducted interviews principally in that the witnesses would testify under oath and the testimony would be recorded. In light of these differences, the Department gave renewed consideration to whether it should adhere to the longstanding Department policy and insist that Department counsel be present at the depositions. When the Department preliminarily raised its concerns with the Committee, the Committee indicated that it would adhere to its prior position of not permitting Department counsel to be present and that it was prepared to subpoena the employees (in which case, it asserted, the House rules would only allow private counsel to be present to advise the witness of his constitutional rights). You then decided that the Department would again acquiesce to the Committee's position and not insist that Department counsel be present but that if any employee wanted counsel at his deposition, the employee could retain private counsel and the Department would reimburse the employee.

Your decision that the Department would reimburse employees for their private counsel fees was based on the specific circumstances presented. These

circumstances include that the Committee is not permitting the Department to adhere to its longstanding policy of providing Department counsel when employees give congressional testimony in their official capacities, that it is not fair to expect employees to pay for private counsel when testifying in their official capacities, that there are no pending criminal investigations involving the employees, and that there is no other divergence between the interests of the Department and the employees.

At the time you made your decision, the Civil Division and this Office had orally advised you that the Department has legal authority to make such reimbursement. You have asked that this advice be confirmed in a written opinion from this Office. We have prepared this opinion in consultation with the Civil Division.

II. Discussion

The vast majority of Department reimbursements of private counsel fees involve payment, pursuant to the Department's representation guidelines, to employees who seek representation in their *individual* capacity; in these cases the acts being questioned are within the scope of the employees' employment but the Department has some conflict of interest. On rare occasions reimbursement has also been made for employees who need representation in their *official* capacities but for institutional reasons the Department must seek to represent them indirectly through reimbursed private counsel. The present situation is one of the latter occasions, due to the refusal of the Judiciary Committee to permit the Department to follow its longstanding policy that Department counsel should be present at official capacity testimony for congressional investigations.[3]

The general principles on Departmental authority that apply in these circumstances are well established:

---

[3] For your information, the Department's representation guidelines are inapplicable here because they only

> govern the legal representation of employees "sued or subpoenaed in [their] *individual capacities*." 28 C.F.R. § 50.15(a). Representation of employees in their *official capacities* is provided automatically, without reference to the representation guidelines. Since suits or subpoenas against employees in their official capacities are tantamount to suits or subpoenas against the government itself, official capacity representation is virtually always provided by government attorneys. By contrast, when an employee is sued or subpoenaed in his individual capacity, there is the potential for conflict between the individual interest of the employee and the interests of other employees. . . . [The] representation guidelines are designed to set standards for determining 1) whether to provide individual capacity representation, . . . and if so, 2) whether to provide that representation by government counsel or by private counsel retained at government expense.

Memorandum for the Deputy Attorney General from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Reimbursement of Anne M. Burford for Private Counsel Fees*, at 3 n.3 (May 3, 1983) ("Burford Memorandum").

> The practice of retaining and paying private attorneys was born of necessity. From time to time, cases arise in which it is awkward from an institutional or professional standpoint for the Attorney General to represent government employees directly, through DOJ attorneys, even though it is clear that representation would be in the interests of the United States. . . . [I]n such cases . . . the Attorney General has "implied authority" to provide representation . . . through a mechanism that will enable him to resolve the professional difficulty. Using his general authority to contract for services that are necessary in the performance of his statutory functions, he may hire private lawyers to do indirectly what it would be awkward or inappropriate for the United States to do directly through DOJ lawyers.[4]

The conclusion that the Attorney General has such implied authority is based on that fact that he possesses not only representational authority, *see* 28 U.S.C. § 517, but executive authority as well, *see* 28 U.S.C. § 509, and the latter may be used in furtherance of the former.[5]

A number of opinions of this Office specifically hold that where Department representation would ordinarily be provided in a congressional investigation but is inappropriate under the specific circumstances, the Department may reimburse a government employee for legal fees incurred using private counsel.[6] Indeed, one opinion addressed a situation that was strikingly similar to the present situation. During the course of an investigation by the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs into the Labor Department's handling of Teamsters'

---

[4] Memorandum for Edward C. Schmults, Deputy Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Civil Division's Recommendations Concerning Reimbursement of Legal Expenses*, at 2-3 (June 24, 1981).

[5] *See* Memorandum for Glen E. Pommerening, Assistant Attorney General for Administration, from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, *Re: Authority for Employment of Outside Legal Counsel*, at 6 (Mar. 4, 1976) ("Pommerening Memorandum") ("[I]nterests of the United States, as well as interests of the individual Federal employees, are at stake. Because of possible conflicts of interest, representation by Department employees is not feasible. In these circumstances, . . . the Attorney General can use his general authority as the head of the Department, *see* 28 U.S.C. 509, to further the . . . interests of the United States by retaining private attorneys."); Memorandum for James A. Barnes, General Counsel, Environmental Protection Agency, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Payment of Private Counsel Fees Incurred by Anne M. Burford*, at 3 (Mar. 12, 1984) ("When the Department of Justice provides representation to agency employees, it does so pursuant to 28 U.S.C § 517 . . . .").

[6] *See* Burford Memorandum, n.3 (the government may reimburse former Administrator of EPA for private counsel fees incurred in connection with congressional investigations into management and activities of EPA), Memorandum for J. Paul McGrath, Assistant Attorney General, Civil Division, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Reimbursing Norman Edward Perkins for Attorney's Fees* (Mar. 15, 1982) ("Perkins Memorandum") (Justice Department may reimburse Labor Department employee for private counsel legal expenses incurred in testimony before Senate subcommittee investigative hearing); Pommerening Memorandum, n.5 (Justice Department may retain private counsel for employees of various agencies in connection with congressional hearings and civil litigation).

Union matters, many Labor Department employees testified before the Subcommittee while accompanied by Justice Department counsel. However, the Chairman of the Subcommittee, Senator Nunn, objected to Norman Edward Perkins and one other Labor Department employee being accompanied by Justice Department counsel because the Subcommittee suspected these individuals of criminal conduct. The apparent rationale for the Subcommittee position on Department representation was that the Subcommittee "wished to avoid a conflict of interest which could have arisen if Justice later decided to prosecute Mr. Perkins." Perkins Memorandum at 3. Upon discussing the matter with Senator Nunn, Attorney General Civiletti acquiesced to the Senator's preference and agreed that Perkins and the other employee would not be accompanied by Department counsel. *Id.* at 2. Perkins retained private counsel (*id.* at 1) and reimbursement of his counsel fees was approved by this Office's opinion (*id.* at 6).

The Perkins situation was basically the same as the present one. "In the absence of the Nunn-Civiletti agreement, it appears that Perkins would have been represented by a Justice Department attorney, as were the other Labor Department employees." *Id.* at 3. Likewise, Department counsel would be representing the employees at the Judiciary Committee depositions but for the Department's agreement (by acquiescing to the Committee's position) that Department counsel would not be present at the employee interviews or depositions. In addition, in the two situations Senator Nunn and the Judiciary Committee were each concerned that Department representation would present a conflict of interest. Although the Department in fact had no conflict of interest in the Perkins situation because no criminal investigation had been initiated (*see id.* at 4), and the Department has no conflict of interest in the present situation because the employees are appearing in their official capacities and there is no pending criminal investigation, in both cases the Department acquiesced to the congressional committee's position and made an exception to the longstanding policy that government counsel accompany government employee witnesses.

Although the Department's representation guidelines do not apply in this situation, *see* n.3 *supra*, reimbursing the employees is consistent with the principles underlying the guidelines. In reaching this conclusion, we adopt the analysis we used in the Perkins matter.[7] We noted there that the guidelines authorize use of private counsel where the employee is the subject of a federal criminal investigation or the representation would involve asserting a position that conflicts with a government position. We indicated that while there was no ongoing criminal investigation or conflicting positions, "[b]oth the concern of possible criminal conduct and the possible conflict arising

[7] In a comment that underscores the factual similarities between the Perkins matter and the present situation, we noted in the Perkins opinion that "[b]ecause denial of representation appears to have been based not on an interpretation of the Justice Department's Representation Guidelines, but rather on urging of a United States Senator, the usual grounds for permitting representation by private counsel at federal expense are not readily applicable." *Id.* at 3.

from Justice Department representation of Perkins appear to have motivated the agreement between Senator Nunn and Attorney General Civiletti . . . [and] therefore . . . reimbursement . . . can be supported by the principles underlying [the guidelines]." *Id.* at 5. Similarly, in the present situation, even though there are no pending criminal investigations or other conflicting positions, the Judiciary Committee has asserted that the Department has a conflict of interest, and in light of that position the Department has acquiesced to the Committee's insistence that Department counsel not be present.

Finally, we should make it clear that this opinion addresses only the question you asked: whether as a general matter the Department has authority to reimburse Department employees for private counsel fees in connection with the Judiciary Committee depositions. To answer that question in the affirmative, it has only been necessary to find that sufficient governmental interests are at stake in all of the depositions to justify representation by Department counsel — and when the Committee objected to the presence of Department counsel, representation by private counsel paid for by the Department.

You have not asked us to make the individualized inquiries necessary to determine whether the representation of any particular employee to whom this opinion applies may involve "purely personal" as well as governmental interests. Thus, we do not opine on "what, if any, portion of the representation" of particular employees should not be "provided by Government attorneys or at Government expense." Perkins Memorandum at 4.[8] We do note, however, that it would appear at this time that any personal interests are merely incidental to the governmental interests. After looking into the matter thoroughly, the Civil Division knows of no personal or official wrong-doing of which the employees could fairly be accused. Like all witnesses before Congress, the employees have "personal" interests such as being treated fairly, having a full and fair opportunity to respond, and avoiding being made an unfair target of congressional criticism; beyond that, these witnesses are appearing before Congress only because they did their jobs as Department employees. These personal interests would not appear to be of the kind this Office has previously identified as "purely personal."[9]

CONCLUSION

We conclude, under these specific and unusual circumstances, that the Department may reimburse Department employees for legal fees they incur in connection with their representation by private counsel at the depositions

---

[8] *See also Representation of White House Employees*, 4B Op. O.L.C. 749, 750 (1980) ("White House Memorandum") ("No government attorney, and no private attorney retained at government expense may represent the *personal interests* of White House employees in connection with the Senate investigation ")

[9] *See* White House Memorandum, 4B Op. O.L.C. at 753 ("[T]he interests in avoiding federal criminal prosecution, civil liability to the United States or adverse administrative action by a federal agency are clearly personal rather than governmental interests.").

being conducted by the Judiciary Committee. You have not asked us to make the individualized inquiries necessary to determine whether the representation of particular employees includes representation of purely personal interests that should not be reimbursed. We do note, however, that we are unaware at this time of any such interests. The Civil Division concurs in our analysis and conclusions.

JOHN O. McGINNIS
Deputy Assistant Attorney General
Office of Legal Counsel

Attorney General's Authority with Respect to the Regulatory Initiatives of the U.S. Parole Commission

The Attorney General has the authority to require the United States Parole Commission, a component of the Department of Justice for administrative purposes, to participate in Department-wide regulatory coordination that does not entail substantive control of the Commission's regulatory initiatives. The Attorney General thus may require the Commission to submit any proposed regulations to the Office of Management and Budget's Office of Information and Regulatory Affairs through the Department's Office of Policy Development and may also require the Commission to keep OPD informed of any regulatory initiatives under consideration.

The Commission's statutory status as an "independent agency" within the Department precludes the Attorney General as a general matter from asserting substantive control over the Commission's policymaking, including its issuance of regulations. Accordingly, the Attorney General may not require the Commission to obtain OPD approval of its proposed regulations.

October 10, 1990

MEMORANDUM OPINION FOR THE DIRECTOR
OFFICE OF POLICY DEVELOPMENT

This memorandum responds to your request for our opinion as to whether the Attorney General may require the United States Parole Commission ("Commission") to participate in a centralized regulatory coordination process established by the Attorney General at the request of the Office of Management and Budget ("OMB"). Specifically, you asked whether the Attorney General may require the Commission to consult the Office of Policy Development ("OPD") concerning the Commission's regulatory initiatives and to submit proposed regulations to OPD in advance of their submission to OMB's Office of Information and Regulatory Affairs ("OIRA"). As explained more fully below, we conclude that the Attorney General has the authority to require the Commission, as an administrative unit of the Department of Justice, to coordinate its regulatory activities with OPD and other components of the Department. The Attorney General thus may require the Commission to submit any proposed regulations to OIRA through OPD and may also require the Commission to keep OPD informed of any regulatory initiatives under consideration. The Commission's statutory status as an "independent agency" within the Department, however, precludes the Attorney

General as a general matter from asserting substantive control over the Commission's policymaking, including its issuance of regulations. Accordingly, the Commission may not be required to obtain OPD approval of its proposed regulations.

II.

On April 10, 1989, the Administrator of OIRA sent a memorandum to the Attorney General stating that OIRA believed that the process of regulatory review and coordination "would be improved if the Department established a single point of contact for working with various Justice offices and OMB staff on the review of rules." Memorandum for Richard Thornburgh, Attorney General, from J. Plager, Administrator, OIRA (Apr. 10, 1989). The memorandum explained that a "single point of contact would help avert confusion over what Departmental regulations are subject to OMB review and speed the overall Justice and OMB review process." *Id.* Pursuant to this recommendation, the Attorney General sent a memorandum on March 14, 1990 to the heads of all components of the Department of Justice outlining new procedures for the coordination of Departmental regulatory initiatives. Memorandum from Dick Thornburgh to All Component Heads (Mar. 14, 1990). In the memorandum, the Attorney General designated OPD as the Department's principal point of contact in the coordination of the regulatory clearance process. The Attorney General's memorandum states that all components "should consult with OPD with respect to proposed regulations at an early stage of the process for informal review," noting that this procedure "will allow OPD to generally coordinate the Department's rulemaking activities, and to identify potential policy inconsistencies informally early on." *Id.* at 2. In addition, when preparation of a proposed regulation is complete, it must be "transmitted to OPD *before* being submitted to OIRA for clearance." *Id.*

The Chairman of the Commission, Mr. Benjamin Baer, has since stated his view that the requirements of the Attorney General's March 14 memorandum do not apply to the regulatory initiatives of the Commission. Memorandum for T. Boyd, Director, Office of Policy Development, from B. Baer, Chairman, U.S. Parole Commission (Apr. 9, 1990). Mr. Baer asserted that, in view of the Commission's status as "an independent agency that promulgates its regulations pursuant to direct statutory authority," it is not subject to the procedures set forth in the Attorney General's memorandum, at least with respect to "the quite narrow issues of paroling policy and procedure that are covered by the Commission's regulations at 28 C.F.R. § 2.1 through § 2.64." *Id.* Mr. Baer assumed that it would "not be objectionable" if the Commission continued to submit its proposed regulations directly to OIRA for review. He noted, however, that "[r]egulatory initiatives such as proposed parole guideline changes that concern specific types of crimes are routinely coordinated with the appropriate DOJ components." *Id.* Mr. Baer

also stated that he would "be glad to send any U.S. Parole Commission regulatory initiatives to OPD for comment prior to the Commission's quarterly meetings." *Id.*

II.

The Commission was established in 1976 as "an independent agency in the Department of Justice." 18 U.S.C. § 4202.[1] The legislative history of the Act that created the Commission states that Congress intended the Commission to be "independent for policy-making purposes" but that the Commission would be "attached to the Department of Justice for administrative convenience." S. Rep. No. 369, 94th Cong., 1st Sess. 14 (1975), *reprinted in* 1976 U.S.C.C.A.N. 335, 336; *see also id.* at 20, 1976 U.S.C.C.A.N. at 342 ("The Commission is attached to the Department for administrative reasons but its decision-making machinery is independent . . . ."); H.R. Conf. Rep. No. 838, 94th Cong., 2d Sess. 20 (1976), *reprinted in* 1976 U.S.C.C.A.N. 351, 353 ("[The Commission is] independent of the Department of Justice for decision-making purposes."). Indeed, the Conference Report on the bill stated that "[t]he Commission is attached to the Department *solely* for administrative purposes." *Id.* at 21, 1976 U.S.C.C.A.N. at 353 (emphasis added); *see also* H.R. Rep. No. 184, 94th Cong., 1st Sess. 4 (1975) ("Except for administrative purposes, the Commission is to be independent of the Department . . . ."). Congress granted the Commission independence from the Department because it wanted to ensure that "parole decisionmaking [would] be independent of, and not governed by, the investigative and prosecutorial functions of the Department of Justice." 1976 U.S.C.C.A.N. at 353; *see also* S. Rep. No. 369, at 20, 1976 U.S.C.C.A.N. at 342 ("[The Commission's] decision-making machinery is independent so as to guard against influence in case decisions.").[2]

The Commission possesses independent statutory authority to "promulgate rules and regulations establishing guidelines for the [Commission's powers] and such other rules and regulations as are necessary to carry out a national parole policy." 18 U.S.C. § 4203(a)(1). Pursuant to this authority, the Commission has promulgated regulations relating to the standards and procedures governing the granting, regulation, and revocation of parole. *See* 28 C.F.R. §§ 2.1-2.66 (1989). The amendment of these regulations or the adoption of new regulations, if "necessary to carry out a national parole policy," is within the range of "policy-making" activities that Congress intended to be

[1] Chapter 311 of title 18 of the U.S. Code, consisting of sections 4201-4218, was repealed by section 218(a)(5) of Pub. L. No. 98-473, 98 Stat. 1837, 2027 (1984), effective Nov. 1, 1986. Section 235(b)(11)(A) of Pub. L. No. 98-473, 98 Stat. at 2032, provides, however, that chapter 311 shall remain in effect for five years after Nov. 1, 1986, as to certain specified individuals.

[2] The fact that the Commission is independent for policy-making purposes from the Attorney General does not in itself present a constitutional problem. Nothing in the statute creating the Commission purports to limit the *President*'s constitutional authority to supervise and control the Commission. Indeed, the Commission has always submitted its proposed regulations to OIRA for review.

generally independent from direct Departmental control. Although the adoption of a particular regulation might not compel a specific result in any given parole decision, Congress's grant of independent regulatory authority to the Commission, which Congress intended to be independent from the Department for "policy-making purposes," confirms that the Commission's independence is not limited to decisions in individual cases, but extends to the issuance of regulations governing the granting, regulation, and revocation of parole. Accordingly, we conclude that the Attorney General may not require the Commission to obtain OPD approval of its proposed regulations.[3]

Because the Commission remains "attached" to the Department for administrative purposes,[4] however, the Attorney General may require the Commission to participate in Department-wide regulatory coordination that does not entail substantive control of the Commission's regulatory initiatives. For example, this office previously informed the Commission that it was required to participate in the preparation of a unified calendar of the major regulations then under development in the Department, which was to be used by the President's Regulatory Council. Memorandum for Cecil C. McCall, Chairman, United States Parole Commission, from Larry A. Hammond, Deputy Assistant Attorney General, Office of Legal Counsel (Dec. 8, 1978). The Commission was also subject to the Attorney General's order providing for Departmental review of the Semi-Annual Agenda of Regulations that was required to be prepared under Executive Order No. 12044 by each component. Memorandum to Heads of Offices, Boards and Divisions (including the U.S. Parole Commission), from Larry A. Hammond, Deputy Assistant Attorney General, Office of Legal Counsel (May 14, 1979); *see also* Report on the Implementation of Executive Order No. 12044, "Improving Government Regulations", Att'y Gen. Order No. 831-79, § 111(A)(5), 44 Fed. Reg. 30,461, 30,463 (1979). Similarly, we believe that the Attorney General may require the Commission to keep OPD informed of its pending regulatory initiatives, so long as OPD does not thereby acquire any power to disapprove or delay the Commission's proposed regulations. The Attorney General may also require the Commission to submit its proposed regulations to OIRA through OPD, provided that OPD does not exercise substantive approval authority over the regulations.

---

[3] We note that OMB's memorandum to the Attorney General did not purport to delegate to the Attorney General the President's authority to oversee and supervise the substantive actions of the Commission. Therefore, we do not address whether the Attorney General could properly exercise, through delegation, the President's oversight authority, notwithstanding the Commission's statutory status as an "independent agency within the Department."

[4] Congress has expressly provided, however, that the Commission's budgetary requests shall be separate from those of any other component of the Department. 18 U.S.C. § 4203(a)(3) (1982).

CONCLUSION

We conclude that the Attorney General may require the Commission, a component of the Department for administrative purposes, to inform OPD of its regulatory initiatives and may also require the Commission to submit its proposed regulations to OIRA through OPD. The Commission's statutory status as an independent agency in the Department, however, prevents the Attorney General from requiring the Commission to obtain substantive approval of its proposed regulations from OPD.

J. MICHAEL LUTTIG
Acting Assistant Attorney General
Office of Legal Counsel

White House Communications Agency Expenses Incurred on Political or Personal Travel by the President

When the White House Communications Agency accompanies the President on travel, it may (and should) use appropriated funds to pay for any expense incurred for activities in furtherance of its official mission to provide a continuous communications capability to the President and his advisors, regardless of whether the travel is for official, political, or personal purposes.

The White House Communications Agency may use appropriated funds to pay for expenses incurred in connection with the provision of communications facilities and services for the official use of the President and his staff during Presidential travel.

Appropriated funds may be expended to facilitate official, but not political, communication between the President and the press.

October 22, 1990

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

This memorandum responds to your request for our opinion on which expenses of the White House Communications Agency ("WHCA"), if any, may be paid from appropriated funds when the President travels for political or other non-official purposes. We conclude for the reasons set forth below that virtually all of the activities which you have informed us that WHCA undertakes in connection with travel by the President are in furtherance of WHCA's official mission, and thus may be -- indeed, should be -- paid for out of appropriated monies, whether the President's trip is official, political, or personal in nature.[1]

I.

WHCA is a component of the White House Military Office, responsible for providing continuous communications services to the President, his senior staff, and the Secret Service, both at the White House and during presidential travel, domestic or international. Your memorandum of March

[1] We addressed in two prior opinions the general question of the allocation of expenses for political trips taken by the President. *See Payment of Expenses Associated with Travel by the President and Vice President*, 6 Op. O.L.C. 214 (1982) ("Olson Memorandum"); Memorandum for Robert J. Lipshutz, Counsel to the President, from John M. Harmon, Acting Assistant Attorney General, Office of Legal Counsel (Mar. 15, 1977) ("Harmon Memorandum").

28, 1990, details the principal functions performed by WHCA in connection with a routine presidential trip.[2] Approximately one week prior to a presidential visit, WHCA travels to the site, establishes staff offices, and installs telephone lines, satellite terminals, and other equipment necessary for continuous communications capability. These facilities and equipment are then used during the President's trip for communications between the President, his senior advisers, and the Secret Service, and the other departments and agencies of government and the general public. Staff telephones are generally provided "to permit staff and trip coordination." Nelson Memorandum at 2. The White House staff has been advised repeatedly, however, that it may not use WHCA communications equipment "for direct political purposes such as campaign fundraising and crowd-building." *Id.*

WHCA, as one of its communications functions, also arranges for the President's access to and communication with the press. One or two WHCA officers "provide services used in routine press advance work" for each site. *Id.* WHCA establishes an emergency press briefing center at each site for use if required.

For official presidential events, WHCA provides lighting and sound equipment. At political events, these services are procured from private sources, with WHCA merely providing technical advice. At all events, "WHCA controls the 'feed' to the sound system and shuts down power to the microphones at the appropriate conclusion of remarks." *Id.* WHCA furnishes a teleprompter whenever required, regardless of the nature of the event.

Certain WHCA communications functions also serve a security purpose. For instance, WHCA provies a bullet-proof podium for presidential events. WHCA also "sets up emergency public address system speakers at each site, primarily for purposes of crowd control in case of an emergency." *Id.*[3]

II.

The legal principles governing payment of WHCA expenses are set forth in the Olson Memorandum. In that memorandum, we identified two "major principles" of appropriations law applicable in this and similar contexts. First, "appropriated funds may be spent only for the purposes for which they have been appropriated." Olson Memorandum at 215. Second, "in general, official activities should be paid for only from funds appropriated for such

[2] *See* Memorandum for Mike Luttig, Deputy Assistant Attorney General, Office of Legal Counsel, from Frederick D. Nelson, Associate Counsel to the President (Mar. 28, 1990) ("Nelson Memorandum").

[3] We understand that the WHCA functions detailed in this memorandum may not be exhaustive and that you may need to return to this Office for advice on the proper treatment of expenses incurred in connection with functions not identified herein.

purposes, unless Congress has authorized the support of such activities by other means." *Id.* at 216.[4]

Over the years, this Office has considered against the backdrop of these twin principles a variety of issues arising out of presidential trips on which political business is conducted.[5] We have consistently concluded with respect to these so-called "mixed" trips that while political activities must be paid for by political organizations,[6] appropriated funds must be used to pay expenses incurred in connection with the performance of official duties during presidential travel, regardless of the purpose of the travel. We have specifically noted that certain individuals are required in the performance of their official duties to accompany the President whenever he travels, and that expenses of such individuals should be paid from official sources:

> [T]here are some persons whose official duties require them to be with the President, whether or not the President himself is on official business. . . . A similar group would exist for the Vice President. Expenses incurred during travel with the President or Vice President by this group of individuals should be considered official regardless of the character of the event that may be involved in a given trip.

Id. at 217-18 (footnotes omitted); *see also id.* at 218, 221.

The President's military aide and doctor, for example, accompany the President on all of his travel, but we have said that their expenses should be paid from appropriated monies. *See id.* at 217-18. The official nature of the responsibilities performed by these persons does not change depending upon whether the trip is official, political, or personal. All of these persons are, when performing the duties described, engaged in the official business of the United States, and thus their expenses must be paid from public funds.

WHCA is an obvious example of a group that, like the military aide and the President's doctor, performs official responsibilities for the President when he travels, regardless of whether the travel is official, personal, or political. We have never squarely addressed whether expenses incurred in the performance of these responsibilities may be paid from appropriated

---

[4] The first principle derives from the statutory requirements of 31 U.S.C. § 1301(a). The second principle, under which the executive branch may not augment its appropriations, is asserted by the Comptroller General to be a corollary of Congress' constitutional power to control the Treasury. *See* U.S. General Accounting Office, Office of General Counsel, *Principles of Federal Appropriations Law* 5-62 to 5-63 (1st ed. 1982) (explaining the non-augmentation principle).

[5] *See, e.g.*, Memorandum for Fred F. Fielding, Counsel to the President, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel (Apr. 21, 1982); Memorandum for the Hon. Myer Feldman, Special Counsel to the President, from Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel (Aug. 20, 1964).

[6] *See, e.g.*, Memorandum for the Hon. Lloyd N. Cutler, Counsel to the President, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel (Sept. 17, 1980).

funds when the travel is for personal or political purposes, but we have always assumed that they should be. For example, we observed in 1977 that,

> [n]o reimbursement to the Government should be required, even on non-official travel, for accompanying staff and support personnel required for the President and Vice President to perform their official duties. This would include the Secret Service, military aides and support personnel, *communications personnel*, and whatever other staff the President and Vice President require for advice and assistance in transacting the public business.

Harmon Memorandum at 9 (emphasis added).[7] Now that we are directly confronted with the question, we conclude that WHCA may — and indeed should — use appropriated funds to pay for any expense incurred for activities in furtherance of its official mission when it accompanies the President on travel for either personal or political purposes.

Our conclusion that these expenses should be paid from appropriated funds is consistent with the treatment of such expenses under the Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431-456 and the Presidential Election Campaign Fund Act ("PECFA"), 26 U.S.C. §§ 9001-9013.[8] Generally, Secret Service, WHCA, or other official expenses are not campaign "expenditures" under the FECA or "qualified campaign expenses" under the PECFA.[9]

Under the regulations promulgated pursuant to the FECA, if a candidate for federal office, other than a candidate for President or Vice President who receives federal funds under the PECFA, "uses government conveyance or accommodations for travel which is campaign-related," then the candidate must report as an "expenditure" under the FECA "the rate for comparable

---

[7] *See also* Harmon Memorandum at 15-16:

> The President and Vice President should be provided all staff and other assistance as required for support of the official responsibilities of those officers regardless of location. This would ordinarily include . . . *communications facilities for control and administration of the armed forces and other agencies of the Government*[.]

(Emphasis added).

[8] The Harmon Memorandum did not reference the Federal Election Commission ("FEC") regulations in force at the time. *See* Harmon Memorandum at 20-21. The Olson Memorandum explicitly declined to address FEC rules applicable during federal elections. Olson Memorandum at 214.

[9] The treatment of WHCA expenses under the FECA or the PECFA is not necessarily dispositive of whether such expenses may be paid from appropriations. While it likely will often be the case that official expenses properly payable from appropriations would not be campaign "expenditures" or "qualified campaign expenses" for the purposes of these Acts, and conversely that expenses that are "expenditures" or "qualified campaign expenses" within the meaning of those Acts would not be payable from appropriations, this need not be true. *See, e.g.*, 11 C.F.R. § 9004.6 (1981) (Secret Service transportation paid by an authorized committee "shall be qualified campaign expenses," although to the extent that the government reimburses such expenses, they are not "expenditures" under the FECA), *amended by* 48 Fed. Reg. 31,822, 31,822 (1983) (deleting language referring to Secret Service expenses); *see discussion infra* p.150.

commercial conveyance or accommodation." 11 C.F.R. § 106.3(e) (1981).[10] The regulations make clear, however, that expenses associated with staff and equipment authorized by law or necessary for national security are not "expenditures" reportable under this section:

> In the case of a candidate authorized by law or required by national security to be accompanied by staff and equipment, the allocable expenditures are the costs of facilities sufficient to accommodate the party, *less authorized or required personnel and equipment.*

Id. (emphasis added). Accordingly, the expenses associated with such authorized or required personnel are not included in calculating the amount that must be reported as an "expenditure" under this regulation.

A similar rule applies to travel of the President when, as a participating candidate under the PECFA, he campaigns for his own renomination or reelection or when he is campaigning on behalf of other federal candidates. The regulation governing presidential campaign travel during the general presidential election campaign[11] states that

> [i]f any individual, including a candidate, uses government conveyance or accommodations paid for by a government entity *for campaign related travel*, the candidate's authorized committee shall pay the appropriate government entity an amount [calculated according to a specified formula].

11 C.F.R. § 9004.7(b)(5) (1981) (emphasis added).[12] Any such repayable expenses are defined as "qualified campaign expenses" under the PECFA and must be reported as "expenditures" under the FECA. *Id.* § 9004.7(a). However, an individual's travel is a campaign expenditure only if *that individual's travel* is "campaign-related."[13] Because personnel, like Secret Service agents and WHCA employees, accompany the President for official,

---

[10] By its terms, this regulation only applies to the President when he is a candidate *and* is not participating in the public financing system of the PECFA. *See* 11 C.F.R. § 106.3(a) (1981).

[11] An identical provision governs presidential travel during the primaries. *Id.* § 9034.7(b)(5).

[12] The reimbursement formula specifies that the candidate must pay an amount equal to:

> (i) The first class commercial air fare plus the cost of other services, in the case of travel to a city served by a regularly scheduled commercial service; or
>
> (ii) The commercial charter rate plus the cost of other services, in the case of travel to a city not served by a regularly scheduled commercial service.

11 C.F.R. § 9034.7(b)(5) (1983).

[13] The regulation recognizes that whether or not an individual's travel with the President is "campaign-related" is not dependent upon the purposes for which the President is traveling, but upon the purposes of the particular individual's travel. Subsection (b)(4) states that, "[f]or trips by government conveyance or by chapter," the candidate must make available to the FEC "a list of all passengers on such trip, *along with a designation of which passengers are and which are not campaign related.*" 11 C.F.R. § 9004.7(b)(4) (1981) (emphasis added). *See also id* § 9034.7(b)(4) (1981) (identical provision for primary campaign travel).

governmental purposes, their travel is not "campaign-related," and therefore is not a reimbursable "expenditure" or "qualified campaign expense" under the regulation.[14]

Similarly, under the regulation applicable to individuals, including the President, who campaign on behalf of candidates for federal office, expenses for Secret Service protection and other such personnel who travel with that individual in the performance of their official duties would not be campaign "expenditures" under the FECA. The regulation states:

> [w]here an individual, other than a candidate, conducts campaign-related activities on a trip, the portion of the trip attributed to each candidate *shall be allocated on a reasonable basis.*

11 C.F.R. § 106.3(c)(1) (1981) (emphasis added). This regulation requires an individual campaigning on behalf of another "to allocate their mixed campaign/non-campaign travel expenses on a reasonable basis." 1 *Federal Election Campaign Financing Guide* (CCH) ¶ 807, at 1537-8 (1989) (reproducing FEC "Explanation and Justification of Part 106"); Federal Election Commission, *Campaign Guide for Congressional Candidates and Committees* 21 (1988) (same comment). Under this regulation, the expenses of Secret Service or other such personnel clearly would not be considered to be an allocable portion of the President's total expenditures in making the campaign trip. Since expenses for Secret Service and other such personnel are not campaign "expenditures" under the FECA when a federal candidate campaigns for himself or herself, considering such costs to be noncampaign expenses when such an individual campaigns for someone else certainly allocates the campaign and noncampaign costs "on a reasonable basis." Furthermore, applying the regulation directly to each individual member of the President's support staff would also lead to the conclusion that no portion of

[14] An earlier version of this regulation included an explicit exemption for personnel authorized by law or required by national security to accompany the candidate. *See* 11 C.F.R. § 9004.7(b)(5)(iii) (1981) ("In the case of candidates authorized by law or required by national security to be accompanied by staff, such staff shall not be considered to be travelling for campaign purposes unless such staff engages in campaign activity during a trip."). There is no indication that, by deleting this sentence in the later regulation, the FEC intended for such expenses to be considered campaign "expenditures" under the FECA. The change, which was made shortly after the FEC issued comparable regulations governing presidential primary campaigns, was made primarily to conform section 9004.7 to the new primary regulations. 48 Fed. Reg. 31,822, 31,822 (1983). As explained further below, *see infra* p. *150*, the primary campaign regulations deleted references to Secret Service and other such personnel because the payment of their expenses was generally addressed under the federal travel regulations. That the FEC did not intend deletion of the reference to such personnel in section 9004.7 or its primary election counterpart, section 9034.7, to affect the treatment of Secret Service and other such expenses is evidenced by the fact that the FEC, in its explanatory comments, did not identify the change as significant; the FEC identified only "*one* significant change," namely that candidates using government conveyance were required to pay a higher rate than under the previous regulation. 48 Fed. Reg. 5224, 5229 (1983) (emphasis added) (discussing section 9034.7); *see also* 48 Fed. Reg. at 31,824 (identical comment on section 9004.7).

the cost of the travel of Secret Service or other such personnel need be allocated to any candidate as an expenditure. Even though they may accompany the President on a campaign trip he makes on behalf of various federal candidates, Secret Service and similar personnel do not "conduct[] campaign-related activities" when they merely perform their official responsibilities.[15]

Secret Service and other such personnel expenses thus have consistently been considered not to be "expenditures" under the FECA, and generally have been considered not to be "qualified campaign expenses" under the PECFA. We are aware of only one regulation under which expenses for Secret Service agents and other such personnel would have been considered to be "qualified campaign expenses" under the PECFA. Under a previous version of 11 C.F.R. § 9004.6 (1981), expenses incurred by an authorized committee of a participating presidential candidate for transportation and ground services provided to "Secret Service or other staff authorized by law or required by national security" were considered to be "qualified campaign expenses." *See* 11 C.F.R. § 9004.6(a) (1981). This regulation, however, simply allowed Secret Service travel and similar expenses, when incurred by the authorized committee, to be paid from federal funds received under the PECFA; it did *not* require committees to treat these expenses as campaign "expenditures" under the FECA. The regulation, which permitted an authorized committee to receive reimbursement for such expenses up to an established limit, *id.* required the committee to report such reimbursements only as "[o]ffsets to operating expenditures" under 11 C.F.R. § 104.3(a)(3)(ix) (1981). *See id.* § 9004.6(c). The FEC comments explaining this provision made clear that these offsets were not "expenditures" for purposes of the presidential spending limit in the FECA, 2 U.S.C. § 441a(b). *See* 45 Fed. Reg. 43,371, 43,376 (1980) ("Pursuant to Part 104, the reimbursements will be subtracted from the committee's total expenditures to produce the committee's net expenditures. It is the net expenditures which will count against the candidate's expenditure limit.").

The classification of such costs as "qualified campaign expenses" was of little practical significance. The regulation by its terms did not apply where *the government* provided the transportation for these individuals and where, under section 9004.7(b)(5), the committee incurred no costs for such transportation. It applied only when "*an authorized committee* incur[red] expenses for transportation made available [to such persons]," 11 C.F.R. § 9004.6(a) (1981) (emphasis added). However, when a committee had paid the travel expenses of Secret Service agents or other such personnel and the regulation therefore applied, the committee's expenses were generally reimbursable under regulations providing for government reimbursement of employees who travel on official business. *See* 41 C.F.R. ch. 301 (1990). Accordingly, in

[15] Of course, were such personnel to perform any campaign function distinct from their official functions, they would be required to allocate their mixed campaign/non-campaign travel expenses on a reasonable basis.

most situations, the regulation was either inapplicable or irrelevant. It was apparently for this reason that the FEC deleted as superfluous the reference to such personnel when it revised this regulation.[16] Because of this deletion, such expenses would not in any event be considered "qualified campaign expenses" under the current regulations. Furthermore, and more significant, nothing in the current or previous FEC regulations governing presidential campaign expenses would require that expenses for Secret Service and other such personnel be classified as "expenditures" under the FECA.

In sum, we adhere to the conclusion of the Olson and Harmon Memoranda that expenses incurred for official purposes during travel with the President should be paid from appropriated funds, even if the purpose for the President's trip is not official. Accordingly, expenses incurred by WHCA for services in furtherance of its official mission that are performed in connection with presidential travel should be paid from appropriated funds.

III.

We now turn to the question of whether the particular WHCA functions described in your memorandum further the agency's official mission. The resolution of this question ultimately turns on whether the funds used to pay WHCA's expenses are being used for the purposes for which they were provided by Congress.

Congress has not detailed the purposes for which funds appropriated for WHCA may be used.[17] WHCA officials therefore have a substantial measure of discretion in defining the precise scope of the agency's official mission, and whether a given expenditure is an authorized use of the funds appropriated by Congress is in the first instance a question for those officials. An expenditure, however, of course must be reasonably related to the official mission of the agency.

The primary responsibilities of WHCA during presidential travel are to install, maintain, and operate the communications facilities and equipment that permit the President and his entourage to have continuous communications capabilities, and the lion's share of expenses incurred by WHCA during

---

[16] The reference was deleted from section 9004.6 in order to conform to the corresponding primary campaign regulation, 11 C.F.R. § 9034 6. *See* 48 Fed Reg. 31,822 (1983). The FEC explained that it deleted the reference to travel expenses of Secret Service and other such personnel from the primary campaign regulation because "other government regulations govern payment for those expenditures." 48 Fed Reg. at 5229 (discussing section 9034.6); 48 Fed. Reg. at 31,824 (identical comment on section 9004.6).

[17] You have informed us that WHCA's expenses are paid from accounts of the Defense Communications Agency ("DCA"), one of the "Defense Agencies" included in the annual Department of Defense appropriations legislation. *See generally* National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, §§ 104, 201, 301, 2401-2422, 103 Stat. 1352, 1370, 1393, 1407, 1639-44 (1989) (the "Authorization Act"); Department of Defense Appropriations Act, 1990, Pub. L. No. 101-165, 103 Stat. 1112, 1116, 1124, 1126 (1989) (the "Appropriations Act"). The Authorization Act and the Appropriations Act do not provide specific directions concerning the use of appropriated funds for WHCA expenses, and we are aware of no relevant limitation on the use of Defense Agencies appropriations.

and in connection with presidential travel are associated with the discharge of these responsibilities. As Commander in Chief, as well as in his other official roles, the President requires dependable means by which to communicate instantly with individuals anywhere in the world at any moment. In an age when conflict may develop and escalate to crisis proportions in minutes, the President cannot be expected to rely on unpredictable and variable private communications facilities. Indeed, it was precisely to eliminate the need for reliance upon such non-governmental facilities that WHCA was created.

The provision of these communications facilities and services for the official use of the President and his staff is WHCA's official mission. Therefore, provided that these facilities and services are used for official government purposes, WHCA may expend appropriated funds to pay for the expenses incurred in connection with the provision of such facilities and services, regardless where and for what reason the President travels.[18]

WHCA also provides facilities and services for communication with the media. We believe that funds appropriated for WHCA's use may also permissibly be expended to facilitate official, as distinguished from political, communication between the President and the press. The press is indispensable to the effective and proper functioning of the presidency -- indeed to government as a whole. As Commander in Chief and in his other official roles, the President must communicate with the public. Such communication may on occasion even be necessary for reasons of national defense. Direct communication with the public is, as a practical matter, only possible with the assistance of private news media. Facilitation of such contact thus furthers important governmental interests, regardless of the purpose for which the President may be traveling.[19]

---

[18] The responsibilities and duties performed by the President and those serving the President cannot always be satisfactorily characterized as wholly "official," "political," or "personal." We noted, for example, in the Olson Memorandum:

> [I]t is simply not possible to divide many of the actions of the President and Vice President into utterly official or purely political categories. To attempt to do so in most cases would ignore the nature of our political system and the structure of our government. Accordingly, efforts to establish such divisions must be approached with common sense and a good faith effort to apply the spirit of the principles we discuss in this memorandum, and they must be judged with considerable deference to the decisions of the persons directly involved in making the determinations.

Olson Memorandum at 215.

Thus, there will always be particular instances when it will not be evident (and certainly not in advance) whether use of a WHCA facility will be in furtherance of the President's official, as distinguished from his political, responsibilities. For example, a presidential aide who returns a reporter's telephone call will not know until the conversation is over whether the reporter is interested in political or official matters, or both. We believe that even when it eventuates that the reporter's inquiry relates more to the President's political than to his official responsibilities, WHCA may pay for such *de minimis* use of its facilities, and that special logs need not be maintained nor other monitoring methods employed. We have repeatedly emphasized that common sense must be the touchstone in many of the particular applications of the broadly drawn rules in this area.

[19] There will no doubt be occasions when there are additional costs for press or other third-party communications beyond those ordinarily associated with the President's travel. If the costs are incurred for items or services that are attributable to the special needs and/or requests of such third parties, WHCA should seek reimbursement from the third parties.

The same governmental interests are served by the incidental security functions performed by WHCA, such as provision of a bullet-proof podium or an emergency sound system. Danger to the President's life does not vary depending on the purpose of a public appearance.[20] Appropriated monies therefore may be used to pay the expenses associated with these services as well.

CONCLUSION

We conclude that virtually all of the functions that you have informed us are performed by WHCA in connection with presidential travel are in furtherance of WHCA's official mission to provide a continuous communications capability to the President and his advisers. As a consequence, the expenses incurred for these activities may be paid with appropriated funds, regardless of whether the travel is for official, political, or personal purposes.

J. MICHAEL LUTTIG
Assistant Attorney General
Office of Legal Counsel

[20] The official purpose behind two other WHCA activities — controlling the "feed" to the sound system (including turning off the microphones at the end of a speech) and furnishing a teleprompter whenever required — is not as easily discernible. We simply have not been provided sufficient information concerning the purposes for having WHCA perform these functions to enable us to conclude whether they may be paid for with appropriated funds.

Constitutionality of Subsection 4117(b) of Enrolled Bill H.R. 5835, the "Omnibus Budget Reconciliation Act of 1990"

The conditions imposed on action by the Secretary of Health and Human Services by subsection 4117(b) of the Omnibus Budget Reconciliation Act of 1990 violate either the Appointments Clause or the bicameralism and presentment requirements of the Constitution. The subsection is also unconstitutional insofar as it attempts to confer federal lawmaking power on State organizations. *

In the event that the President signs the bill into law, he may direct that the unconstitutional conditions imposed by subsection 4117(b) be given no legal force or effect.

November 5, 1990

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

This responds to your request for our advice concerning the constitutionality of subsection 4117(b) of enrolled bill H.R. 5835, the "Omnibus Budget Reconciliation Act of 1990." For the reasons set forth below, we believe that the conditions imposed on action by the Secretary of Health and Human Services in subsection 4117(b) violate either the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, or the bicameralism and presentment requirements in Article I, Section 7 of the Constitution. We are further of the view that, in the event that the President approves the bill, he may direct that the requirements imposed by subsection 4117(b) be given no legal force or effect.

Section 4117 provides in relevant part:

> (a) *In General.* — Notwithstanding section 1848(j)(2) of the Social Security Act (42 U.S.C. 1395w-4(j)(2)) [which defines "fee schedule area[s]" in terms of "localit[ies]"], in the case of the States of Nebraska and Oklahoma, if the respective State meets the requirements specified in subsection (b)

* Editor's Note: The holding of this opinion relating to the Appointments Clause has been disavowed. *See* Memorandum for the General Counsels of the Federal Government, from Walter Dellinger, Assistant Attorney General, *Re: The Constitutional Separation of Powers between the President and Congress*, at 20-21 n.53 (May 7, 1996).

on or before April 1, 1991, the Secretary of Health and Human Services . . . shall treat the State as a single fee schedule area for purposes of determining —

(1) the adjusted historical payment basis (as defined in section 1848(a)(2)(D) of such Act (42 U.S.C. 1395w-4(a)(2)(D))), and

(2) the fee schedule amount (as referred to in section 1848(a) (42 U.S.C. 1395w-4(a)) of such Act),

for physicians' services (as defined in section 1848(j)(3) of such Act (42 U.S.C. 1395w-4(j)(3))) furnished on or after January 1, 1992.

(b) *Requirements.* — The requirements specified in this subsection are that (on or before April 1, 1991) there are written expressions of support for treatment of the State as a single fee schedule area (on a budget-neutral basis) from —

(1) each member of the congressional delegation from the State, and

(2) organizations representing urban and rural physicians in the State.

In effect, subsection 4117(b) grants "each member of the congressional delegation" from the States of Nebraska and Oklahoma and "organizations representing urban and rural physicians in the State" the power to determine, *ab initio*, whether "the Secretary of Health and Human Services . . . shall treat the States as a single fee schedule area" for the purposes enumerated in subsection 4117(a).

In our view, the power to determine whether or not the Secretary shall treat the States of Nebraska and Oklahoma as a single fee schedule area clearly affects physicians' "eligibility for funds" in those States, and therefore constitutes the exercise of "significant authority pursuant to the laws of the United States," *Buckley v. Valeo*, 424 U.S. 1, 126, 140 (1976). Such authority must be exercised by persons appointed as Officers of the United States in conformity with the Appointments Clause, U.S. Const. art. II, § 2, cl. 2. *Buckley*, 424 U.S. at 140-41; *see also Bowsher v. Synar*, 478 U.S. 714, 726 (1986) ("The structure of the Constitution does not permit Congress to execute the laws . . . ."). Since neither the members of State congressional delegations nor "organizations representing urban and rural physicians in the

State" are Officers of the United States appointed consistent with Article II, subsection 4117(b) unconstitutionally delegates executive power to these entities. Indeed, the members of State congressional delegations could not be appointed Officers of the United States without violating the Incompatibility Clause, U.S. Const. art. I, § 6, cl. 2.

Alternatively, by conditioning the Secretary's action on the prior approval of certain members of Congress, subsection 4117(b) permits several Members of Congress to take action that "alter[s] the legal rights, duties and relations of persons" while evading the bicameralism and presentment requirements in Article I, Section 7. *INS v. Chadha*, 462 U.S. 919, 952 (1983). Statutory arrangements of this kind are clearly unconstitutional. *Id.* at 959. Furthermore, subsection 4117(b) is unconstitutional insofar as it attempts to confer lawmaking power on State organizations, because only Congress has the authority to exercise the "legislative Powers" of the federal government. U.S. Const. art. I, § 1.

At least in the context of legislation that infringes upon the President's constitutional authority, and thereby violates the constitutional principle of separate powers, the President may refuse to enforce unconstitutional requirements. *See Issues Raised by Foreign Relations Authorization Bill*, 14 Op. O.L.C. 37, 50 (1990). Accordingly, we believe that, consistent with the Constitution, the President may treat the unconstitutional condition in subsection 4117(b) as having no legal force or effect.[1]

J. MICHAEL LUTTIG
Assistant Attorney General
Office of Legal Counsel

[1] Given the invalidity of subsection 4117(b) of the statute, it will be necessary to determine whether the direction to the Secretary in subsection 4117(a) is severable from the unconstitutional condition. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684-87 (1987).

Appointment of Members of the Board of Directors of the Commission on National and Community Service

The unconstitutional restrictions on the President's appointment power contained in the National and Community Service Act of 1990 are severable from the remainder of the Act.

With one exception, the programs established under title I of the Act may not be implemented before the President has appointed members of the Board of Directors of the Commission on National and Community Service.

There is no statutory prohibition against officers currently holding other advice-and-consent positions serving on the Board, so long as the person receives only one salary, the positions are not "incompatible" from the standpoint of public policy, and there is no augmentation of relevant appropriations.

December 28, 1990

MEMORANDUM OPINION FOR
THE ASSOCIATE COUNSEL TO THE PRESIDENT

This responds to your request for an opinion concerning the appointment of members of the Board of Directors of the newly-established Commission on National and Community Service (the "Commission"). *See* Memorandum for John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, from Nelson Lund, Associate Counsel to the President (Dec. 14, 1990). The National and Community Service Act of 1990, Pub. L. No. 101-610, 104 Stat. 3127 (codified at 42 U.S.C. §§ 12501-12862 (Supp. II 1990)) (the "Act"), which creates the Commission, contains a number of unconstitutional restrictions on the President's power to appoint such members. *See* Statement on Signing the National and Community Service Act of 1990, Pub. Papers of George Bush 1613 (Nov. 16, 1990). You have asked whether these restrictions are severable from the remainder of the Act. In addition, you have asked whether the programs established under title I of the Act may be implemented before the President has appointed members of the Board, and whether officers currently holding other advice-and-consent positions may serve on the Board.

We believe that the unconstitutional provisions are severable from the remainder of the Act, and that, with one exception, the programs established

by title I may not be implemented before the President appoints members of the Board. With regard to your third question, there is no problem in principle with persons having two simultaneous appointments in the executive branch. Nevertheless, dual appointments must be examined on an individual basis to assure that the offices are not incompatible from the standpoint of public policy. We would be pleased to consider the legality of any particular nominations you wish us to review.

Title I of the Act establishes several grant programs to be administered by the Commission. § 190. The purpose of the grants is to enable recipients "to carry out" specified "national or community service programs." § 102. Subtitle B authorizes the Commission, in consultation with the Secretary of Education, to make grants to States or local applicants in connection with school-aged service programs, § 111, and "to make grants to, and enter into contracts with, institutions of higher education" and other parties in connection with community service projects. § 118. Subtitle C gives the Commission power to make grants to States, local applicants, and certain federal agencies "for the creation or expansion of full-time or summer youth corps programs." § 121. Under subtitle D, the Commission may make grants to States "for the creation of full- and part-time national and community service programs." § 141. Finally, subtitle E authorizes the Commission to make grants to States, Indian tribes, specified federal agencies, and other parties in connection with certain "innovative" and demonstration programs. §§ 157, 160, 165-167.

The Act provides that the Commission is to be administered by a Board of Directors (the "Board") consisting of twenty-one members appointed by the President with the advice and consent of the Senate. § 190(a), (b)(1)(A).[1] Section 190(b) imposes several restrictions upon the President's authority to make such appointments. It provides, for instance, that the Board must "be balanced according to the race, ethnicity[,] age and gender of its members," § 190(b)(1)(A); must contain "[n]ot more than [eleven] members of . . . the same political party," § 190(b)(2); and must include seven members chosen from among persons nominated by the Speaker of the House of Representatives, and seven from among persons nominated by the Majority Leader of the Senate. § 190(b)(3).

As the President explained in signing the Act, requirements such as these are unconstitutional restrictions on his authority to appoint officers of the United States. *See* Pub. Papers of George Bush at 1613-14. *See also Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 482 (1989) (Kennedy, J., concurring); *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam). We believe, however, that these unconstitutional provisions may be severed from the remainder of the Act.

The Act contains no severability clause. Nonetheless, even in the absence

[1] In addition, the Secretary of Education, the Secretary of Health and Human Services, the Secretary of Labor, the Secretary of the Interior, the Secretary of Agriculture, and the Director of the ACTION agency serve as ex-officio members of the Board. § 190(b)(1)(B).

of such a clause, there exists a presumption in favor of the severability of unconstitutional provisions so long as what remains of the statute is capable of functioning independently. *See Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality opinion); *Alaska Airlines v. Donovan*, 766 F.2d 1550, 1560 (D.C. Cir. 1985), *aff'd sub nom. Alaska Airlines v. Brock*, 480 U.S. 678 (1987). As the Supreme Court has explained on numerous occasions, "'[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'" *Alaska Airlines v. Brock*, 480 U.S. 678, 684 (1987) (quoting *Buckley*, 424 U.S. at 108). This presumption may be overcome by evidence that, absent the unconstitutional provisions, the statute will not function "in a *manner* consistent with the intent of Congress," *id.* at 685, that is, by evidence that Congress would not have enacted the statute without the unconstitutional provisions. Such evidence may be gleaned from the language and structure of the statute as well as its legislative history. *Id.* at 687.

We do not believe that the presumption of severability may be overcome in this case. The Commission and the grant programs it administers would remain fully operative in the absence of the unconstitutional provisions. In addition, the Act does not suggest that the provisions were so important to Congress that it would not have passed the Act without them. Manifestly, Congress thought it necessary to have a federal entity administer the title I programs. There is no evidence, however, that the precise composition of the board administering that entity was also essential to Congress' plan. Indeed, in order to assure that the Commission would administer the various grant programs in accordance with congressional intent, Congress placed substantive limitations on the Commission's discretion.[2] In comparison with these substantive limitations, restrictions on the composition of the Board are of only minor significance. There is nothing in the legislative history of the Act to support a different conclusion.[3]

---

[2] *See, e.g.*, § 115(a), (b) (specifying priorities for certain grants under subtitle B); § 122 (specifying requirements for allocation of funds for grants under subtitle C); § 129 (directing that the Commission give preference to certain programs under subtitle C); § 142 (specifying criteria for awarding of grants under subtitle D); § 157 (specifying criteria for awarding of grants for certain programs under subtitle E); § 171 (placing limit on number of grants to be made by the Commission during each fiscal year); § 179 (specifying criteria for evaluation of programs by the Commission).

[3] The relevant legislative history may be summarized briefly as follows. As introduced by Senator Kennedy, the Act initially provided for a nonprofit "'Corporation for National Service'" to be directed by an eleven-member "National Service Board" appointed by the President with the advice and consent of the Senate. S. 1430, 101st Cong., 1st Sess. §§ 402(a), 403(a), 135 Cong. Rec. 16,708 (1989). This version of the Act also contained unconstitutional restrictions on the President's authority to appoint officers of the United States. *Id. See also* S. Rep. No. 176, 101st Cong., 1st Sess 64 (1989) (discussing membership of the proposed National Service Board). On the Senate floor, Senator Kennedy substituted another version of the Act that replaced the Corporation with the Commission, explaining that the substitute contained "some technical changes" made at the behest of the Administration. 136 Cong. Rec. 2731 (1990) (statement of Sen. Kennedy). *See also id.* at 2732 (statements of Sens. Hatch and Kennedy). Section 190 took its final form in conference; the only relevant statement in the Conference Report indicates that the House insisted on a provision adding the secretaries of certain departments and the Director of ACTION to the Board as ex-officio members. *See* H.R. Conf. Rep. No. 893, 101st Cong., 2d Sess. 69 (1990).

You also ask whether the grant programs established by title I may be implemented before the President appoints members of the Board. We do not believe so. Section 190 makes clear that the Commission, or more precisely the Board, is responsible for administering such programs, or for delegating that responsibility to other federal agencies. *See* § 190(c)(2), (4). In addition, section 190 provides that the Board must appoint an "Executive Director," who in turn may appoint up to ten "technical employees to administer the Committee [sic]." § 190(d)(1), (e). Until the President appoints members of the Board, then, the Commission is inoperative, and the grant programs cannot be implemented.[4]

Finally, you ask whether the President may appoint as Board members persons who currently serve as full-time federal employees. As we have explained in the past, there is no statutory prohibition against a person holding two offices within the executive branch, so long as the person receives only one salary, the positions are not "incompatible" from the standpoint of public policy,[5] and there is no augmentation of relevant appropriations. *See Dual Office of Chief Judge of Court of Veterans Appeals and Director of the Office of Government Ethics*, 13 Op. O.L.C. 241 (1989); Intrater Memorandum. Nonetheless, determinations of the legality of dual appointments must be made on an individual basis. Of course, we would be pleased to consider the propriety of any specific nominations you wish us to review.

JOHN O. McGINNIS
Deputy Assistant Attorney General
Office of Legal Counsel

[4] There is an exception. Section 182(a) provides that "[t]he head of each Federal agency and department shall design and implement a comprehensive strategy to involve employees of such agencies and departments in partnership programs with elementary schools and secondary schools." These "Partnerships With Schools" programs may be implemented absent the appointment of Board members.

[5] "The operative principle is that two offices are incompatible if public policy would make it improper for one person to perform both functions. Examples of incompatibility are where the official interests of the positions conflict, where one office adjudicates matters in which the other is a party, or where Congress intended that one office serve as a check on the other. Application of this standard thus depends on the statutory or constitutional duties of the offices involved." Memorandum for Arnold Intrater, General Counsel, Office of White House Administration, from John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel at 3-4 (March 1, 1988) (citation omitted) ("Intrater Memorandum").