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OFFICE OF LEGAL COUNSEL

OF THE

UNITED STATES DEPARTMENT OF JUSTICE

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FOREWORD

The Attorney General has directed the Office of Legal Counsel to publish selected opinions on an annual basis for the convenience of the executive, legislative, and judicial branches of the government, and of the professional bar and the general public. The first fourteen volumes of opinions published covered the years 1977 through 1990; the present volume covers 1991. The opinions included in Volume 15 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 1991 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.

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OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

Ex Parte Communications During FCC Rulemaking

Ex parte communications by White House officials to Federal Communications Commission commissioners that advocate positions on the FCC rulemaking proceeding to evaluate financial interest and syndication rules would be permissible.

According to FCC regulations, as interpreted by the FCC General Counsel, communications by the White House must be disclosed in the FCC rulemaking record if they are of substantial significance and clearly intended to affect the ultimate decision.

Although solicitation of the views of White House officials by FCC commissioners would be permissible and need not be included in the rulemaking record, any response by White House officials to such a solicitation would be subject to the same disclosure requirements that apply to unsolicited communications.

January 14, 1991

MEMORANDUM OPINION FOR THE DEPUTY COUNSEL TO THE PRESIDENT

This memorandum responds to your request that we answer certain questions regarding ex parte communications between White House officials and Commissioners of the Federal Communications Commission ("FCC") in connection with the FCC's ongoing rulemaking proceeding to evaluate its financial interest and syndication rules relating to television network involvement in the programming marketplace. Specifically, you have asked (1) whether it is permissible for White House officials to contact FCC Commissioners to advocate a position on this rulemaking; (2) whether any such communications would be subject to FCC disclosure requirements; and (3) whether it would be permissible for FCC Commissioners to solicit the views of White House officials and whether any such communications would be subject to the FCC disclosure requirements.

We conclude that the communications by White House officials would be permissible and, according to FCC regulations, they must be disclosed in the FCC rulemaking record if they are of substantial significance and clearly intended to affect the ultimate decision. Solicitations of the views of White

House officials by FCC Commissioners would be permissible and need not be included in the rulemaking record. Any response by White House officials to such a solicitation, however, would be subject to the same disclosure requirements that apply to unsolicited communications.

I.

We believe it is clearly permissible, as a matter of general administrative law, for White House officials, including senior members from the Council of Economic Advisors and officials from the Office of the Vice President, Office of Management and Budget, and Office of White House Counsel, to contact FCC Commissioners to advocate a position on this rulemaking. This conclusion is compelled by *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981), the leading ex parte contacts case under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-559, 701-706.

In *Sierra Club*, an Environmental Protection Agency ("EPA") rulemaking was challenged as procedurally defective in a variety of ways, including that the decisionmaking was influenced by an "undocketed meeting . . . attended by the President, White House staff, other high ranking members of the Executive Branch, as well as EPA officials, and which concerned the issues and options presented by the rulemaking." *Id.* at 404. In holding that the meeting was permissible and need not have been "docketed" (*i.e.*, a summary placed in EPA's rulemaking record),[1] the D.C. Circuit Court of Appeals

> recognize[d] the basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy. He and his White House advisers surely must be briefed fully and frequently about rules in the making, and their contributions to policymaking considered. The executive power under our Constitution, after all, is not shared — it rests exclusively with the President.

Id. at 405. The court not only concluded that "[t]he authority of the President to control and supervise executive policymaking is derived from the Constitution," *id.* at 406, but added that

> the desirability of such control is demonstrable from the practical realities of administrative rulemaking. Regulations such

[1] The *Sierra Club* holding on "docketing" did not modify the APA case law providing that purely factual and "conduit" (*i.e.*, from interested parties outside the government) information provided in the course of such communications should be included in agency rulemaking records. *See Contacts Between the Office of Management and Budget and Executive Agencies Under Executive Order No. 12,291*, 5 Op. O.L.C. 107 (1981).

> as those involved here demand a careful weighing of cost, environmental, and energy considerations. They also have broad implications for national economic policy. Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive. Single mission agencies do not always have the answers to complex regulatory problems. An over-worked administrator exposed on a 24-hour basis to a dedicated but zealous staff needs to know the arguments and ideas of policymakers in other agencies as well as in the White House.

Id. (footnotes omitted).

Just as the court found in *Sierra Club* that it was permissible under the APA for the President and other White House officials to meet with EPA officials in an effort to influence the results of an EPA rulemaking, we believe it is permissible for White House officials to contact FCC Commissioners in an effort to influence the results of an FCC rulemaking. The constitutional and administrative rationales set forth in *Sierra Club* are fully applicable to the FCC rulemaking on financial interest and syndication rules.[2]

Sierra Club makes it clear that, in addition to the general requirements of the APA, any more specific statutory requirements must be considered. *Id.* at 406-07. The only such requirements that we are aware of that might apply in the present situation are those contained in the laws and regulations governing FCC proceedings. The FCC's notice of proposed rulemaking expressly states that the FCC has determined that ex parte communications are permissible in this rulemaking proceeding. *See* 55 Fed. Reg. 11,222, 11,223 (1990) ("After June 13, 1990, the proceeding will become a non-restricted proceeding, in which *ex parte* presentations will be permissible, subject to the disclosure requirements set forth in the Commission's rules.") The FCC's ex parte communication regulations, 47 C.F.R. Subpart H, apply by their terms to ex parte communications from any person outside the FCC, expressly including presentations from government officials. *See* 47 C.F.R. §

[2] *Sierra Club* is not distinguishable on the basis that the FCC, unlike the EPA, might be viewed as an "independent agency." *Sierra Club* is the leading construction of the APA on ex parte contacts during rulemaking, and the APA clearly applies equally to the FCC and the EPA. *See* 5 U.S.C. § 551(1). Thus, the *Sierra Club* rationale concerning "the practical realities of administrative rulemaking," 657 F.2d at 406, applies fully to all agency rulemaking, whether done by a purely executive or "independent" agency. Indeed, the only exception to its holdings on White House contacts that *Sierra Club* specifically identifies is where the contacts "directly concern the outcome of adjudications or quasi-adjudicatory proceedings," thus implying that all rulemaking is covered by the main holding *Id.* at 407. Moreover, whatever the constitutionality of restricting the removal of the heads of "independent agencies," there is no doubt that the President has the constitutional authority to inform (directly or through his staff) an "independent agency" of the Administration's program, in an effort to coordinate policy within the executive branch. *See Morrison v. Olson*, 487 U.S. 654 (1988). Accordingly, the President retains authority to attempt to influence rulemaking decisions by "independent agencies" in the ways endorsed in *Sierra Club*.

1.1206(a)(1)-(3) note 1 ("[P]resentations from members of Congress or their staff or from other agencies or branches of the Federal Government or their staff that are of substantial significance and clearly intended to affect the ultimate decision shall be treated as *ex parte* presentations . . . ."). Accordingly, we conclude that ex parte communications by White House officials in connection with this rulemaking are permissible under the FCC ex parte regulations.

Although ex parte communications to FCC Commissioners by White House officials are thus legally permissible, we note the current White House policy guidance applicable to contacts with independent regulatory agencies like the FCC. *See* Memorandum for White House Staff, from C. Boyden Gray, Counsel to the President, *Re: Prohibited Contacts with Agencies.* That guidance states:

> As a general rule, no member of the staff should make an *ex parte* contact with a regulatory agency in regard to any particular matter pending before that agency, regardless of whether the proceedings are deemed to be rulemaking or adjudicative, when such a contact may imply preferential treatment or the use of influence on the decision-making process.
>
> . . . White House staff members should avoid even the mere appearance of interest or influence — and the easiest way to do so is to avoid discussing matters pending before the independent regulatory agencies with interested parties and avoid making *ex parte* contacts with agency personnel. Should an occasion arise . . . where it appears necessary [for White House staff] to discuss general policy matters with the staff of an independent regulatory agency, to avoid any appearance of impropriety, [the White House staff individual] should first consult with the Office of the Counsel to the President to determine whether such contact would be appropriate under the circumstances.

Id. at 1-2.

II.

You have also asked whether, if ex parte communications to FCC Commissioners by White House officials are permissible, the communications must be publically disclosed: *i.e.*, included in the FCC's rulemaking record. Although *Sierra Club* makes it clear that such disclosure is not required as a matter of general administrative law, *see* 657 F.2d at 404-08, the FCC regulations on ex parte communications provide for disclosure of certain

communications of that nature. We have consulted the FCC General Counsel's Office to ascertain the FCC's interpretation of its regulations.[3] The following discussion is based on that interpretation.[4]

As noted above, the FCC's notice of proposed rulemaking states that "*ex parte* presentations will be permissible" in this proceeding, "subject to the disclosure requirements set forth in the Commission's rules." 55 Fed. Reg. at 11,223. This statement is consistent with the FCC regulations, which provide that all informal rulemaking proceedings, except proceedings on allotment of specific radio or television channels, are "non-restricted proceedings," *see* 47 C.F.R. § 1.1206(b)(1), in which "*ex parte* presentations are permissible . . . if [certain enumerated] disclosure requirements are met." 47 C.F.R. § 1.1206(a). The regulations specify which communications during a non-restricted proceeding from government sources outside the FCC should be viewed as ex parte communications that must be included in the rulemaking record:

> Unless otherwise exempted under Section 1.1204, presentations from members of Congress or their staff or from other agencies or branches of the Federal Government or their staff that are of substantial significance and clearly intended to affect the ultimate decision shall be treated as *ex parte* presentations and placed (if oral, a written summary of the presentation shall be prepared and placed) in the record of the proceeding by Commission staff or in accordance with the procedures set forth in Section 1.1206(a)(1)-(3).

47 C.F.R. § 1.1206(a)(1)-(3) note 1. Thus, unless otherwise exempted under section 1.1204(b), all ex parte communications from government officials or employees that "are of substantial significance and clearly intended to affect the ultimate decision" must be placed in the rulemaking record. If the communications are oral, they may be placed in the record either by the means of a written summary prepared by Commission staff or by a written memorandum submitted by the ex parte "communicator" on the day of the communication. 47 C.F.R. § 1.1206(a).

Accordingly, the FCC regulations require the placement in the FCC rulemaking record of a memorandum summarizing any ex parte communication by a White House official to an FCC Commissioner in which the White House official advocates a position on this rulemaking, so long as the communication is "of substantial significance and clearly intended to affect the

[3] We consulted David H. Solomon, Assistant General Counsel, Administrative Law Division.

[4] We do not address in this memorandum the authority of the President to direct the FCC to change its regulations.

ultimate decision." The regulations apply by their terms to all parts of the government and make no exception for communications from White House officials. Nor would any of the section 1.1204(b) exemptions appear to be applicable. In particular, the FCC does not believe that exemption (5) is available. *See* 47 C.F.R. § 1.1204(b)(5) (exempting presentations "to or from an agency or branch of the Federal Government or its staff [that] involve[] a matter over which that agency or branch and the Commission share jurisdiction"). In the view of the FCC General Counsel's Office, the exemption for agencies that "share jurisdiction" pertains only to other federal agencies that exercise statutory authority that overlaps with the FCC's authority; it is not addressed to a government entity that might supervise the FCC. Accordingly, the White House does not, within the meaning of the exemption, "share jurisdiction" with the FCC over financial interest and syndication rules. We believe that the FCC's interpretation of exemption (5) is reasonable.

III.

Finally, you have asked whether it would be permissible for an FCC Commissioner to solicit the views of White House officials and whether any such solicitation would be subject to the FCC disclosure requirements. We are unaware of any statutory or regulatory provisions that would prohibit such a solicitation or require that it be included in the rulemaking record. The conclusions reached above regarding *Sierra Club* should apply equally to a solicitation by an FCC Commissioner, because nothing in the court's rationale suggested that the protection of ex parte White House communications should be "one-way": *i.e.*, protecting communications by White House officials but not to them.

Moreover, nothing in the FCC regulations would preclude such a solicitation (indeed, the regulations contemplate solicitations, *see* 47 C.F.R. § 1.1206(a)(3)) or require that it be docketed. The FCC General Counsel's Office has advised us that solicitations are permissible and whether they are recorded in the rulemaking record is discretionary. Any communication by a White House official in response to a solicitation, however, would be subject to disclosure under the same standards governing unsolicited communications. *See* 47 C.F.R. §§ 1.1204(b) note, 1.1206(a)(3), 1.1206(a)(1)-(3) note 1.

CONCLUSION

Ex parte communications by White House officials to FCC Commissioners that advocate positions on the ongoing FCC rulemaking proceeding to evaluate financial interest and syndication rules would be permissible. According to FCC regulations, as interpreted by the FCC General Counsel's Office, such communications must be disclosed in the FCC rulemaking record

if they are of substantial significance and clearly intended to affect the ultimate decision. Solicitations of the views of White House officials by FCC Commissioners would be permissible and need not be included in the rulemaking record. Any response by White House officials to such a solicitation, however, would be subject to the same disclosure requirements that apply to unsolicited communications.

JOHN O. MCGINNIS
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Office of Legal Counsel

Secretary of Education Review of Administrative Law Judge Decisions

Section 22 of the Drug-Free Schools and Communities Act Amendments of 1989 provides that a decision of an administrative law judge reviewing the termination of federal assistance to educational institutions or agencies "shall be considered to be a final agency action." This provision does not preclude the Secretary of Education from reviewing such administrative law judge decisions.

Because section 22 makes an administrative law judge decision a final agency action for purposes of judicial review, it deprives the Secretary of the power to require exhaustion of secretarial review procedures before an aggrieved party may seek judicial review.

January 31, 1991

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF EDUCATION

This memorandum is in response to your request for our opinion whether section 22 of the Drug-Free Schools and Communities Act Amendments of 1989 precludes the Secretary of Education from reviewing decisions of administrative law judges concerning the termination of federal assistance to educational institutions or agencies. You have also requested that, if section 22 does not forbid such review, we further consider whether exhaustion of the procedures for secretarial review may be made a prerequisite for seeking judicial review.

We conclude that the Drug-Free Schools and Communities Act Amendments do not preclude the Secretary of Education from reviewing decisions of administrative law judges under section 22. Our conclusion is supported not only by the text and structure of the Act, but also by familiar principles of administrative law. We further conclude that the Secretary may not require litigants to exhaust the procedures for secretarial review before seeking judicial review.

I.

Section 22 of the Drug-Free Schools and Communities Act Amendments of 1989, Pub. L. No. 101-226, 103 Stat. 1928, 1938 (codified at 20 U.S.C.

§§ 1145g, 3224a) ("the Act"), permits institutions of higher education and local education agencies to appeal to an administrative law judge ("ALJ") when the Secretary of Education ("the Secretary") decides to terminate financial assistance because of a failure to comply with the Higher Education Act of 1965, 20 U.S.C. §§ 1001-1146a, or the Drug-Free Schools and Communities Act of 1986, 20 U.S.C. §§ 3171-3227. Section 22 states that "[t]he decision of the [administrative law] judge with respect to such termination shall be considered to be a final agency action."

On April 24, 1990, the Secretary published proposed regulations under the Act. 55 Fed. Reg. 17,384. Under the proposed regulations, the decision of an ALJ in an appeal under section 22 would be "the final decision of the agency unless the Secretary on his or her own initiative or on request by either party reviews the decision."[1] *Id.* at 17,393 (proposed 34 C.F.R. § 86.410(b)(1)). The proposed regulations would further provide that the ALJ's decision would not take effect until the Secretary completed any review. *Id.* (proposed 34 C.F.R. § 86.410(d)).

In response to the notice of the proposed rulemaking, three Members of Congress submitted joint comments disputing the Secretary's authority to review the decisions of ALJs under section 22. Letter from Congressmen Augustus F. Hawkins, William F. Goodling, and William D. Ford, to the Office of the Secretary, U.S. Department of Education (June 8, 1990). Citing the section 22 directive that "[t]he decision of the judge with respect to such termination shall be considered to be a final agency action," *id.* at 1, and an analysis by the Congressional Research Service, the Congressmen maintained that the Act precluded the Secretary from reviewing ALJ decisions.

On August 16, 1990, the Secretary published the regulations in final form. 55 Fed. Reg. 33,580. The Secretary rejected the contention that section 22 precluded secretarial review of ALJ decisions. Such a conclusion, he stated, "would produce a result that is not only unprecedented within the Department's experience and inconsistent with the organic statutes that govern the operations of the Department, but would also be subject to serious constitutional question under the Appointments Clause." *Id.* at 33,600. The Secretary did, however, make one "clarifying change" to the regulations relating to secretarial review so that they would "conform more closely to the language of the statute." *Id.* The final version of 34 C.F.R. § 86.410(b)(1) thus provides:

> The ALJ's decision is the final decision of the agency. However, the Secretary reviews the decision on request of either party, and may review the decision on his or her own initiative.

[1] The parties would be the local education agency or institution of higher education and a "designated Department official," to whom the Secretary would delegate his authority to make the initial decision to terminate assistance. 55 Fed Reg. at 17,392 (proposed 34 C.F.R. § 86.402(a)).

55 Fed. Reg. at 33,586. The question presented here is whether this regulation is a lawful implementation of section 22.

III.

Section 22 provides that the ALJ's decision "shall be *considered to be a* final agency action." 20 U.S.C. §§ 1145g(d), 3224a(e) (emphasis added). This phraseology on its face suggests that Congress intended the ALJ's decision to be final agency action in some particularized sense, not that it be final in the general sense that no further review would be possible. Congress did not provide that the ALJ's decision "shall be" final agency action; it provided that it "shall be considered to be" final agency action.[2] It did not provide that the ALJ's decision shall be considered to be *the* final agency action; it provided merely that the ALJ's decision shall be considered to be *a* final agency action. Had Congress intended ALJ decisions to be final in the sense that no further agency review would be available, it would have at least provided so expressly.[3]

Congress' deliberate decision to have the ALJ's decision "considered to be a final agency action" we believe represents a conscious effort to harmonize section 22 with the general body of administrative law authorities — particularly the judicial review procedures of the Administrative Procedure Act ("APA") — which refer to "final agency action" as that action after which judicial review is available. Thus, when Congress chose the somewhat unusual language that it did, we believe it intended that the ALJ's decisions be final only in the sense that judicial review would thereafter be available.

Under the APA, "final agency action" is generally understood to mean that action which is necessary and sufficient for judicial review. Title 5, section 704, for example, provides that, "*final agency action* for which there is no other adequate remedy in a court [is] subject to judicial review." (Emphasis added.) There is an extensive body of precedent on the question whether an agency action is final and, therefore, reviewable under the APA. *See, e.g., FTC v. Standard Oil Co. of California*, 449 U.S. 232 (1980); *Carter/Mondale Presidential Comm., Inc. v. FEC*, 711 F.2d 279 (D.C. Cir. 1983). Under these authorities, an agency's decision need not be its last word on a subject to be considered "final agency action." Indeed, the APA expressly provides that an agency action can be "final" for purposes of the APA, and

[2] Because "final agency action" is a term of art, there is, in fact, no substantive difference between these two locutions The locution chosen, however, plainly telegraphs that the term "final agency action" which follows is to be understood to have specialized meaning

[3] Unequivocal language that the ALJ's decision "shall be the final agency action" would, at a minimum, present a question as to whether Congress intended for the ALJ decision to be final in the sense that no further agency review is available, although it is unlikely that we would construe even this language to express an intent to foreclose secretarial review, absent affirmative evidence that Congress so intended. *See* discussion *infra*.

thus for purposes of judicial review, even though it is subject to reconsideration or appeal to a higher authority within the agency.[4] "Final agency action" therefore is a familiar and well-developed term of administrative law referring to the action after which judicial review may be available.

Where Congress employs a term of art with a well-established meaning, it is generally presumed in the absence of evidence to the contrary to have intended that meaning to apply. *See Moskal v. United States*, 498 U.S. 103, 114 (1990). *See also id.* at 121 (Scalia, J., dissenting) ("when a statute employs a term with a specialized legal meaning relevant to the matter at hand, that meaning governs") (citing *Morissette v. United States*, 342 U.S. 246, 263 (1952)).[5] Section 22 therefore is most naturally read as a signal to the respective parties and a direction to the courts that an ALJ's decision shall be considered to be a final agency action for purposes of determining the availability of judicial review under 5 U.S.C. § 704. As under the APA, section 22 should not be read to preclude further review of an ALJ's decision within the agency, and particularly by the Secretary. Indeed, we are not aware of any statute in which Congress, in an effort to foreclose further agency review, directed that an inferior employee's decision shall be final.

Nothing in the legislative history of this particular Act suggests an intention on the part of Congress to depart from the accepted meaning of the term "final agency action" as it is generally used in administrative law. There is neither a House nor a Senate committee report on the Act. There is no comment upon the relevant portions of the Act in the Conference Report, H.R. Rep. No. 384, 101st Cong., 1st Sess. (1989), or in the floor debates. We would be especially hesitant to infer from such silence a congressional intent to depart from the well-settled understanding of "final agency action." *See Morissette*, 342 U.S. at 263 ("In such case, absence of contrary direction [by Congress] may be taken as satisfaction with widely accepted definitions, not as a departure from them.").

The conclusion that Congress did not intend section 22 to foreclose secretarial review is further supported by the structure of the Act. The Act explicitly provides for an "appeal" of the Secretary's decision to an ALJ,

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[4] The APA states that:

> Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 704.

[5] In *Morissette*, Justice Jackson explained:

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

342 U.S. at 263.

who is an employee, or subordinate officer, of the Department of Education.[6] *See* 20 U.S.C. § 1234(c) ("The [administrative law] judges shall be officers or employees of the Department."). If an ALJ's decisions were "final" in the sense that they were not subject to review by the Secretary, a decision by the head of a department could be reversed by his subordinate.[7] According finality as a matter of law to a subordinate's decision would conflict with the statutory commands that the "Department [of Education] shall be administered . . . under the supervision and direction of a Secretary of Education," 20 U.S.C. § 3411, and that "[t]he Secretary shall be responsible for the administration of the programs authorized" by the Act. *Id.* § 3222(a).[8] As the preamble to the Secretary's proposed rule stated, insulation of ALJ decisions from secretarial review would mean that "the Secretary could not ensure consistent interpretation of the law, or even correct manifestly erroneous interpretations." 55 Fed. Reg. at 17,387. An intent to divest the Secretary of such authority seems especially improbable as to decisions with the clear potential to strain federal-state relations, such as those surrounding the termination of federal funds for a local education agency.[9]

Interpreting section 22 so as to permit secretarial review of ALJ decisions also conforms proceedings under section 22 with the general administrative procedures under the APA. Under that statute, an "agency" may itself preside over a trial-type hearing, or it may assign the case for a hearing before a "presiding employee[]." 5 U.S.C. § 556(b). Unless otherwise provided by statute, the "presiding employee[s]" to which the APA refers are ALJs. 5 U.S.C. §§ 556(b)(3), 3105. Under the APA, "[w]hen the presiding employee [at a trial-type hearing] makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there

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[6] Although the statute refers to an initial "determination by the Secretary," 20 U.S.C. §§ 1145g(d), 3224a(e), the first determination to end financial assistance would be made not by the Secretary but by a "designated Department official" 55 Fed Reg. at 33,585 (to be codified at 34 C.F.R. §§ 86.304(a), 86.400(a)). The regulations set out "procedures governing appeals of decisions by [that] designated Department official." *Id.* § 86.400(a).

[7] We do not believe it is anomalous under our interpretation that the statute permits the Secretary to review an appeal from a decision that in theory was itself an appeal from "the Secretary's" decision. Because the initial decision is made not by the Secretary, but rather by his designee, the Secretary will likely be considering the matter for the first time in reviewing the ALJ's decision. We would not think it odd even if the same individual were both to make the initial determination and review the ALJ's decision. It would not be unreasonable to create a system under which an official is permitted to reconsider his initial determination with the benefit of a record generated during trial-type proceedings before an ALJ

[8] The analysis appended to the final rule observes that such insulation would be "inconsistent with the organic statutes that govern the operations of the Department." 55 Fed. Reg. at 33,600.

[9] We find unpersuasive the assertion in the Congressional Research Service ("CRS") analysis that the absence of an explicit right in the Secretary to review an ALJ's decisions, *see, e.g.*, 20 U.S.C. § 1234a (explicitly providing for secretarial review of ALJ decisions), implies an intent not to confer such authority here. Memorandum to House Committee on Education and Labor, from Kevin B. Greely, Congressional Research Service, at 5 (June 4, 1990). Both 20 U.S.C. § 1234a and a similar statute not cited by CRS, 20 U.S.C. § 1234d, unlike section 22, appear in the context of elaborate statutorily-mandated review procedures where specification of the Secretary's power of review might be expected. Because of the vastly different context in which section 22 appears, any inference based upon the existence in 20 U.S.C. § 1234, but not in section 22, of an explicit right of secretarial review would be unwarranted.

is an appeal to, or review on motion of, the agency within time provided by rule." 5 U.S.C. § 557(b). The APA further states that "[o]n appeal from or review of the initial decision [of the presiding employee], the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule." *Id.* The APA therefore contemplates that decisions by ALJs will be reviewable in precisely the manner allowed by the Secretary's regulations here. Decisions will be final unless the parties or the "agency" seeks review, but if there is further review the agency may exercise all of its powers as if the agency had itself presided over the hearing.[10]

Accordingly, we conclude on the strength of the textual, structural and historical evidence that Congress, in mandating that ALJ decisions under section 22 "shall be considered to be a final agency action," did not intend to preclude further review of an ALJ's decision by the head of the agency in which the ALJ is employed, but rather intended only that the ALJ's decision be considered a final agency action for purposes of judicial review.

III.

The conclusion that the Act does not preclude review by the Secretary is reinforced by the fact that the contrary conclusion would render the Act constitutionally infirm. It is an elementary canon of construction that statutes should be interpreted to avoid constitutional difficulties, provided the adopted interpretation is reasonable. *Gomez v. United States*, 490 U.S. 858, 864 (1989); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986). If the Act were construed to forbid the Secretary's review of an ALJ decision, there would be presented serious constitutional questions relating to the ALJ's appointments and the lack of presidential control over their activities.

Under the Appointments Clause, the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States . . .

[10] For purposes of this opinion, we view 5 U.S.C. § 557(b) as providing a model for administrative adjudication; however, we do not address whether that section actually governs hearings under the Act. We need not reach that question, given our conclusion that decisions of ALJs under section 22 are reviewable whether or not 5 U.S.C. § 557(b) applies to hearings under the Act.

It is reasonable to look for guidance to sections 556 and 557 of the APA, even though most trial-type hearings are not conducted pursuant to those provisions because the governing statutes under which agencies make their determinations do not require that decisions be made "on the record after opportunity for an agency hearing." *See, e.g., United States v. Florida East Coast Ry. Co.*, 410 U.S. 224, 234-38 (1973). Where a trial-type hearing before an ALJ is available under regulations rather than under the command of the APA, agencies typically provide for review by higher authority. *See, e.g.*, 18 C.F.R. § 385.711 (Federal Energy Regulatory Commission); 47 C.F.R. § 1.276 (Federal Communications Commission); 49 C.F.R. § 1115.2 (Interstate Commerce Commission); 40 C.F.R. § 124.91 (certain proceedings of the Environmental Protection Agency).

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

U.S. Const. art. II, § 2, cl. 2. Because the Secretary, who is the head of the, Department, appoints the Department's ALJs, 5 U.S.C. § 3105; 20 U.S.C. § 1234(b), (who are not confirmed by the Senate), they are properly appointed only if they serve as "inferior officers."

An ALJ whose decision could not be reviewed by the Secretary, however, would appear to be acting as a principal officer of the United States. He would be an "Officer of the United States" because he would be exercising "significant authority pursuant to the laws of the United States," including "determinations of eligibility for funds." *Buckley v. Valeo*, 424 U.S. 1, 126, 141 (1976). And applying the criteria enumerated in *Morrison v. Olson*, 487 U.S. 654 (1988), he most likely would be a principal, not an "inferior," officer. Unlike the independent counsel at issue in *Morrison*, whose jurisdiction was limited to a single case, an ALJ has jurisdiction under the Act over various proceedings in a whole category of cases relating to the termination of funds. *Id.* at 672. An ALJ's tenure, unlike that of the independent counsel, is not limited in duration. *Id.*[11] And although both an ALJ and an independent counsel are bound to follow agency regulations, *id.*, the ALJ would have a much greater opportunity than the independent counsel to effectively "formulate" policy. By deciding a series of cases, the ALJ presumably would develop interpretations of the statute and regulations and fill statutory and regulatory interstices comprehensively with his own policy judgments. Given these characteristics of the office, and that the ALJs are appointed not by the President but by the department head, interpretation of section 22 to insulate ALJ decisions from review by the Secretary would raise serious questions under the Appointments Clause.

The foreclosure of secretarial review would also be constitutionally suspect under Article II because all executive power (other than purely ministerial authority)[12] must ultimately be subject to Presidential control. Article II provides that the executive power "shall be vested in a President of the United States of America," U.S. Const. art. II, § 1, cl. 1, who alone is responsible to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3, cl. 4.[13] These constitutional provisions generally require that the

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[11] Like the independent counsel, an ALJ is removable by another official in the executive branch, 487 U.S. at 671, but, unlike the independent counsel, an ALJ has the additional tenure protection of a pre-removal hearing. 5 U.S.C. § 7521.

[12] *See, e.g.*, *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 610-11 (1838); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

[13] A unitary executive branch was the considered and deliberate choice of the Framers of the Constitution. This is evident in contemporaneous exposition of the Constitution during the ratification period, *e.g.*, The Federalist No. 70, at 354-61 (A. Hamilton) (G. Wills ed. 1982); 2 Elliot's Debates 480 (2d ed. 1836) (statement of James Wilson at Pennsylvania ratifying convention), in the contrast between Article II and Article III, in which the judicial power is vested "in one Supreme Court, *and in such inferior Courts as the Congress may from time to time ordain and establish*," U.S. Const. art. III, § 1 (emphasis added), and in the contrast between Article II and the Article I legislative bicameralism.

President, either personally or indirectly through other executive officers, be able to direct and countermand actions of subordinate executive officials that entail the exercise of significant executive power. *Myers v. United States*, 272 U.S. 52, 163-64 (1926); *cf. Bowsher v. Synar*, 478 U.S. 714, 721-34 (1986); *see generally Morrison v. Olson*, 487 U.S. 654, 691-93 (1988).

The duties of ALJs under section 22 are generally executive in nature, because the ALJs determine, on a case-by-case basis, the policy of an executive branch agency for the administration of a federal program. *See Bowsher v. Synar*, 478 U.S. 714, 732-33 (1986); *Buckley v. Valeo*, 424 U.S. 1, 138 (1976); *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272, 279, 284-85 (1855); *cf. Heckler v. Chaney*, 470 U.S. 821 (1985).[14] If section 22 were construed so that these decisions were the conclusive determinations of an executive branch department, serious constitutional questions would be presented, given the restrictions on ALJ removal. ALJs can be removed by their agencies only after the Merit Systems Protection Board holds a hearing and finds cause for removal. 5 U.S.C. § 7521. *See generally* 5 C.F.R. §§ 930.201-930.216. The members of the Merit Systems Protection Board are in turn protected by removal restrictions during their seven-year terms. 5 U.S.C. § 1202(a), (d). ALJs are thus doubly insulated from meaningful executive control. *Cf. Bowsher*, 478 U.S. at 726. A conclusion that their exercise of executive power is not subject to review by any other executive branch official would therefore clearly be problematic under Article II.[15]

Although the Supreme Court upheld the statute at issue in *Morrison v. Olson*, which granted significant executive authority to an executive branch official protected by a "for cause" removal restriction, we do not believe that the existence of "for cause" removal authority over ALJs granted unreviewable discretion would be sufficient to save the statute from constitutional infirmity. In *Morrison*, the Court embraced the principle that the President's constitutional duty to take care that the laws be faithfully executed requires some power to control or supervise subordinates, generally including the power to remove them from their posts. 487 U.S. at 689-93, 696. The Court simply reasoned that this general principle was not violated by a "for cause"

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[14] The functions of ALJs under section 22 can also be understood as "quasi-judicial" in nature. *Cf. Wiener v. United States*, 357 U.S. 349 (1958); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). But as *Morrison* makes clear, the mere characterization of a power exercised by executive branch officials as "quasi-judicial" does not affect the primary issue of whether removal restrictions interfere with the President's discharge of his constitutional duty to take care that the laws be faithfully executed 487 U S at 689-90.

[15] *Butterworth v. United States ex rel. Hoe*, 112 U.S 50 (1884), is not to the contrary. In *Butterworth*, certain decisions of the Commissioner of Patents were held not to be reviewable by the Secretary of the Interior. However, the Commissioner of Patents was, as a practical matter, the head of a separate executive department, with the Secretary of Interior merely performing a "ministerial" act in signing patent registrations. Thus, *Butterworth* does not address squarely the question of the President's constitutional powers over subordinate executive officers. There is, moreover, no suggestion in *Butterworth* that the Commissioner of Patents was not subject to presidential control through removal.

removal restriction in the highly unusual circumstances of the "independent counsel," where Congress perceived an inherent conflict between an unlimited power of removal and the independence necessary for the counsel to investigate and prosecute high executive branch officials. *Id.* at 692-93. There simply is no similar conflict between an ALJ's discharge of his particular responsibilities and the existence of an "at will" removal authority.

Two factors relied on by the Court in *Morrison* to sustain the "independent counsel" statute suggest that section 22, if interpreted to prevent review of ALJ determinations by higher executive officers, might well unconstitutionally intrude upon executive power. First, the Court in *Morrison* emphasized that the Attorney General's initial decision whether to apply for the appointment of an independent counsel was committed to his unreviewable discretion, thus "giv[ing] the Executive a degree of control over the power to initiate an investigation by the independent counsel." *Id.* at 696. Here, by contrast, ALJs are assigned to section 22 cases by operation of statute, at the behest of local education agencies or institutions of higher education aggrieved by the Secretary's decision, and not by the Secretary.[16]

Second, the Court in *Morrison* emphasized both the limited tenure of an independent counsel, whose appointment ends with the completion of the particular investigation for which he is appointed, and the statutory requirement that an independent counsel generally follow policy guidelines established by the Department of Justice. 487 U.S. at 671-72. In contrast to an independent counsel, ALJs are civil service employees who may continue in their posts indefinitely, unless removed for cause. Furthermore, if ALJ decisions with respect to section 22 claims are unreviewable, the aggregate of those decisions over time effectively will establish the policy of the Department. The combined effect of tenure protection and the unreviewability of decisions substantially deprives the President of control over a particular set of policy decisions made by an executive branch Department, and thereby impairs his ability to perform his constitutional duty to take care that the laws be faithfully executed. *Cf. Morrison*, 487 U.S. at 691 (noting that independent counsel "lack[s] policymaking or significant administrative authority").

In sum, even if Congress' intent were less clear than it is from the statutory text, we would likely still adopt the interpretation of section 22 that we do because of the two quite serious constitutional questions that would attend the contrary interpretation of the section.

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[16] Officers of "independent agencies" may also be distinguished from ALJs empowered to make unreviewable decisions, on the basis of the degree of control possessed by the President at the appointment stage. Action by an independent agency official may be reviewed by the head of the agency or by commissioners acting collectively as the head of the agency, who, although they may possess tenure protections, are appointed by the President with the advice and consent of the Senate. The appointment power thus gives the President a measure of control over the actions of independent agencies.

IV.

It follows from the conclusion that ALJ decisions are final under section 22 only for purposes of judicial review that an aggrieved party can seek judicial review upon receipt of the ALJ's decision, whether or not there are further proceedings before the Secretary. Indeed, the fairest inference to be drawn given the well-understood practice under the APA — where the existence of "final agency action" permits immediate judicial review — is that Congress intended precisely this result when it mandated that decisions of the ALJs "shall be considered to be a final agency action." Thus, section 22 constitutes the express exception contemplated in 5 U.S.C. § 704 to the general permissibility of a requirement of exhaustion of administrative remedies. *See supra* note 4.

This reading gives meaning to the relevant language of section 22. It also furthers an apparent purpose of the Act to assure speedy resolutions by the agency, a purpose reflected, for example, in the requirement that a hearing be held within 45 days of the filing of the appeal, unless the ALJ extends the time on motion of the local education agency or institution of higher education. 20 U.S.C. §§ 1145g(d), 3224a(e). The aggrieved party may proceed immediately into court upon issuance of the ALJ's decision even if the Secretary intends to review the ALJ's decision.

CONCLUSION

We conclude for the reasons stated that section 22 does not preclude the Secretary from reviewing decisions by ALJs. The clear import of the language in section 22 that an ALJ's decision "shall be considered to be a final agency action," given the consistent practice under the APA, is that the ALJ's decision is final for the purposes of permitting judicial review. We further conclude that section 22 deprives the Secretary of power to require exhaustion of the secretarial review procedures before an aggrieved party may seek judicial review.

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FBI Authority to Charge User Fees for Record Check Services

The Federal Bureau of Investigation has authority to charge the Department of State user fees for FBI record check services used by the State Department to determine whether visa applicants have criminal records and are thus ineligible for visas.

The imposition of user fees by the FBI for record check services is discretionary.

February 11, 1991

MEMORANDUM OPINION FOR THE ASSISTANT DIRECTOR
FEDERAL BUREAU OF INVESTIGATION

This memorandum responds to your request for our opinion whether the Appropriations Act for the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies for Fiscal Year 1990 ("the FY 1990 CJS Act") authorizes the Federal Bureau of Investigation ("FBI") to charge the Department of State user fees for FBI fingerprint identification and name check services ("record check services") provided to the State Department in connection with its review of visa applications. We conclude that the Act authorizes the FBI to establish and collect fees for record check services that are requested for, among other things, "non-criminal justice" purposes. Because the State Department's requests for such visa-related record checks are for a "non-criminal justice" purpose, the FBI may charge the State Department a user fee for record check services provided in response to such requests. We also conclude that the imposition of user fees by the FBI for record check services is discretionary.

I.

The FY 1990 CJS Act authorized the FBI to "establish and collect fees to process fingerprint identification records and name checks for non-criminal justice, non-law enforcement employment and licensing purposes." Pub. L. No. 101-162, 103 Stat. 988, 998-99 (1989) (the "user fee provision"). Based upon this authority, the FBI notified all federal agencies that use record check services that it would charge user fees for all such services that are not specifically for criminal justice or law enforcement purposes. Letter to All Federal Users of FBI Identification Division Services, from Assistant Director in Charge, Identification Division, FBI, at 1 (Dec. 8, 1989). The State Department subsequently asked the FBI to confirm that user fees would

not be charged for any visa-related record check services, asserting that "[t]he purpose of such namechecks is to avoid issuance of visas to persons who are excludable from the United States by law; they are, therefore, inextricably intertwined with the enforcement and administration of the criminal and immigration laws of the United States." Letter to William S. Sessions, Director, FBI, from Elizabeth M. Tamposi, Assistant Secretary for Consular Affairs, State Department, at 1 (Feb. 2, 1990).

In responding to the State Department's request, the FBI distinguished between two types of record checks of interest to the State Department. *See* Letter to Elizabeth M. Tamposi, from William S. Sessions (Mar. 26, 1990). The FBI explained that record checks ordered by the FBI's Intelligence or Criminal Investigative Divisions based upon requests submitted by the State Department are considered to be "primary source information in support of the [i]ntelligence and [c]ounterterrorism missions of the FBI's national security responsibilities," and consequently no user fee would be charged for such requests. *Id.* at 2-3. However, the FBI stated that other record checks requested by the State Department in connection with visa applications would be subject to a user fee because they are not "used in support of the FBI's intelligence and counterterrorism, or even criminal investigative mission responsibilities." *Id.* at 3.

The FBI and the State Department attempted to resolve their differences over the FBI's authority to charge user fees for visa-related record checks. That attempt was unsuccessful, and the FBI subsequently requested the opinion of this Office on the scope of the FBI's authority to charge user fees under the FY 1990 CJS Act.

II.

The FY 1990 CJS Act, as noted above, authorizes the FBI to establish and collect user fees for record check services provided "for non-criminal justice, non-law enforcement employment and licensing purposes." 103 Stat. at 998-99. The State Department asserts that this language, by its terms, authorizes fees only for services provided for "employment and licensing purposes." *See* Letter to Joseph R. Davis, Assistant Director, Legal Counsel, FBI, from Alan Kreczko, Deputy Legal Adviser, Department of State, at 2 (May 24, 1990) ("Kreczko Letter"). Under this reading, the terms "non-criminal justice" and "non-law enforcement" are construed as coordinate adjectives that together modify the word "employment."[1] The FBI, by contrast, argues that the user fee provision must be read as a series of three adjectives, each of

[1] Alternatively, these two terms might be considered as modifying the entire phrase "employment and licensing purposes," so that the provision would be read as covering both non-criminal justice, non-law enforcement employment purposes and non-criminal justice, non-law enforcement licensing purposes. The State Department has not taken a clear position as to whether, under its reading of the provision, these two terms modify both "employment" and "licensing" or just "employment." In any event, it is clear that the State Department's use of FBI record check services is not for an employment or a licensing purpose.

which modifies the word "purposes." Thus read, the user fee provision authorizes the FBI to impose fees for record check services provided for any of three purposes: a "non-criminal justice" purpose, a "non-law enforcement employment" purpose, or a "licensing" purpose. *See* Letter to Alan Kreczko, from Joseph R. Davis, at 2 (May 2, 1990) ("Davis Letter").

Applying ordinary rules of English grammar, syntax and usage, we conclude that the phrase "non-criminal justice, non-law enforcement employment and licensing purposes" is susceptible of either of two permissible constructions. On the one hand, it would be consistent with ordinary usage to read the terms "non-criminal justice" and "non-law enforcement" as coordinate adjectives that both modify the word "employment." The use of a comma rather than the word "and" between these two terms does not defeat this construction; it is well established that coordinate adjectives may properly be separated by commas. *See, e.g., The Chicago Manual of Style* § 5.45, at 142 (13th ed. 1982) (giving as an example "a faithful, sincere friend"); Government Printing Office ("GPO"), *Style Manual* § 8.38, at 121 (1984) ("short, swift streams").

On the other hand, it would also be consistent with ordinary usage to construe the user fee provision as comprising a series of three terms ("non-criminal justice," "non-law enforcement employment" and "licensing"), each of which modifies the word "purposes." The absence of a comma after the word "employment" does not imply that the provision may not be read as a list of three items. Although grammarians appear to be divided on the strict propriety of omitting the comma before the word "and" in a list of three or more items, *see, e.g., The Chicago Manual of Style* § 5.50, at 143 (final comma should always be used); GPO, *Style Manual* § 8.43, at 122 (same); *see generally* R. Copperud, American Usage and Style 78-79 (1980) ("Opinion is divided on whether the comma should be used before 'and' in a series . . . ."), it is nonetheless consistent with ordinary English usage to leave out the final, or "serial," comma. *See, e.g.*, L. Todd & I. Hancock, *International English Usage* 389 (1987) (comma is used "with words or phrases in a series but not before 'and'"); *see also The World Almanac Guide to Good Word Usage* 52 (M. Manser & J. McQuain eds. 1989) ("the final comma preceding 'and' or 'or' is optional"). At any rate, whatever the views of grammarians, it is clear that Congress regards it as acceptable to leave out the serial comma. In the very same section that enacts the user fee provision, Congress omitted the final comma in a context where it clearly intended that the enumerated activities comprise a series of four activities. *See* 103 Stat. at 998 (appropriating funds to the FBI for expenses for "acquisition, lease, maintenance and operation of aircraft").[2] Accordingly, the FBI's construction of the user fee provision is consistent both with ordinary English usage and, more importantly, with congressional usage.

[2] Indeed, Congress does not appear to follow consistently any particular rule with respect to the use of the serial comma. In another list of items in the same section, Congress did use a serial comma. 103 Stat. at 998 (appropriating funds necessary for "detection, investigation, and prosecution of crimes").

The State Department argues that the FBI's construction of the user fee provision renders part of the provision superfluous and that therefore the State Department's construction is syntactically preferable. Kreczko Letter, at 2. We disagree. While "non-criminal justice" purposes, "non-law enforcement employment" purposes and "licensing" purposes are overlapping categories, none of them is completely subsumed within the other two. For example, there are "licensing" purposes that are related to criminal justice and thus *not* within the "non-criminal justice" category (*e.g.*, a firearms license for a court bailiff). Similarly, there are "non-law enforcement employment" purposes that are related to criminal justice (*e.g.*, hiring of a public defender). Accordingly, we cannot conclude that the FBI's construction renders any portion of the user fee provision superfluous.[3]

Because both the construction suggested by the State Department and the one offered by the FBI are grammatically permissible readings of the statutory language, the user fee provision is ambiguous. The legislative history, however, establishes that the FBI's construction is the only one that fulfills Congress' intent in enacting the provision.

The legislative history establishes that the user fee provision in the FY 1990 CJS Act was intended to effect a significant expansion in the authority of the FBI to charge user fees for record check services. Prior appropriations acts had provided the FBI only limited authority to institute a user fee program. Since 1982, appropriations acts for the Department of Justice included language authorizing the FBI to charge fees only for fingerprint identification record checks requested for "noncriminal employment and licensing purposes." Pub. L. No. 97- 257, 96 Stat. 818, 823 (1982); *see also*, *e.g.*, Pub. L. No. 100- 459, 102 Stat. 2186, 2195 (1988) (appropriations act for fiscal year 1989). By its terms, this statutory language permitted the FBI to charge user fees only for fingerprint identification record checks and then only if requested for "employment" purposes or "licensing" purposes.

In the FY 1990 CJS Act, Congress deleted this earlier, narrow formulation of the FBI's user fee authority in favor of the current language. The report submitted by the Senate Appropriations Committee, which added the new language, explained that the change was intended to expand significantly the FBI's authority to charge user fees for record check services:

> The expanded authority would permit the FBI to institute a user fee for processing of *all requests for other than law enforcement purposes*, including those for other Federal

[3] At any rate, the FBI's reading is no more redundant than that suggested by the State Department. Because the terms "non- criminal justice" and "non-law enforcement" substantially overlap, construing *both* words as simultaneously modifying the term "employment" renders the second adjective largely redundant.

> Government agencies. The costs to the FBI of providing name check and fingerprint identification services for nonlaw enforcement purposes are considerable and have begun to negatively impact on its basic law enforcement mission. The Committee recognizes the value of these services to other Federal users, however, and believes it is important that the FBI continue to make them available, although on a reimbursable basis.

S. Rep. No. 144, 101st Cong., 1st Sess. 46 (1989) (emphasis added). The Senate Committee thus recognized that the increasing cost of record check services "for nonlaw enforcement purposes" was having an adverse effect on the FBI's overall budget and, consequently, on its ability to perform "its basic law enforcement mission." It therefore expanded the FBI's authority so as to permit the collection of user fees for all record check requests "for other than law enforcement purposes," rather than just the employment and licensing purposes previously authorized. *Id.*

The FBI's construction of the user fee provision is the only reading that gives effect to this unmistakable congressional intent to expand the FBI's authority to charge user fees for all record check services "for other than law enforcement purposes." Under the FBI's reading of the provision, the FBI is authorized to charge a user fee for any record check that is requested for, among other things, a "non-criminal justice" purpose. Because there is a substantial overlap between the term "non-law enforcement," which is used in the Senate Report, and the statutory term "non-criminal justice," the FBI's construction substantially effectuates the congressional intent that the FBI have the authority to collect user fees for record checks performed for all "non-law enforcement" purposes.

By contrast, the State Department's construction fails to expand the range of purposes for which a record check request would be subject to the FBI's user fee authority. Under the State Department's reading, Congress simply substituted a new set of adjectives to describe the type of *employment* purposes for which the FBI could charge a user fee: the coordinate adjectives "non-criminal justice, non-law enforcement" were substituted for the earlier adjective "noncriminal." The State Department has not pointed to any evidence in the legislative history — and we have been unable to find any evidence — that Congress intended to limit the FBI's expanded user fee authority to employment and licensing purposes. On the contrary, this reading of the provision fails to carry out Congress' explicit intent to expand the FBI's authority so that it would cover "all requests for other than law enforcement purposes." S. Rep. No. 144, *supra*, at 46. Indeed, the State Department's reading may actually *contract* the FBI's authority in this regard. To the extent that the two new adjectives do not completely overlap in meaning, the set of employment purposes that are *both* "non-criminal justice" and "non-law enforcement" is necessarily smaller than the comparatively

broad set of "noncriminal" employment purposes.[4]

The State Department argues that the FBI's conclusion that it may charge a user fee for record checks conducted for "non-criminal justice" purposes is, on its face, inconsistent with the Senate Report's statement that the provision "would permit the FBI to institute a user fee for processing of all requests for other than *law enforcement* purposes." S. Rep. No. 144, *supra*, at 46 (emphasis added); Kreczko Letter, at 3. In essence, the State Department contends that the FBI's reading places primary emphasis on the wrong statutory term. We find this argument unpersuasive. Under *any* reading of the user fee provision, the term "non-law enforcement" modifies the word "employment"; therefore, there is no sense in which the statutory language can be read to align *precisely* with the description in the Senate Report. Under these circumstances, our task is to determine which of the facially permissible constructions of the statutory text best fulfills the congressional purpose. As explained above, "non-criminal justice" is sufficiently close in meaning to "non-law enforcement" that the FBI's reading effectuates Congress' intent. Indeed, the FBI's reading is the *only* construction that fulfills that intent.[5]

Accordingly, we conclude that the FY 1990 CJS Act must be construed to authorize the FBI to impose a user fee for any record check services performed for a "non-criminal justice" purpose, a "non-law enforcement employment" purpose or a "licensing" purpose.

III.

The State Department asserts that the record check requests it submits to the FBI "have no other purpose than to support a law enforcement objective" and that they are therefore not subject to a user fee. Kreczko Letter, at

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[4] Both the State Department and the FBI assert that their respective constructions are supported by the statement in the Senate Report that the new user fee provision was intended to give the FBI authority to charge fees for record checks performed for "all civil, nonlaw enforcement employment and licensing purposes." S. Rep. No. 144, *supra*, at 45 *See* Kreczko Letter, at 3; Davis Letter, at 3. Although we believe that this language helps to clarify the meaning of the term "non- criminal justice," *see infra* p. 24, we do not believe that it assists in determining which of the two constructions is the correct one, because the passage includes precisely the same grammatical ambiguity as the statutory language

[5] Although the State Department's reading fails to give effect to Congress' intent that FBI have the authority to charge a user fee for all record checks conducted for non-law enforcement purposes, S. Rep. No. 144, *supra*, at 46, both constructions of the provision would expand the FBI's user fee authority in three other respects intended by Congress. First, the Senate Report makes clear that, in making these changes to the user fee provision, Congress intended that the provision would be given its full literal scope and therefore that the FBI was authorized to collect user fees from other federal agencies. *Id.* at 45-46. Despite the broad terms of the 1982 provision, the FBI had not collected user fees from federal agencies between 1982 and 1989 Second, the new language also authorized the FBI to charge user fees in connection with "name checks" of criminal records in addition to "fingerprint identification" record checks. *Compare* Pub. L. No. 101-162, 103 Stat. at 999 *with* Pub. L No. 97-257, 96 Stat. at 823. Third, the new provision also allowed the FBI to charge a user fee for record checks performed "for certain employees of private sector contractors with classified Government contracts." Pub. L. No 101-162, 103 Stat at 999. Either reading of the provision would effectuate the congressional purpose on these three points, but only the FBI's construction fulfills Congress' intent that the FBI have the authority to collect user fees *for all record checks conducted for non-law enforcement purposes.*

2. It says that its only purpose in submitting name checks in connection with visa applications is "to avoid issuance of visas to persons who are excludable from the United States by law." *Id.* Because "[s]ections 212(a)(9), (10), and (23) of the [Immigration and Nationality Act ("INA")] forbid the issuance of visas to aliens who have criminal records," the State Department argues, its record check requests are submitted for the purpose of enforcing the law and therefore should not be subject to a user fee. *Id.*; *see also* Letter for Paul P. Colborn, Senior Counsel, Office of Legal Counsel, from Alan Kreczko, at 1 (Aug. 31, 1990) ("the sole and exclusive justification for the namecheck/fingerprint function in the first instance is a criminal justice, law enforcement one, *i.e.*, the detection and exclusion of criminal aliens from the United States in accordance with Congress' intent in the relevant exclusionary provisions of the [INA]").

We conclude, however, that the State Department's requests for record checks in connection with visa applications are for a "non-criminal justice" purpose. In ordinary usage, the term "criminal justice" refers to the administration and enforcement of the criminal law. *See, e.g.*, *Webster's Third New International Dictionary* 1228 (1986) (defining "justice" as the "administration of law"). Accordingly, a "non-criminal justice" purpose is a purpose that is not related to the administration of criminal laws. The Senate Report confirms this understanding of "non-criminal justice" purposes by generally equating them with "civil" purposes. *See* note 4 *supra*. The State Department's requests for visa-related record checks relate not to the administration of criminal laws, but to the administration of certain civil provisions of the INA. The State Department does not request record checks for visa applicants for the purpose of investigating whether those applicants have violated the criminal laws of the United States and should be arrested or prosecuted, but rather to determine whether a visa applicant already has a criminal record that would require his or her exclusion from the United States. *See* 8 U.S.C. § 1182(a)(9), (10), (23) (listing classes of aliens with criminal records who "shall be ineligible to receive visas and shall be excluded from admission into the United States"). Indeed, a decision by the State Department to deny a visa does not involve any criminal penalty. *See id.* § 1201. In short, the State Department's role under the INA does not include criminal justice responsibilities, but rather the administration of a civil program.[6]

[6] The State Department also argues that, even if these record checks are not requested for "criminal justice" purposes, they are nonetheless for "law enforcement" purposes and for this reason should be exempt from user fees. It is not clear from the statutory text whether the term "law enforcement" is meant to embrace just the enforcement of *criminal* laws — which we believe to be the more conventional use of the term — or whether it is also intended to include the enforcement of civil laws. As noted above, however, the Senate Report is clear that this term is being used in the narrower sense of criminal law enforcement. *See* S. Rep. No. 144, *supra*, at 45 (user fees generally authorized for record checks requested for "civil" purposes). The State Department's argument ultimately fails in any event because the term "non-law enforcement," as used in the user fee provision, modifies the word "employment." There is, of course, no suggestion that the State Department's review of visa applications is in any way associated with potential employment of aliens by agencies that conduct law enforcement, whether it be civil or criminal.

The State Department's purpose in requesting a record check of a visa applicant is, therefore, a civil, rather than a criminal justice, purpose.[7] Because the record check services that the FBI provides the State Department in connection with visa applications serve a "non-criminal justice" purpose, we conclude that the FBI is authorized to charge user fees for such services.[8]

IV.

The FBI has also asked whether, if it has such authority, it is *required* to charge the State Department for these services. This question is resolved by the language of the user fee provision, which states that "the Director of the [FBI] *may* establish and collect fees to process fingerprint identification records and name checks for non-criminal justice, non-law enforcement employment and licensing purposes." 103 Stat. at 998-99 (emphasis added). In using the permissive "may," rather than the mandatory "shall," Congress clearly authorized, but did not require, the FBI to charge user fees.[9]

CONCLUSION

We conclude for the reasons stated that the FY 1990 CJS Act authorizes the Federal Bureau of Investigation to charge the Department of State user fees for FBI record check services used by the State Department to determine whether visa applicants have criminal records and are thus ineligible for visas. We also conclude that the FBI's exercise of this authority is discretionary.

J. MICHAEL LUTTIG
Assistant Attorney General
Office of Legal Counsel

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[7] We agree with both the FBI and the State Department that record checks ordered by the FBI's Intelligence or Criminal Investigative Divisions, based upon requests submitted by the State Department, are conducted for a criminal justice purpose and thus are not subject to a user fee.

[8] In light of this conclusion, we do not address the FBI's argument that the Economy Act, 31 U.S.C. § 1535, is available as a separate and independent source of authority. Nor do we consider the FBI's authority to charge user fees to any other particular federal agency, because to do so would require examination of the particular purposes for which the services would be provided. We note, however, that the analytical framework used in this opinion will generally be applicable in the context of record check services provided by the FBI to other federal agencies. We also note that the conclusions and analysis in this opinion remain applicable for the current fiscal year because the user fee provision in the FY 1990 CJS Act has been reenacted verbatim in the fiscal year 1991 appropriations legislation for the FBI *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1991, Pub. L. No. 101-515, 104 Stat. 2101, 2112 (1990).

[9] The provision of record check services to the State Department for visa-related purposes does not implicate the rule prohibiting augmentations of agency appropriations that are not authorized by law. *See generally* United States General Accounting Office, Office of General Counsel, *Principles of Federal Appropriations Law*, at 5-62 through 5-93 (1982). In granting the FBI discretionary authority to impose user fees, Congress has expressly authorized any resulting augmentation in the appropriations of either the FBI or any agency to which it provides record check services.

Application of the Airport and Airway Improvement Act to the Proposed Lease of the Albany County Airport

Section 511(a)(12) of the Airport and Airway Improvement Act permits an airport owner or operator to recoup its unreimbursed capital or operating costs from airport revenues, regardless of when the expenses were incurred. The Federal Aviation Administration, however, in the exercise of discretion conferred upon the Secretary of Transportation by the Act, may oversee the rates charged to airport users by private lessees to ensure that such rates remain fair and reasonable

February 12, 1991

MEMORANDUM OPINION FOR THE ACTING GENERAL COUNSEL
DEPARTMENT OF TRANSPORTATION

This memorandum responds to your request for our opinion on a proposed lease arrangement pursuant to which Albany County, New York, the owner of Albany Airport, would lease the Airport to a private joint venture.[1] You have asked us to address two narrow questions. First, you have asked whether the County's use of an initial lease payment of thirty million dollars for general expenditures unrelated to the Airport would violate section 511(a)(12) of the Airport and Airway Improvement Act of 1982, as amended (the "AAIA"), 49 U.S.C. app. § 2210(a)(12). That section requires airport owners or operators who receive federal assistance to use all airport-generated revenues "for the capital or operating costs of the airport, the local airport system, or other local [airport-related] facilities." Second, you have

[1] Letter for William P. Barr, Assistant Attorney General, Office of Legal Counsel, from Philip D. Brady, General Counsel, Department of Transportation (Mar. 5, 1990) (the "March Letter"). Mr. Brady subsequently provided us with an undated and unsigned memorandum of law prepared by the Federal Aviation Administration ("FAA") (the "FAA Memorandum") discussing the issues raised by the proposed lease. Letter for J. Michael Luttig, Acting Assistant Attorney General, Office of Legal Counsel, from Philip D. Brady, General Counsel, Department of Transportation (July 27, 1990).

You have also provided us with internal legal memoranda prepared by the Department of Transportation and the FAA, certain correspondence between the FAA and Albany County, and a memorandum presenting the views of USAir, a current user of the Albany Airport. We have also received the written views of Baker, Worthington, Crossley, Stansbetty & Wolf, counsel to Lockheed Air Terminal.

asked whether the AAIA permits the FAA to oversee the lessee's recoupment of the thirty million dollars through rates charged to current and future airport users.[2]

The County maintains that its use of the thirty million dollar payment for general municipal purposes does not violate the revenue-retention requirement in the statute because the payment constitutes reimbursements for capital and operating costs that the County has incurred for the Airport over the past three decades. The FAA argues, however, that section 511(a)(12) does not permit an airport owner or operator to elect to recoup its capital and operating investments in an airport as long after those investments were made as it has been since Albany County made its investments.

We conclude that section 511(a)(12) of the AAIA permits an airport owner or operator like Albany County to recoup its unreimbursed capital and operating expenses from airport revenues, regardless of when the expenses were incurred. The statute requires only that airport revenues be used "for the capital or operating costs" of the airport. The use of airport revenues to reimburse past capital or operating expenses may fairly be characterized as an expenditure "for the capital or operating costs" of the airport within the meaning of the statute. We also conclude, however, that the FAA has discretion under other provisions of the AAIA to oversee the rates that the private lessee charges airport users. Therefore, whether and to what extent those rates should be permitted to reflect the lessee's investment, including the thirty million dollar payment, is a judgment that must be made in the first instance by the FAA.[3]

I.

Albany County has requested the FAA to approve a proposal made by a joint venture consisting of British American, Ltd. and Lockheed Air Terminal ("BALLAT"), to lease Albany Airport from the County for forty years, with an option to renew the lease for an additional forty years, and to manage the Airport either directly or through BALLAT's affiliates.[4] Under the

[2] In his original request, Mr. Brady framed the issue raised by the proposed lease in terms of whether "recoupment of *a private lessee's* up-front or periodic payments from airport user charges would be inconsistent with [section 511(a)(12)]" if the private lessee "retain[s] any portion" of such charges for its own use. March Letter at 1, 2 (emphasis added). Mr. Brady thereafter recast the request and asked us to address (1) whether the AAIA permits *Albany County* to use the thirty million dollar payment for general expenditures; (2) whether the lessee may charge the thirty million dollar payment, as well as certain other expenses, such as management and construction fees, to airport users; and (3) whether, under the proposed lease, the County would retain sufficient control of the Airport to satisfy the contractual assurance and funding eligibility requirements of the AAIA. FAA Memorandum at 3. As we have discussed with your office, the only issues we address herein are the two presented by your modified request and set forth in the text above. The remaining issues you have raised turn on policy judgments that must be made in the first instance by the FAA. *See* discussion *infra* note 15.

[3] In his original request, Mr. Brady asked us whether it makes any legal difference if the lessee is a public rather than a private entity. March Letter at 2. We do not believe that it does.

[4] The Secretary of Transportation has delegated the Administrator of the FAA the authority to carry out the functions vested in the Secretary by the AAIA. Memorandum for the Federal Aviation Administrator, from

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terms of the proposal, Albany County would receive an initial payment of thirty million dollars, lease payments of $500,000 per year for the first twenty years, and lease payments of one million dollars per year thereafter. The County, which will retain title to the airport, intends to place the annual lease payments in an interest-bearing account for use in airport development and to use the thirty million dollar payment for general expenditures unrelated to the Airport.[5] There is no dispute that the thirty million dollar payment to the County constitutes "revenue[] generated by the airport" within the meaning of section 511(a)(12). *See FAA Memorandum* at 3-4.[6] Furthermore, the FAA does not contest that as a general matter section 511(a)(12) permits an airport owner or operator to recoup airport-related capital and operating costs through airport revenues. *Id.* at 5. The narrow questions before us, therefore, are whether the statute imposes a temporal limitation on the recovery of such costs and, if not, whether the FAA can oversee BALLAT's recoupment of its payment to the County through rates charged to airport users.

According to the FAA, *see id.* at 4, the County contends that it may use the thirty million dollar payment for general municipal purposes without violating the revenue-retention requirement in section 511(a)(12) because the payment represents reimbursement for capital and operating costs that the County has incurred for the Airport over the past three decades.[7] In

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[4](....continued)
Drew Lewis, Secretary of Transportation (Sept. 15, 1982). The County cannot transfer a property interest in the Airport without the approval of the FAA because the County has received approximately twenty-four million dollars in federal assistance under the AAIA and related programs since acquiring the Airport from the City of Albany in 1960. As an AAIA grantee, the County has agreed that "[i]t will not sell, lease, encumber or otherwise transfer or dispose of any part of its title or other interests in the [Airport] property . . . for the duration of the terms, conditions, and assurances in the grant agreement without approval by the Secretary." FAA Advisory Circular No. 150/5100-16A, app. 1 at 3 (Oct. 4, 1988). Even if the proposed lease is executed, the County would remain subject to the assurance requirements in section 511(a). *Id.*; *see also infra* note 11. The County's obligations under the grant assurance requirements do not expire until the year 2010. *See* FAA Memorandum at 2.

[5]The thirty million dollars would be paid by BALLAT to the County as consideration for a 170-acre parcel of land adjacent to the Airport. BALLAT will immediately transfer the parcel back to the County, however, for one dollar for inclusion in the Airport's layout plan. FAA Memorandum at 1.

[6]*See also* FAA Order No. 5100 38A at 73 (Oct. 24, 1989) ("Airport revenue is revenue generated by facilities and activities on or off airport. Examples of airport revenue include revenue from service fees, landing fees, lease or rental fees, usage fees, sale of commodities such as agricultural or forest products, proceeds from mineral sales, or other net revenue produced from real property."). When it was originally proposed that the Airport be sold to BALLAT rather than leased, proponents of the arrangement argued that the thirty million dollar payment to the County was not airport revenue. Memorandum of Baker, Worthington, Crossley, Stansberry & Wolf at 7-8 (Aug. 3, 1990). To our knowledge, however, none of the parties now contends that the lease payment is not "revenue[] generated by the airport."

[7]Preliminary information furnished to the FAA by the County indicates that its unreimbursed capital and operating costs consists of (1) $4.437 million in cash paid to the City of Albany in 1960; (2) $8.62 million in outstanding debt related to the Airport; (3) $9.148 million transferred to the Airport by the County between 1963 and 1985; and (4) $4.194 million in services contributed by the County for the benefit of the Airport, for a total of approximately $26.3 million. FAA Memorandum at 4. We express no view herein on the accuracy of these figures. We note, however, that the AAIA grants the FAA discretion to impose documentation and accounting requirements on airport owners and operators. *See* 49 U.S.C. app. § 2210(a)(10) ("[T]he airport operator or owner will submit to the Secretary such . . . airport financial and operations reports as the Secretary may reasonably request . . . ."). Thus, the FAA may require the County to produce records sufficient to support the amounts claimed.

other words, the County maintains that the lease proposal would merely permit it to recover its earlier airport-related expenses which, consistent with section 511(a)(12), it could have elected to recover from airport revenues at the time the expenses were incurred. *See id.* at 5.[8]

The FAA, on the other hand, argues that section 511(a)(12) "contemplates a timing relationship between the expenditures for capital or operating costs (or the commitment to do so) and the actual recoupment of revenues." *Id.*[9] The FAA does not define the time period within which capital or operating expenditures must be recouped. It simply contends that section 511(a)(12) implicitly requires that an airport owner or operator elect to recoup such costs at the time the costs are incurred, or within a relatively short period of time thereafter. *Id.*[10]

II.

Under the AAIA, both "public" and "public-use" airports may apply for federal grants to help fund airport development projects. 49 U.S.C. app. §§ 2202(a)(22), 2208(a)(1). If an application for AAIA assistance is approved, the United States will typically bear ninety percent of the project costs. *Id.* § 2209(a). Section 511(a) of the AAIA requires that as a condition to approval of a project grant, the airport owner or operator must provide certain written "assurances" to the Secretary of Transportation. *Id.* § 2210(a).[11] In order to comply with section 511(a), an airport owner or operator who receives

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[8] The permissibility of the County's proposed use of the thirty million dollar payment depends entirely upon the County's unreimbursed capital and operating costs, *not* the capital or operating costs of BALLAT. In turn, whether BALLAT can charge the thirty million dollars to airport users depends upon whether, in the FAA's view, the inclusion of the thirty million dollars in BALLAT's rates is consistent with the County's continuing obligation under the AAIA to make the Airport available for public use on fair and reasonable terms. *See* discussion *infra* Part III.

[9] In recent years, the FAA appears to have expressed different views on the timing issue. In 1985, the FAA relied upon an argument similar to the one it advances here in rejecting a proposal by the City of Burlington, Vermont, to use surplus revenues from Burlington International Airport to reimburse the City for unreimbursed airport subsidies. Letter for the Honorable Bernard Sanders, Mayor of Burlington, Vermont, from J.W. Murdock III, Chief Counsel, FAA (Jan. 8, 1985).

In 1989, however, in response to a proposal by the Albany Capital District Transit Agency whereby the Transit Agency should have acquired a long-term lease interest in the Airport for $25.25 million, the FAA Chief Counsel replied that "if the payment to Albany County is limited to payment of the currently outstanding debt incurred for the capital or operating costs of the airport, we would not expect major obstacles to transfer." Letter for the Honorable James T. Coyne, Albany County Executive, from Gregory S. Walden, Chief Counsel, FAA at 2 (Dec. 4, 1989).

For the reasons discussed in Part II below, we believe that the latter view more accurately reflects the correct interpretation of section 511(a)(12)

[10] We do not understand the FAA to argue that once an airport owner or operator has elected to recover capital or operating costs, the recovery must necessarily be accomplished within a particular period of time. Indeed, section 511(a)(12) itself contemplates the use of airport revenues to retire long-term debt.

[11] Section 511 provides in part:

> (a) Sponsorship
>
> As a condition precedent to approval of an airport development project contained in a project grant application submitted under this chapter, the Secretary [of Transportation] shall receive assurances, in writing, satisfactory to the Secretary, that

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federal assistance must satisfy all of the contractual assurance requirements enumerated in the statute.

Section 511(a)(12) requires that an airport owner or operator provide the Secretary with assurances that "all revenues generated by the airport" will be expended for "capital or operating costs" related to the airport. 49 U.S.C. app. § 2210(a)(12).[12] The FAA agrees (as it must) that there is no express limitation in section 511(a)(12) on the time within which airport capital and operating costs may be recovered through airport revenues, or any affirmative evidence in the history of section 511(a)(12) that such a limitation should be implied. FAA Memorandum at 4-5, 6. The FAA argues, however, that the text and history of the AAIA as a whole indicate that Congress intended to incorporate such a limitation in section 511(a)(12). *Id.* at 5-7. We do not discern any such intent in either the text or the legislative history.

The FAA advances two essentially textual arguments in support of its position. First, the FAA analogizes unreimbursed airport expenses to "a 'debt' of the airport to the [owner or operator's] general treasury." *Id.* at 5. It then reasons from the express exception to the revenue-retention requirement

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[11](....continued)

(1) the airport to which the project relates will be available for public use on fair and reasonable terms and without unjust discrimination. . . .

. . .

(12) *all revenues generated by the airport*, if it is a public airport, and any local taxes on aviation fuel (other than taxes in effect on December 30, 1987) *will be expended for the capital or operating costs of the airport*, the local airport system, or other local facilities which are owned or operated by the owner or operator of the airport and directly and substantially related to the actual air transportation of passengers or property; except that if covenants or assurances in debt obligations issued before September 3, 1982, by the owner or operator of the airport, or provisions enacted before September 3, 1982, in the governing statutes controlling the owner or operator's financing, provide for the use of revenues from any of the airport owner or operator's facilities, including the airport, to support not only the airport but also the airport owner or operator's general debt obligations or other facilities, then this limitation on the use of all other revenues generated by the airport (and, in the case of a public airport, local taxes on aviation fuel) shall not apply. . . .

(b) Compliance

To insure compliance with this section, the Secretary shall prescribe such project sponsorship requirements, consistent with the terms of this chapter, as the Secretary considers necessary.

49 U.S.C. app. § 2210 (emphases added); *see also* FAA Advisory Circular No. 150/5100-16A, app. 1 at 6, 7 (Oct. 4, 1988) (incorporating language of sections 511(a)(1) and 511(a)(12) into the contractual assurances required of grant recipients).

[12]The phrase "capital or operating costs" in section 511(a)(12) is not defined. The Supreme Court has stated, however, that "it should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses." *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984). "Capital costs" and "operating costs" are generally understood as referring, collectively, to all of the costs incurred by a business. *See, e.g.*, Eric Louis Kohler, *A Dictionary for Accountants* at 82, 333 (5th ed. 1975). Consistent with this common meaning, section 511(g) of the AAIA, which permits the use of certain airport-generated revenues in the State of Hawaii for highway construction projects, broadly defines the phrase "airport capital and operating costs" as "costs incurred . . . for operation of all airports . . and costs for debt service incurred . . . in connection with capital projects for such airports, including interest and amortization of principal costs." 49 U.S.C. app. § 2210(g)(4)(A). The FAA does not suggest that a different meaning should be ascribed to the phrase "capital or operating costs" in section 511(a)(12)

in section 511(a)(12) for certain non-airport-related debt obligations incurred prior to the effective date of the AAIA that the statute generally does not permit an airport owner or operator to recoup past capital or operating expenses on a reimbursement theory. We do not believe that the exception in section 511(a)(12) supports the inference that the FAA would have us draw. The exception merely permits airport owners or operators to use airport revenues to retire certain debt obligations that were incurred for expenditures that were *not* airport-related. The exception implies nothing about the recoverability of costs that *were* airport-related, and certainly nothing about a time limitation on the recoverability of airport-related costs. Indeed, if the exception suggests anything about the proper interpretation of section 511(a)(12), it is that when Congress intended to limit or to permit the recovery of costs based upon when the costs were incurred, it did so expressly.

Second, the FAA advances a similar textual argument based upon a 1987 amendment to the revenue-retention requirement. As originally enacted in 1982, section 511(a)(12) of the AAIA permitted an airport owner to use airport revenues "for . . . other local facilities which are owned or operated by the owner or operator of the airport and directly related to the actual transportation of passengers or property." Tax Equity and Fiscal Responsibility Act ("TEFRA"), Pub. L. No. 97-248, tit. V, § 511(a)(12), 96 Stat. 324, 687 (1982). In 1987, section 511(a)(12) was amended by, inter alia, requiring that such local facilities be "directly and substantially related to the actual air transportation of passengers or property." Airport and Airway Safety and Capacity Expansion Act of 1987, Pub. L. No. 100-233, tit. I, § 109, 101 Stat. 1486, 1499. The FAA asserts, without explanation, that "[t]his limitation is inconsistent with the broad interpretation [of the statute] required for the reimbursement theory." FAA Memorandum at 6.

The 1987 amendment, however, is not inconsistent with the recovery of unreimbursed, airport-related capital or operating expenses under the statute. The 1987 amendment simply narrowed the permissible uses of airport revenues to expenditures that were not only "directly" but also "substantially" related to actual air transportation, to further ensure that such revenues would not be diverted for general expenses. *See* H.R. Conf. Rep. No. 484, 100th Cong., 1st Sess. 63-64 (1987); H.R. Rep. No. 123, 100th Cong., 1st Sess., pt. 2, at 13 (1987). The amendment thus is concerned solely with the relationship between expenditures and transportation services provided by the airport (*i.e.*, the relationship must be "direct[] and substantial[]"); the amendment simply does not bear on whether Congress did or did not intend to limit the recoverability of past capital or operating costs after a certain period of time.[13]

[13] The FAA also submits that an airport owner or operator's recoupment of unreimbursed investments is inconsistent with sections 511(a)(1) and 511(a)(3) of the AAIA, 49 U.S.C. app. §§ 2210(a)(1), (a)(3), which require, respectively, that an airport owner or operator provide assurances to the Secretary that "the airport . . . will be available for public use on fair and reasonable terms and without unjust discrimination," and that "the airport and all facilities thereon or connected therewith will be suitably operated and maintained." FAA Memorandum at 5-6, 8. Although the requirement in section 511(a)(1)

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Apart from its arguments from the text of the AAIA, the FAA asserts that the "legislative history of the [Act] and predecessor legislation indicates strong congressional concerns about the use of funds generated at [federally financed] facilities." FAA Memorandum at 6. The FAA, however, does not cite to any particular passage in the legislative record that in any way suggests that Congress intended to impose a temporal limitation on the recoverability of unreimbursed "capital or operating costs" through airport revenues, and we have not found any evidence in the legislative history that Congress intended such a limitation.

The AAIA was enacted in 1982 as title V of TEFRA, Pub. L. No. 97-248, 96 Stat. 324, 671. The House and Senate Conference Reports of TEFRA describe the revenue-retention requirement in section 511(a)(12) as follows:

> One [requirement] is that airports receiving assistance under this program must dedicate all revenues generated by the airport for the capital [and] operating costs of that airport, the local airport system, or other local facilities which are owned by the owner or operator of the airport and used for the transportation of passengers or property. This provision is designed to ensure that airport systems which are receiving Federal assistance are utilizing all locally generated revenue for the systems which they operate. Airports that are part of a unified ports authority are exempt from this requirement if covenants or assurances in previously issued debt obligations or controlling statutes require that these funds are available for use at other port facilities.
>
> However, airports users should not be burdened with "hidden taxation" for unrelated municipal services.

H.R. Conf. Rep. No. 760, 97th Cong., 2d Sess. 712 (1982); S. Conf. Rep. No. 530, 97th Cong., 2d Sess. 712 (1982); *see also* S. Rep. No. 494, vol. 2, 97th Cong., 2d Sess. 28 (1982); S. Rep. No. 97, 97th Cong., 1st Sess. 27-28 (1981).[14] As the Conference Reports state, section 511(a)(12) is intended to

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[13](....continued)
that an airport be made available "on fair and reasonable terms" may, in practical effect, ultimately limit an owner or operator's ability to recoup unreimbursed investments from airport users, section 511(a)(1) cannot be read to flatly prohibit such recoupment. The FAA alternatively suggests that section 511(a)(3) prohibits the contemplated reimbursement because it requires an airport owner or operator "to spend its *own* money to keep the airport running." FAA Memorandum at 8 (emphasis added). Neither the text nor the legislative history of section 511(a)(3) in any way supports this assertion.

[14]Some legislative materials relevant to the interpretation of the AAIA pre-date its enactment in 1982. The AAIA was originally passed by the Senate in 1980, but failed to receive consideration in the House prior to the end of the 96th Congress In 1981, the AAIA was reported out of the Senate Committee on Commerce, Science, and Transportation, but was not passed in either chamber. *See* S. Rep. No. 97, 97th Cong., 1st Sess. 1-2 (1981).

ensure that airport owners or operators who receive federal assistance "are utilizing all locally generated revenue for the systems which they operate," and that the users of such airports are "not . . . burdened with 'hidden taxation' for unrelated municipal services." The plain purpose of section 511(a)(12) is simply to prevent an airport owner or operator who receives federal assistance from using airport revenues for expenditures unrelated to the airport. Thus, a grant recipient cannot use airport revenues to pay for "capital or operating costs" that are not airport-related. There is no suggestion, however, that section 511(a)(12) was intended to limit the time within which an airport owner or operator may elect to recover "capital or operating costs" that are airport-related.

The FAA finally argues that construing section 511(a)(12) to permit airport owners or operators to recoup their past capital or operating expenses from airport revenues on a reimbursement theory is unwise as a matter of policy, and would raise a host of administrative difficulties. FAA Memorandum at 7-12. Whatever the merits of these policy arguments, they do not support the conclusion that, as a matter of law, section 511(a)(12) precludes the recoupment of such expenses on a reimbursement theory.[15]

In sum, section 511(a)(12) does not by terms impose a temporal limitation on the recovery of airport capital or operating costs through airport revenues, nor is there any evidence that Congress intended to impose such a limitation. Accordingly, we conclude that, consistent with section 511(a)(12), an airport owner or operator may elect to recoup its airport-related capital or operating costs when the costs are incurred or at any time thereafter.

III.

You have additionally asked us whether, assuming that Albany County is permitted to accept and use the thirty million dollar lease payment for general expenditures unrelated to the Airport, the FAA retains authority to oversee the rates the BALLAT charges to airport users. We conclude that the FAA does retain such authority. Section 511(a)(1) of the AAIA provides in part

[15] Among other things, the FAA argues that the lease of an airport may collapse traditional distributions between airport owners and operators, who are required to keep revenues on-airport, and airport businesses such as service providers and concessionaires, who are permitted to take revenues off-airport, raising issues as to whether various kinds of income received by the lessee constitute "revenues generated by the airport" within the meaning of section 511(a)(12). FAA Memorandum at 8-10. In addition, the FAA questions whether a lease arrangement affords an airport owner or operator sufficient control of the airport to satisfy its assurances of compliance with the requirements of section 511(a) as a whole, and to remain eligible for federal funds. *Id.* at 10-13.

These questions call for policy judgments that must be made — and, in our understanding, traditionally have been made — in the first instance by the FAA. *See, e.g., id.* at 9 ("It would be possible, *applying principles of traditional public utility rate regulation and existing FAA policy*, to make judgments about what categories of 'costs' can be included in the rate base.") (emphasis added); *id.* at 11 ("the [lease] arrangement is inherently inconsistent with the sponsor's obligation to provide *adequate* assurances" to the Secretary). We therefore do not address which airport receipts received by BALLAT in its capacity as lessee would constitute "revenues generated by the airport" within the meaning of the statute, or whether the lease of Albany Airport is consistent with the County's obligation under the AAIA to maintain control of the Airport. *See* discussion *supra* note 2.

that, as a condition to approval of a project grant, an airport owner or operator must assure the Secretary of Transportation that "the airport to which the project relates will be available for public use on fair and reasonable terms." 49 U.S.C. app. § 2210(a)(1).[16] Although the FAA does not view the AAIA as having established a "full-scale ratemaking regulatory regime," FAA Memorandum at 5-6, the FAA acknowledges that under the authority of section 511(a)(1), it currently "review[s] the reasonableness of the level and structure of specific airport charges." *Id.* at 6; *see also id.* at 9.[17] Consistent with section 511(a)(1) and the discretion that has traditionally been conferred on administrative bodies that monitor the rates charged by a regulated industry, we believe that the AAIA grants the Secretary of Transportation substantial discretion to limit the rates charged to airport users by BALLAT. It would be within the discretion of the FAA, for example, to employ historical cost ratemaking principles or some other approach in determining whether the rates charged by BALLAT are "fair and reasonable." The methodology imposed by the FAA will in turn determine whether and to what extent the rates BALLAT charges airport users may reflect BALLAT's lump sum payment to the County.

CONCLUSION

We conclude for the foregoing reasons that section 511(a)(12) of the AAIA does not limit the time within which an airport owner or operator may recoup unreimbursed capital or operating costs through airport revenues. We

[16] Section 511(a)(1) continues a provision that originally appeared in the Federal Airport Act of 1946, ch. 377, § 11(1), 60 Stat. 170, 176, and was subsequently reenacted in the Airport and Airway Development Act of 1970, Pub. L. No. 91-258, tit. I, § 18(1), 84 Stat. 219, 229. The phrase "fair and reasonable terms" is not defined in the 1946 Act, the 1970 Act, or the AAIA, and the legislative history of this provision is sparse. *See, e.g.*, H.R. Rep. No. 844, 79th Cong., 1st Sess. 4 (1945) ("The Administrator [of Civil Aeronautics] may require project sponsors to enter into agreements insuring, among other things, the continued availability of the airport for public use on fair and reasonable terms . . . ."); *see also* H.R. Rep. No. 601, 91st Cong., 1st Sess. 24 (1969); H.R Conf. Rep. No. 760, 97th Cong., 2d Sess. 711-12 (1982). The standard in section 511(a)(1) is comparable to the standard in the Anti-Head Tax Act, which provides in part that a State or political subdivision thereof that owns or operates an airport may "levy[] or collect[] reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities." 49 U.S.C. app. § 1513(b).

[17] *Cf.* 49 U.S.C. app. § 2218(a) ("The Secretary is empowered to perform such acts . . . pursuant to and consistent with the provisions of this chapter, as the Secretary considers necessary to carry out the provisions of . . this chapter."); *New England Legal Found. v. Massachusetts Port Auth.*, 883 F.2d 157, 169 (1st Cir. 1989) (noting that "Congress has entrusted the administration of § 511 to the Secretary" and within the bounds of the statutory framework "the Secretary has wide discretion"), *City of Denver v. Continental Air Lines, Inc.*, 712 F. Supp. 834, 839 (D. Colo. 1989) ("The enforcement of . . section [511(a)(12)] is exclusively within the administrative authority of the Secretary of the Department of Transportation.").

also conclude, however, that in the exercise of the discretion conferred upon the Secretary of Transportation by the AAIA, the FAA may oversee the rates charged to airport users by BALLAT — including the extent to which they may permissibly reflect BALLAT's thirty million dollar payment to Albany County — to ensure that these rates remain fair and reasonable.

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Military Use of Infrared Radars Technology to Assist Civilian Law Enforcement Agencies

The Department of Defense has statutory authority to assist civilian law enforcement agencies to identify or confirm suspected illegal drug production within structures located on private property by providing them with aerial reconnaissance that uses Forward Looking Infrared Radars technology.

February 19, 1991

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF DEFENSE

This memorandum is in response to your request for our opinion whether, under existing statutory authority, the Department of Defense may assist civilian law enforcement agencies to identify or confirm suspected illegal drug production within structures located on private property by providing them with aerial reconnaissance that uses Forward Looking Infrared Radars technology. We conclude that such assistance is authorized by 10 U.S.C. § 374(b)(2)(B), and not prohibited by 10 U.S.C. § 375.

I.

Forward Looking Infrared Radars ("FLIR") is a passive technology that detects infrared radiation generated by heat-emitting objects. Infrared rays are received by the FLIR system, electronically processed, and projected on a screen as a visual image in the shape of the object that is emitting the heat. The warmer the object, the brighter the image of the object appears. *See United States v. Sanchez*, 829 F.2d 757, 759 (9th Cir. 1987); *United States v. Kilgus*, 571 F.2d 508, 509 (9th Cir. 1978). FLIR is not an x-ray technology. We have been informed that it cannot provide information concerning the interior of an object or structure. It detects only heat emanating from surfaces that are directly exposed to the FLIR system. Thus, for example, if there were heat-producing objects within a building, FLIR could detect that more infrared radiation was being emitted from the building's roof than if the building were empty, but the system could not identify the shapes of

heat-emitting objects located within the structure. Nor could the system identify the source of the heat or the precise location of the heat source within the structure.

Law enforcement agencies believe that FLIR technology can be useful in identifying buildings that house marijuana crops, or methamphetamine or other drug processing laboratories. In particular, FLIR can aid law enforcement officials in establishing probable cause that criminal activity is ongoing within a particular building by determining whether the building is radiating unusually large amounts of heat (due to the use of high intensity lighting or combustion generators) or unusually small amounts of heat (due to heavy insulation). Recently, therefore, federal and state law enforcement agencies have requested that military aircraft equipped with FLIR fly over suspect buildings on private lands and produce infrared images of those structures.

The Department of Defense ("DoD") has informed us of three requests for assistance that present the question whether such military assistance is authorized. The Drug Enforcement Administration ("DEA") has asked the Army to conduct infrared imaging of a barn on private land in which the DEA suspects that marijuana is being cultivated. Second, a law enforcement agency has requested that an Army flight crew conduct a training mission over certain private lands and buildings in the vicinity of Wichita, Kansas, using an Army helicopter equipped with FLIR, to identity suspected illegal marijuana cultivation. And third, the DEA has asked that the Army undertake flights in OH-58D helicopters equipped with FLIR, at a height of at least 500 feet above ground, to identify dwellings and other structures on private land in Arizona that the DEA suspects contain methamphetamine laboratories. The requesting agencies maintain that the Defense Department has the authority to provide the requested assistance under the provisions of 10 U.S.C. §§ 371-378, which are designed to promote cooperation between military personnel and civilian law enforcement officials.

II.

Chapter 18 of title 10, which was enacted by Congress in 1981 and subsequently amended in 1988 and 1989, authorizes DoD to provide several forms of assistance to civilian law enforcement officials. Sections 371 through 373 permit the Secretary of Defense to provide these officials with information collected during training missions; equipment or facilities needed for law enforcement purposes; and training or advice relevant to equipment that is provided. Section 374 authorizes the Secretary to make DoD personnel available for the operation and maintenance of equipment in connection with a limited number of law enforcement purposes. Each of these authorizations is subject to the limitations in section 375 that the Secretary of Defense prevent "direct participation by a member of the Army, Navy, Air Force, or

Marine Corps in a search, seizure, arrest, or other similar activity." *Id.* § 375.[1]

We believe it is clear from the language and legislative history of sections 371 through 374 that FLIR surveillance is authorized by those sections, subject to the restrictions of section 375.[2] Section 372 permits the Secretary of Defense to make available to any federal, state or local law enforcement official "any equipment" for law enforcement purposes, and obviously FLIR constitutes "equipment." Section 374, as amended, allows DoD personnel to operate such equipment for the purpose of "aerial reconnaissance," which is precisely what is contemplated in the requests that have been made. 10 U.S.C. § 374(b)(2)(B).[3] The normal meaning of the term "reconnaissance" is "an exploratory or preliminary survey, inspection, or examination made to gain information." *Webster's Third New International Dictionary* 1897 (1986). FLIR surveillance from aircraft is clearly "aerial reconnaissance," so defined. The only limitation on aerial reconnaissance even suggested by the legislative history is that it should "be used for reconnaissance of property and not for surveillance of persons." H.R. Conf. Rep. No. 989, 100th Cong., 2d Sess. 451 (1988) ("1988 Conference Report"). Here, of course, the proposed reconnaissance is of property, not persons. We conclude, therefore,

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[1] The scope of section 375 is itself restricted by 10 U.S.C. § 378, which states that "[n]othing in this chapter shall be construed to limit the authority of the executive branch in the use of military personnel or equipment for civilian law enforcement purposes beyond that provided by law before December 1, 1981." Thus, if FLIR surveillance of private buildings would not have been prohibited by the Posse Comitatus Act, 18 U.S.C. § 1385, before 1981, section 375 does not proscribe such surveillance. *See infra* note 16.

[2] All parties who have reviewed the requests for DoD assistance that are at issue here appear to agree with this conclusion. Memorandum for Terrence O'Donnell, General Counsel, Department of Defense, from Robert M. Smith, Jr., at 32-33 (Sept. 19, 1980) ("Smith Memorandum"); Memorandum for Office of the Deputy Chief of Staff for Operations and Plans, from Patrick J. Parrish, Assistant to the General Counsel, Department of the Army at 1 (Sept. 17, 1990) ("Parrish Memorandum"); Memorandum for Joint Chiefs of Staff, from Lt. Col. C.W. Hoffman, Jr., Deputy LLC at 1 (Aug. 14, 1990) ("Hoffman Memorandum").

[3] Originally, section 374 authorized DoD personnel to operate equipment "only to the extent the equipment is used for monitoring and communicating the movement of air and sea traffic," and in certain emergency circumstances. Department of Defense Authorization Act, 1982, Pub. L. No. 97-86, tit. IX, § 905(a)(1), 95 Stat. 1099, 1115 (1981). At the time, Congress believed these were the "primary type[s] of assistance sought and needed by Federal drug enforcement agencies." H.R. Conf. Rep. No. 311, 97th Cong., 1st Sess. 120 (1981) ("1981 Conference Report").

When it added the authority for military aerial reconnaissance assistance in 1988, Congress intended to permit military assistance not only in connection with the interdiction of drugs bound for the United States from foreign countries, but also in connection with the eradication of domestically produced narcotics. Several witnesses before the House and Senate Armed Services Committees testified that DoD assistance in the domestic "drug war" was in high priority. *See The Role of the Military in Drug Interdiction: Joint Hearings Before the House and Senate Armed Services Committees*, 100th Cong., 2d Sess. 187 (1988) (statement of Larry L. Orton, Special Agent in Charge, El Paso Intelligence Center, Drug Enforcement Agency) ("We further believe that the National Guard [should] help us in the role that we have here domestically in the United States, and that is the eradication of domestically grown marijuana in the national force. . . . We actually need people to go in, fly over them and locate them, and then go into the patches to eradicate."); *id.* at 242 (statement of Don Siegelman, Attorney General of Alabama) ("Military equipment and certain personnel should be made available, under specified conditions, to assist civilian authorities conduct air and land marijuana spotting and eradication. Military helicopters and pilots could make a significant contribution to the systematic aerial surveying of suspected marijuana growing areas."); *id.* at 257 (statement of Edward Koch, Mayor of New York, New York) ("I believe that those helicopters should be flying over identifying the marijuana fields. . . . Then you notify the local cops, and the cops go in and make the arrest.").

that FLIR surveillance of buildings on private property is authorized aerial reconnaissance under sections 371-374, subject only to the restrictions set forth in section 375.[4]

III.

Section 375 requires the Secretary of Defense to prescribe regulations ensuring that activity undertaken pursuant to sections 371 to 374 does not result in "direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity." 10 U.S.C. § 375. The Secretary has promulgated regulations, based upon an earlier version of the statute, that prohibit military personnel from conducting "[a] search or seizure." 32 C.F.R. § 213.10(a)(3).[5] We understand DoD to take the position that the term "search" in the regulations is intended to have the same meaning as does the statutory term "search," and we assume for purposes of this opinion that this is correct.

DoD has assumed that the statutory term "search" was intended to be coextensive with the same term in the Fourth Amendment and thus that the applicability of the section 375 prohibition to the assistance requested here turns on whether the FLIR surveillance constitutes a "search" within the meaning of the Fourth Amendment.[6] Proceeding on this assumption, DoD has concluded that FLIR surveillance is a "search," and therefore that section 375 prohibits the military from providing the FLIR surveillance assistance to civilian law enforcement agencies. We conclude from the language, structure, and legislative history of section 375 that, contrary to DoD's assumption, the meaning of the term "search" was not intended to be coextensive with the meaning of the same term in the Fourth Amendment. Instead, when Congress used the term "search" in section 375, it intended that the term encompass at most only searches involving physical contact with civilians or their

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[4] Section 371 authorizes the Secretary of Defense to provide to civilian law enforcement officials "any information collected during the normal course of military training or operations that may be relevant to a violation of any Federal or State law." DoD's provision of FLIR surveillance information obtained during training missions in the vicinity of Wichita, Kansas, would thus appear to be separately authorized by section 371 if the requested FLIR surveillance were conducted in the "normal course of military training."

[5] The regulations promulgated by the Department of Defense state:

> Except as otherwise provided in this enclosure, the prohibition on use of military personnel "as a posse comitatus or otherwise to execute the laws" prohibits the following forms of direct assistance:
>
> (i) Interdiction of a vehicle, vessel, aircraft or other similar activity.
>
> (ii) A search or seizure.
>
> (iii) An arrest, stop and frisk, or similar activity.
>
> (iv) Use of military personnel for surveillance or pursuit of individuals, or as informants, undercover agents, investigators, or interrogators.

32 C.F.R. § 213.10(a)(3) (1991). These regulations were promulgated after chapter 18 was enacted in 1981, but they have not been amended to achieve consistency with the statutory changes enacted in 1988 and 1989. For example, subsection (i) of the regulations includes language that no longer appears in 10 U.S.C. § 375.

[6] Smith Memorandum at 3, 32-38; *accord* Parrish Memorandum at 1; *contra* Hoffman Memorandum at 2, *supra*.

property, and perhaps only searches involving physical contact that are likely to result in a direct confrontation between military personnel and civilians.

A.

There is no reason to assume, as a threshold matter, that the meaning of the term "search" in section 375 is coextensive with that of the same word in the Fourth Amendment. "[O]f course words may be used in a statute in a different sense from that in which they are used in the Constitution." *Lamar v. United States*, 240 U.S. 60, 65 (1916); *see also Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 494-95 (1983) (meaning of "arising under" in Article III, Section 2 differs from that of the same phrase in 28 U.S.C. § 1331); *Towne v. Eisner*, 245 U.S. 418, 425 (1918) ("[I]t is not necessarily true that income means the same thing in the Constitution and the [Income Tax] Act."). The term "search" has acquired a specialized meaning in Fourth Amendment jurisprudence, in light of the Amendment's expansive purpose to protect all reasonable expectations of privacy. That specialized definition clearly encompasses activity in which there is no physical contact with or intrusion into private property, such as electronic wiretapping. *Katz v. United States*, 389 U.S. 347 (1967).

In common parlance, however, the term usually connotes at least some amount of physical contact or interference. Indeed, Justice Brandeis conceded in his dissenting opinion in *Olmstead v. United States*, 277 U.S. 438 (1928), which foreshadowed the Court's decision in *Katz* overruling *Olmstead*, that the "ordinary meaning" of "search" would encompass only activity involving a physical trespass. *Id.* at 476-78 (Brandeis, J., dissenting). Although Justice Brandeis was ultimately unsuccessful in persuading his colleagues of his substantive position, the most that he could say about their construction of the term "search" was that it was "unduly literal."[7] The "ordinary meaning" of "search" relied upon by the Court and recited by Justice Brandeis in *Olmstead* is frequently that intended by Congress. A number of statutes concerning searches by law enforcement officials, for example, seem to assume that a "search" involves some physical contact between law enforcement personnel and civilians.[8] It should not be presumed, therefore, that the term "search" in section 375 is coextensive with the same term in the Fourth Amendment.

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[7] It is evident from his opinion that Justice Brandeis did not use the phrase "unduly literal" to suggest that the majority was mistaken as to the ordinary meaning of the term "search." His only point was that adoption of the "ordinary meaning" of the term was inappropriate given the broad privacy protection purpose of the Fourth Amendment.

[8] *See, e.g.*, 7 U.S.C. § 164a (authorizing Department of Agriculture employees "to stop and, without warrant, to inspect, search, and examine such person, vehicle, receptacle, boat, ship, or vessel"); 18 U.S.C. § 913 (subjecting to prosecution "[w]hoever falsely represents himself to be an officer, agent, or employee of the United States, and in such assumed character arrests or detains any person or in any manner searches the person, buildings, or other property of any person"); *id.* § 2231 (subjecting to prosecution "[w]hoever forcibly assaults, resists, opposes, prevents, impedes, intimidates, or interferes with any person authorized to serve or execute search warrants or to make searches and seizures"); *id.*

Continued

The context in which the word "search" appears in section 375 suggests that Congress indeed may have intended the term to refer only to searches involving physical contact. Section 375 employs the term "search" in association with "seizure" and "arrest," terms which contemplate some physical contact with persons or property.[9] If one invokes the common sense maxim noscitur a sociis, "[w]here any particular word is obscure or of doubtful meaning, taken by itself its obscurity or doubt may be removed by reference to associate words," *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893), it would appear that Congress intended for the term "search" in title 10 to have the narrow, "ordinary meaning," rather than the meaning ascribed to the term in the Fourth Amendment. This suggestion is reinforced by the fact that Congress extended the prohibition in section 375 also to "other similar activit[ies]," that is, to other activities similar to searches, seizures, and arrests. It is apparent from this phrase that Congress regarded searches, seizures, and arrests as similar activities.[10] Apart from the obvious fact that these are all law enforcement activities, one of the fundamental similarities of these activities is that each entails some amount of physical contact.

The intent of Congress in section 375 to prohibit only searches involving physical contact is particularly evident in the original version of section 375. As enacted in 1981, section 375 forbade direct participation by DoD personnel "in an interdiction of a vessel or aircraft, *a search and seizure*, arrest, or other similar activity." Pub. L. No. 97-86, tit. IX, § 905(a)(1), 95 Stat. 1099 1116 (1981) (emphasis added). The coupling of "search" and "seizure" through use of the conjunctive "and," and the reference to the two as a single event (*i.e.*, "*a* search and seizure"), strongly suggests that Congress was referring to searches of persons or objects that had been seized and thus were in the custody of law enforcement officers. Searches of seized persons or objects almost always involve physical contact.[11]

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[8](....continued)
§ 2232 (distinguishing between "searches" and "electronic surveillance" and prohibiting "Physical Interference With Search"); 33 U.S.C § 383 ("The commander and crew of any merchant vessel of the United States . . . may oppose and defend against any aggression, search, restraint, depredation, or seizure, which shall be attempted upon such vessel .").

[9] To "seize" is to "take hold of suddenly or forcibly" or "to take possession of by force or at will." *Random House Dictionary of the English Language* 1734 (1987). In the law, a "seizure" generally requires "an intentional acquisition of physical control." *Brower v. County of Inyo*, 489 U S 593, 596 (1989). "Arrest" is most commonly defined as "the act of stopping or restraining (as from further motion)." *Webster's Third New International Dictionary* 121 (1986) The traditional meaning of "arrest" in the legal context is the seizure of a person which "eventuate[s] in a trip to the station house and prosecution for crime." *Terry v. Ohio*, 392 U.S. 1, 16 (1968). *See also Douglas v. Buder*, 412 U S. 430, 431-32 (1973); *Cupp v. Murphy*, 412 U S 291, 294 n 1 (1973). Both arrests and seizures thus virtually always entail physical contact.

[10] It is possible to read the catch-all phrase "other similar activit[ies]" to include any activity similar to searches, similar to seizures, or similar to arrests, in which event no inference need be drawn as to whether Congress regarded searches, seizures, and arrests as themselves similar to each other. This would be a natural reading of the phrase, however, only if the enumerated activities had nothing in common.

[11] The inference that Congress was concerned only with searches that entail some physical contact is strengthened by the inclusion of "search and seizure" in a series of terms with "interdiction" and "arrest," both of which also generally entail physical contact. *See supra* p. 41

Although Congress amended section 375 in 1989, so that it now prohibits participation in a "search, seizure, arrest, or similar activity," there is no indication that by deleting the word "and," Congress intended to signal a departure from the statute's original purpose. *See* H.R. Conf. Rep. No. 331, 101st Cong., 1st Sess. 654 (1989). The 1989 amendment merely clarifies the section so as to prohibit military personnel from participating in searches entailing physical contact, even if they will not involve or lead ultimately to seizures.

B.

1.

The legislative history of chapter 18 confirms that Congress intended in section 375 to prohibit at most searches by the military that entail physical contact with civilians or their property, and perhaps only such searches that are likely to result in direct confrontation between military personnel and civilians. The history of section 375 actually begins with the Posse Comitatus Act, 18 U.S.C. § 1385, which governed military involvement in law enforcement activity prior to enactment of chapter 18 in 1981.[12] The Posse Comitatus Act was adopted in 1878 in response to objections from southern States to United States Army participation in civilian law enforcement during Reconstruction. In the one hundred years immediately following its enactment, the Posse Comitatus Act was rarely the subject of litigation. To date, few courts have attempted to define the contours of the Act, and there apparently has never been a prosecution under the Act. *See Posse Comitatus Act, Hearings on H.R. 3519 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 21 (1981) (statement of Edward S.G. Dennis, Jr., Department of Justice) ("*Posse Comitatus Hearings*"). By 1948, the Posse Comitatus Act was characterized by one court as an "obscure and all-but-forgotten statute." *Chandler v. United States*, 171 F.2d 921, 936 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949).

The courts that confronted issues under the Posse Comitatus Act before 1981 did not interpret the Act uniformly. Some understood the Act as a broad and absolute prohibition against virtually any military participation in civilian law enforcement activity. In two cases arising from the 1973 federal occupation of Wounded Knee, South Dakota, for example, the courts concluded that the mere provision of tactical advice by a military officer, if it were subsequently acted upon by civilians, would be unlawful. *United States v. Jaramillo*, 380 F. Supp. 1375, 1381 (D.S.D. 1974), *appeal dismissed*,

[12] The Posse Comitatus Act states:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both.

18 U.S.C. § 1385.

510 F.2d 808 (8th Cir. 1975); *United States v. Banks*, 383 F. Supp. 368, 375 (D.S.D. 1974). Another court held under the Federal Tort Claims Act that the use of an Air Force helicopter and its personnel to aid in a search for a nonmilitary prison escapee was forbidden by the Posse Comitatus Act. The court emphasized that "[t]he innocence and harmlessness of the particular use of the Air Force in the present case [and] the dissimilarity of that use to the uses that occasioned the enactment . . . are irrelevant to the operation of a statute that is absolute in its command and explicit in its exceptions." *Wrynn v. United State*, 200 F. Supp. 457, 465 (E.D.N.Y. 1961).

Other courts, however, concluded that the Posse Comitatus Act permitted military personnel to offer certain forms of "passive" or "nonauthoritarian" assistance to civilians. In another Wounded Knee case, the court interpreted the Act to prohibit the military from "*actively* performing *direct* law enforcement duties," but to allow a "*passive* role which might *indirectly* aid [law enforcement]." *United States v. Red Feather*, 392 F. Supp. 916, 924-25 (D.S.D. 1975). This court concluded that military involvement in the arrest of a person, seizure of evidence, search of a person, or search of a building constituted impermissible "direct" aid, but that tactical advice, training, and aerial photographic reconnaissance flights were "indirect" assistance permitted by the Act. *Id.*

A second court concluded after transfer of the *Red Feather* case that the Posse Comitatus Act prohibited only military activity "which is regulatory, prescriptive or compulsory in nature, and causes the citizens to be presently or prospectively subject to regulations, proscriptions, or compulsions imposed by military authority." *United States v. McArthur*, 419 F. Supp. 186, 194 (D.N.D. 1975), *aff'd sub nom.*, *United States v. Casper*, 541 F.2d 1275 (8th Cir. 1976), *cert. denied*, 430 U.S. 970 (1977). The court believed that the Act did not outlaw "the borrowing of highly skilled personnel, like pilots and highly technical equipment like aircraft and cameras, for a specific, limited, temporary purpose." *Id.* This Office, in 1978, endorsed the common points of the analyses in *Red Feather* and *McArthur*, concluding that military assistance in civilian law enforcement does not violate the Posse Comitatus Act where "there is no contact with civilian targets of law enforcement, no actual or potential use of military force, and no military control over the actions of civilian officials." Letter for Deanne Siemer, General Counsel, Department of Defense, from Mary Lawton, Deputy Assistant Attorney General, Office of Legal Counsel at 13 (Mar. 24, 1978) ("Lawton Letter").

In the wake of this series of decisions, there understandably was substantial confusion over the kinds of assistance that the military could provide to civilian law enforcement officials.

2.

Congress addressed the confusion that had arisen and clarified the boundaries of permissible DoD law enforcement activity in 1981 through

amendments to chapter 18. H.R. Rep. No. 71, 97th Cong., 1st Sess., pt. 2, at 3 (1981) ("1981 House Report"); S. Rep. No. 58, 97th Cong., 1st Sess. 148 (1981). It is evident from the legislative history of these amendments that Congress intended to codify the distinction — articulated by the district court in *United States v. Red Feather* — between "indirect passive" assistance and "direct active" involvement in law enforcement activity. Edward Dennis, testifying on behalf of the Department of Justice, stated the Department's view that "the principle which is put forth in the statutes is that the armed services would be called upon to lend indirect and passive forms of assistance to civilian law enforcement." *Posse Comitatus Hearings*, at 21. An expert on military-civilian relations, Professor Christopher Pyle, objected strenuously to the *Red Feather* analysis, but acknowledged that "[i]t is not difficult to see how the proposals currently before the Subcommittee build upon this opinion." *Id.* at 42. And Rear Admiral Donald Thompson of the Coast Guard reported that the Navy relied on the Wounded Knee cases to "permit[] aerial surveillance or photo-reconnaissance missions in support of law enforcement activities on a not-to-interfere basis." *Id.* at 49.

The committee reports from the House Judiciary Committee and the Conference Committee are relatively clear that Congress intended to adopt the *Red Feather* passive-active distinction. The committee report on the House bill, from which the authority granted in section 374 derives, rejected the absolutist view of the Posse Comitatus Act taken by the courts in *United States v. Jaramillo* and *United States v. Banks*, stating that those decisions "serve to illustrate the confusion regarding the Act and the problems that result when it is too mechanically applied." 1981 House Report, at 6. The House committee referred more favorably to the conclusion of the *Red Feather* court that only "the direct active use of Army or Air Force personnel" was prohibited, *id.*, and the Conference Committee eventually provided in section 375 for restrictions only "on the direct participation of military personnel in law enforcement activities." 1981 Conference Report at 121.

Significantly, Congress understood *Red Feather* to prohibit only activity that entailed direct, physical confrontation between military personnel and civilians. During the hearings, Representative Hughes, Chairman of the Subcommittee on Crime, observed to William H. Taft IV, General Counsel of the Department of Defense:

> I can understand where you might have to have military personnel, actually operate [in a law enforcement capacity] under given circumstances. I understand that. But that is a long way from giving them the authority to make an arrest or to make a seizure.
>
> An assist, as opposed to a military person making an arrest or participating in a seizure is an important distinction.

Posse Comitatus Hearings, at 28. During the same exchange, Mr. Taft endorsed that prohibition on direct participation by military personnel in arrests or seizures, and presented his view of the passive-active principle: "[I]t is the arrests and the seizures, and active — *putting, really, into a confrontation, an immediate confrontation, the military and a violator of a civilian statute*, that causes us the greatest concern." *Id.* at 30 (emphasis added).[13]

Congress' concern with confrontation between military personnel and civilians is also apparent from the discussions over the provisions of the original section 374(c). That section authorized the use of military personnel to operate equipment outside the land area of the United States only in certain emergencies where the Attorney General and the Secretary of Defense jointly determine that an emergency exists. These procedural safeguards were incorporated because "[t]he conferees were concerned that [the] use of military personnel in such operations *had the potential for placing such personnel in confrontational situations*." 1981 Conference Report at 120 (emphasis added).

In sum, in codifying the *Red Feather* passive-active participation distinction, Congress "maximize[d] the degree of cooperation between the military and civilian law enforcement," 1981 House Report at 3, while carefully preventing the direct, physical confrontation between military personnel and civilians which it believed would "fundamentally alter the nature of the relationship between the military and civilian society." *Id.* at 11.[14]

3.

In 1988, Congress enacted amendments to chapter 18 which further underscore that the purpose of section 375 was to codify the *Red Feather* distinction between "passive" and "active" assistance and thus to prohibit direct interface between military forces and civilians. National Defense Authorization Act, Fiscal Year 1989, Pub. L. No. 100-456, § 1104, 102 Stat. 1918, 2045 (1988). Specifically, Congress deleted the ban in section 375 on participation in "an interdiction of a vessel or aircraft," because that phrase had been understood to prohibit activities which did *not* involve physical confrontation between the military and civilians. The Conference Report explains:

> The conferees deleted the term "interdiction of a vessel or aircraft," which is set forth in current law, *because the term "interdiction" has acquired a meaning that includes detection and monitoring as well as a physical interference with the*

[13] This colloquy caused Representative Hughes to propose language, which was eventually incorporated into section 374(b), that allows DoD personnel to operate or assist in operating equipment for law enforcement purposes. *Id.* at 29.

[14] Some activities prohibited under the *Red Feather* analysis, such as searches of buildings and seizures of evidence, do not *necessarily* entail confrontations with civilians. To the extent that such searches are prohibited under section 375, this reflects Congress' concern that in carrying out such activities, military personnel likely would be placed in a confrontational posture with civilians.

> *movement of a vessel or aircraft.* The conferees emphasize, however, that they do not intend by this action to authorize military personnel to interrupt the passage of a vessel or aircraft except as otherwise authorized by law.

1988 Conference Report at 452 (1988) (emphasis added).

As part of the 1988 revision, Congress also amended section 374 to authorize DoD personnel to operate equipment outside the United States for the purpose of transporting civilian law enforcement officials. 10 U.S.C. § 372(b). This authority, however, was expressly made subject to joint approval by the Secretary of Defense, the Attorney General, and the Secretary of State "because of *the potential for involving DOD personnel in a direct law enforcement confrontation*, even though their role is designed for logistical support." 1988 Conference Report at 452 (emphasis added). Finally, a new subsection (c) of section 374 was added to permit the Secretary of Defense to make DoD personnel available to civilian law enforcement officials for other purposes, but "only to the extent that such support does not involve direct participation by such personnel in a civilian law enforcement operation." *Id.* § 374(c). In a telling explanation of how Congress understood the prohibition in subsection 374(c) on "direct participation . . . in a civilian law enforcement operation," the Conference Report stated that "[t]o the extent that transportation of law enforcement officials or use of military officials *does not reasonably raise the possibility of a law enforcement confrontation*, such assistance may be provided in the United States under subsection (c)." 1988 Conference Report at 452 (emphasis added).[15]

Accordingly, we conclude that Congress intended section 375 to prohibit at most military participation in searches involving physical contact with civilians or their property, and perhaps only such searches that are likely to result in direct, physical confrontation between military personnel and civilians.[16]

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[15] Two recent opinions of this Office have concluded, based largely on this legislative history, that Congress intended in section 375 to bar only the exercise of military authority in contexts where there are likely to be direct confrontations with civilians. *Use of Navy Drug-Detecting Dogs by Civilian Postal Inspectors*, 13 Op. O.L.C. 312 (1989); *Use of Department of Defense Drug-Detecting Dogs to Aid in Civilian Law Enforcement*, 13 Op. O.L.C. 185 (1989).

[16] Because FLIR aerial reconnaissance is authorized by section 374 and not prohibited by section 375, it cannot be prohibited by the Posse Comitatus Act. That Act, by terms, does not apply to activities "expressly authorized by the Constitution or Act of Congress." 18 U.S.C. § 1385. For the same reason, we need not consider whether FLIR surveillance would otherwise be permitted by the Posse Comitatus Act, and thus excepted from the prohibitions of section 375 by 10 U.S.C. § 378. As noted, however, this Office concluded in 1978 that the Posse Comitatus Act does not bar the use of military personnel in situations where "[t]here is no contact with civilian targets of law enforcement, no actual or potential use of military force, and no military control over actions of civilian officials." Lawton Letter at 13. Thus, there is a substantial argument that FLIR surveillance to assist civilian law enforcement officials would be permitted by the Posse Comitatus Act even in the absence of section 374, and therefore could not be prohibited by section 375.

IV.

DoD's principal argument that section 375 prohibits FLIR surveillance is that the term "search" in section 375 is coextensive with the term "search" in the Fourth Amendment. This argument rests on the unsupported assertion that the "usual" meaning of "search" is that ascribed to the term in the Fourth Amendment, *see* Smith Memorandum at 34, an assertion that we reject for the reasons set forth above. DoD also supports its argument with the general statements from the legislative history that Congress sought to "'reaffirm the traditionally strong American antipathy towards the use of the military in the execution of civil law'" and to avoid "'modification in this country's long tradition of separating the military from day to day involvement in the execution and operation of the civilian laws.'" Smith Memorandum at 34 (quoting 1981 House Report at 10-11). Reliance upon Congress' reaffirmation of these traditions, however, begs the only relevant question, which is precisely what historical paradigm Congress sought to reaffirm. As we have shown, the text and history of the legislation amply demonstrate that tradition was essentially that military personnel should be excluded from participation in activities that are likely to result in direct confrontation with civilians.[17]

DoD also argues that because Congress in recent years has declined to authorize active military personnel to conduct searches of cargo, vehicles, vessels, and aircraft at points of entry into the United States, section 375 cannot be interpreted to prohibit only activity that would result in confrontation between military personnel and civilians. Smith Memorandum at 34. We would not draw any inference about the meaning of the statute from Congress' inaction on these proposals. *See Pension Benefit Guaranty Corp. v. The LTV Corp.*, 496 U.S. 633, 650 (1990); *United States v. Wise*, 370 U.S. 405, 411 (1962). In any event, an interpretation of section 375 that precluded border searches could well be consistent with our analysis, because such searches generally would require use of the military in circumstances likely to result in physical contact or in confrontations with civilians.

Finally, if DoD's interpretation of section 375 were correct, then section 375 would prohibit much of the assistance to civilian law enforcement that is authorized under section 374. Section 375 forbids direct participation not only in searches, seizures, and arrests, but also in "other similar activity." If aerial reconnaissance flights over private lands using FLIR technology constitute

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[17] DoD acknowledges in a footnote that "[t]he *Red Feather* test was adopted . . . by the Congress in 10 U S C § 375," but contends that FLIR surveillance by military personnel nonetheless would violate section 375 because military personnel would be "actively performing direct law enforcement duties." Smith Memorandum at 35 n.106 (quoting *United States v Red Feather*, 392 F. Supp. 916, 925 (D S.D. 1975)). Once one concedes that Congress intended to codify in section 375 the *Red Feather* analysis, it is virtually impossible to conclude that FLIR surveillance is prohibited under the section Congress clearly understood *Red Feather* to prohibit at most only searches that involved physical contact with civilians or their property And the *Red Feather* court even stated that aerial photographic reconnaissance was not "direct" assistance of the kind prohibited by the Posse Comitatus Act. 392 F Supp. at 925.

"searches," then analogous activities, such as aerial reconnaissance of open marijuana fields using binoculars or night-vision equipment, naked eye observations of smoke emissions from building rooftops, and other non-trespassory means of detecting and monitoring drug smuggling or production would constitute "other similar activit[ies]," and thus be prohibited. *See supra* at p. 41 & n.11.[18] Indeed, much of the law enforcement assistance authorized by section 374 would be prohibited if FLIR surveillance constitutes a "search" for purposes of the statute. DoD personnel would be forbidden, for example, from operating equipment for detection, monitoring, and communication of the movement of air and sea traffic and from conducting aerial reconnaissance. 10 U.S.C. § 374(b)(2). Congress obviously did not intend to forbid in section 375 the activity that it authorized in section 374. It is evident therefore that the term "search" in section 375 cannot include FLIR surveillance.

CONCLUSION

We believe that the language, structure, and history of section 375 together convincingly demonstrate that Congress intended to prohibit at most searches by the military that entail physical contact with civilians or their property, and perhaps only searches entailing physical contact that are likely to result in a direct confrontation between military personnel and civilians. Because FLIR surveillance does not constitute even a search involving physical contact with civilians or their property, we conclude that DoD personnel are authorized by section 374(b)(2)(B) to conduct FLIR surveillance of buildings on private property, even assuming that the surveillance constitutes a search for purposes of the Fourth Amendment.[19]

J. MICHAEL LUTTIG
Assistant Attorney General
Office of Legal Counsel

[18] DoD apparently would confine the prohibition on "other similar activity" to Fourth Amendment searches, and it would not construe section 375 to ban other activities permitted by section 374. Even accepting DoD's assumption that FLIR surveillance constitutes a Fourth Amendment search, however, this simply is not a permissible construction of the text, because it would render the general words "other similar activity" meaningless

[19] DoD has not asked us to address, and we do not address, whether FLIR surveillance constitutes a Fourth Amendment search. *See* Smith Memorandum at 3.

Severability of Legislative Veto Provision

A legislative veto provision in the Selective Service Act, which would authorize either House of Congress to disapprove contracts in excess of $25,000,000, is unconstitutional under *Immigration and Naturalization Service v. Chadha*, but is severable from the rest of the statute.

This unconstitutional provision must be severed from the statute in its entirety, including its language calling for notification to Congress of proposed contracts.

February 28, 1991

MEMORANDUM OPINION FOR THE ACTING GENERAL COUNSEL
FEDERAL EMERGENCY MANAGEMENT AGENCY

This responds to your request for the opinion of this Office concerning the severability of an unconstitutional legislative veto provision in section 18(a) of the Selective Service Act of 1948, 50 U.S.C. app. § 468(a). The statute authorizes the President to secure expedited delivery of materials procured for the military forces of the United States. It also contains a provision added in 1973 that would enable one House of Congress to disapprove contracts of more than twenty-five million dollars. We conclude that the unconstitutional legislative veto is severable from the statute's grant of authority to the President to obtain expedited delivery of military contracts. We further conclude that the better view, under the unsettled authority, is that the portion of the statute added by the 1973 amendment constitutes the provision that must be severed from the statute.

I.

Section 18(a) of the Selective Service Act of 1948 provides:

> Whenever the President after consultation with and receiving advice from the National Security Resources Board determines that it is in the interest of the national security for the Government to obtain prompt delivery of any articles or materials the procurement of which has been authorized by the Congress exclusively for the use of the armed forces of

> the United States, or for the use of the Atomic Energy Commission, he is authorized, through the head of any Government agency, to place with any person operating a plant, mine, or other facility capable of producing such articles or materials an order for such quantity of such articles or materials as the President deems appropriate, except that no order which requires payments thereunder in excess of $25,000,000 shall be placed with any person unless the Committees on Armed Services of the Senate and the House of Representatives have been notified in writing of such proposed order and 60 days of continuous session of Congress have expired following the date on which such notice was transmitted to such Committees and neither House of Congress has adopted, within such 60-day period, a resolution disapproving such order.

50 U.S.C. app. § 468(a). Section 18(b) of the Act directs contractors to give precedence to orders placed pursuant to the statute. 50 U.S.C. app. § 468(a). The statute did not contain a legislative veto as originally enacted. Congress added the clause in section 18(a) that begins "except that no order" in 1973. *See* Department of Defense Appropriation Authorization Act, 1974, Pub. L. No. 93-155, § 807(d)(1), 87 Stat. 605, 616 (1973).

II.

The provision authorizing one House of Congress to disapprove an order of more than twenty-five million dollars is unconstitutional. *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983). *Chadha* states that congressional "action that ha[s] the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch," *id.* at 952, must comply with the constitutional requirements of passage by both Houses of Congress and presentment to the President for approval or veto. U.S. Const. art. I, §§ 1, 7. The resolution of disapproval authorized by the 1973 addition to section 18(a) authorizes one House of Congress to limit the President's legal powers. The congressional disapproval mechanism, therefore, may not constitutionally be employed.

III.

A.

The next question is whether the legislative veto may be severed from the remaining provisions of the statute that grant the President authority to order articles and materials on an expedited basis. The Supreme Court has decided the severability of a legislative veto provision on two occasions. *See*

Alaska Airlines, Inc. v. Brock, 480 U.S. 678 (1987); *Chadha*, 462 U.S. at 931-35. Both cases employ the standard test for severability questions: "Unless 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*, 480 U.S. at 684; *Chadha*, 462 U.S. at 931-32.[1] Writing with specific reference to legislative vetoes, the Court in *Alaska Airlines* emphasized that "[t]he more relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress." 480 U.S. at 685. Additionally, unconstitutional provisions are presumed to be severable from the remainder of a statute. *See Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality opinion). Finally, unconstitutional provisions are further presumed to be severable if they are contained in a statute that includes a severability clause. *See, e.g.*, *Alaska Airlines*, 480 U.S. at 686; *Chadha*, 462 U.S. at 932. The absence of such a clause, however, does not give rise to a presumption against severability. *See Alaska Airlines*, 480 U.S. at 686.[2]

The grant of authority to the President in section 18(a) would remain fully operative as a law if the congressional disapproval language is excised. The language authorizing the President to order materials needed for national security was part of the statute as originally enacted in 1948. It was fully operational in its original form. The congressional disapproval mechanism was added by Congress in 1973 to provide congressional review of a Presidential decision to place orders over $25,000,000. As the Court explained in *Alaska Airlines*, provisions of this sort are by their "very nature . . . separate from the operation of the substantive provisions of a statute," and do not affect the capacity of the balance of the legislation to function independently. 480 U.S. at 684-85.

Next, the law that results when the legislative veto provision is severed is not one that Congress would not have enacted. *See Alaska Airlines*, 480 U.S. at 685 (severance improper where it would produce a statute that Congress would not have accepted). Of course, "the absence of the veto necessarily alters the balance of powers between the Legislative and Executive Branches of the Federal Government," *Alaska Airlines* 480 U.S. at 685, but that is not enough to preclude severance. Rather, the appropriate inquiry is whether the delegation to the President of the power to enter into these military contracts is "so controversial or so broad that Congress would have been unwilling to make the delegation without a strong oversight mechanism." *Id.*

There is no reason to believe that Congress would have refused to grant this power. Congress made such a grant in 1948, and added the legislative veto provision only in 1973. In this case, then, the proper question is whether in 1973 Congress would have repealed the 1948 law if it had known that the

[1] This is the Court's longstanding test for severability. *See Champlin Refining Co. v. Corporation Comm'n*, 286 U.S 210, 234 (1932).

[2] Neither the 1948 act nor the 1973 amendments include a severability clause.

legislative veto provision was impermissible. We are aware of no indication that Congress would have taken such a step, and the legislative history of the 1973 amendment strongly suggests that it would have done no such thing. Congress added the legislative veto to the statute in 1973 as one of a group of amendments to four statutes giving the President emergency powers in an attempt to "reassert congressional control over backdoor financing of defense contractors." 119 Cong. Rec. 30,873 (1973) (statement of Sen. Proxmire). The initial Senate version of the 1973 amendment would have provided that no order over twenty-million dollars could be placed "except with the prior approval of the Congress." *Id.* at 30,872. The Conference Committee changed this and the other three provisions because "[w]hile the House conferees were sympathetic to the purposes of the amendment, they were concerned that the language was unduly restrictive and could result in delays on important weapons programs." H.R. Conf. Rep. No. 588, 93d Cong., 1st Sess. 44 (1973) (explaining amendment to 10 U.S.C. § 2307). In short, Congress wanted a legislative veto, but not at the price of destroying the President's authority to act in an emergency. Refusal to sever the legislative veto would produce the harsh result Congress was careful to avoid. Accordingly, the legislative veto may be severed from the remainder of the statute.

B.

Because of the way in which this statute is phrased, we must determine the proper way in which to sever the unconstitutional provision. The 1973 amendment reads:

> except that no order which requires payments thereunder in excess of $25,000,000 shall be placed with any person unless the Committees on Armed Services of the Senate and the House of Representatives have been notified in writing of such proposed order and 60 days of continuous session of Congress have expired following the date on which such notice was transmitted to such Committees and neither House of Congress has adopted, within such 60-day period, a resolution disapproving such order.

50 U.S.C. app. § 468(a). If the entire provision were severed, the statute would return to the form it had when first enacted. The language also permits another line of severance. If only the disapproval mechanism — *i.e.*, the words "and neither House of Congress has adopted, within such 60-day period, a resolution disapproving such order" — were removed, the provision would in effect be transformed into a report-and-wait requirement.[3]

[3] There is at least one other alternative: severance of the words "and 60 days of continuous session of Congress have expired following the date on which such notice was transmitted to such Committees and neither House of Congress has adopted, within such 60-day period, a resolution disapproving such order." Severance of this clause would eliminate the sixty-day delay period and the disapproval requirement but would preserve the reporting requirement. The Court's decisions, however, lend no support to this choice.

In order to decide this question, we must identify the portion of the statute that constitutes the unconstitutional legislative veto. Neither *Alaska Airlines* nor *Chadha* addressed this as a separate issue, although each case in some sense decided it, because each case described the statute that would remain after severance. The Court's unexplained decisions in the two cases point in opposite directions: *Alaska Airlines* supports severance of the entire provision added in 1973, but *Chadha* supports the line of severance that would leave a report-and-wait requirement. While the existing authorities thus do not provide a certain answer, we believe the better view to be that the entire clause added in 1973 constitutes the legislative veto that must be severed from the valid remainder of the statute.

Severance of the entire provision is supported by textual analysis and by *Alaska Airlines*. First, the legislative veto is most naturally read as a single requirement; it is only an accident of phrasing that makes it possible to produce a report-and-wait procedure by deleting certain words. The requirement of a report to Congress is integral to the operation of the legislative veto itself. It gives each House of Congress the notice and information needed to exercise its veto power, and provides a time-table for the one-house veto procedure. Without these, the legislative veto could not function, but they have no independent importance. There is therefore no reason to give the notification rule any independent status. Nothing in the legislative history demonstrates any perception of separate requirements for reporting, waiting, and disapproval. Instead, Congress seemingly viewed the entire clause as indivisible, with the reporting requirement and the sixty-day delay period operating only to facilitate the exercise of the disapproval power. The 1973 amendment therefore would not operate in the manner that Congress intended if only the disapproval mechanism is removed from the statute.

Alaska Airlines, in which the Supreme Court most recently considered questions of severability in depth, reinforces this conclusion. The statute at issue in that case authorizes the Secretary of Labor to issue regulations for the administration of an airline employee protection program. 49 U.S.C. app. § 1552(f)(1). The statute further provides:

> The Secretary shall not issue any rule or regulation as a final rule or regulation under this section until 30 legislative days after it has been submitted to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Public Works and Transportation of the House of Representatives. Any rule or regulation issued by the Secretary under this section as a final rule or regulation shall be submitted to the Congress and shall become effective 60 legislative days after the date of such submission, unless during that 60-day period either House adopts a resolution stating that that House disapproves such rules or regulations, except that such rules or regulations may become effective on the date, during

> such 60-day period, that a resolution has been adopted by both Houses stating that the Congress approves of them.

49 U.S.C. app. § 1552(f)(3). The Court characterized the entire second sentence of this subsection as the "legislative-veto provision which gave rise to this litigation," 480 U.S. at 682, and severed that provision from the rest of the statute. Likewise, the legislative veto provision added to the Selective Service Act in 1973 has the same three components: a report requirement, a wait requirement, and a disapproval mechanism. According to the opinion in *Alaska Airlines*, those provisions together constitute the legislative veto and should be treated as a unit for purposes of severance.

While we take some guidance from *Alaska Airlines*, we do not suggest that the case is dispositive. For one thing, the disputed question in that case was whether the regulatory authority the statute gives to the Secretary of Transportation survived the invalidation of the legislative veto. Once the Court determined that the legislative veto could be severed from the grant of authority to issue regulations, the Court did not have to decide what the "legislative veto" was. Also, the statute at issue in *Alaska Airlines* already contains a report-and-wait requirement (the first sentence of 49 U.S.C. app. § 1552(f)(3)) distinct from the provision the Court severed (the second sentence of 49 U.S.C. § 1552(f)(3)). Thus, severance did not eliminate all statutorily-mandated congressional oversight, a point the Court made in its opinion. *See* 480 U.S. at 689 ("should Congress object to the regulations issued, it retains a mechanism for the expression of its disapproval that reduces any disruption of congressional oversight caused by severance of the veto provision"). By contrast, severance of the entire provision added to section 18(a) of the Selective Service Act in 1973 would eliminate any statutory oversight procedure.

Severance of the disapproval mechanism alone is supported by other strands of the Court's severability analysis and by the Court' opinion in *Chadha*. Severance of the last clause of the 1973 amendment instead of the whole 1973 amendment results in legislation that Congress might have enacted. If the purpose of the 1973 amendment was to facilitate congressional oversight, preservation of a report-and-wait requirement would further this goal, albeit less successfully than the legislative veto Congress drafted.[4] *Chadha* lends some support to this line of severance. In *Chadha*, the Court's mode of severance removed the congressional disapproval mechanism while

[4] It also might be argued that this line of severance is most faithful to the Court's command to "refrain from invalidating more of the statute than is necessary." *Alaska Airlines*, 480 U.S. at 684. We doubt, however, that the Court's point is to save as many words as possible. Rather, the goal is to preserve "unobjectionable *provisions* separable from those found to be unconstitutional." *Id.* at 684 (quoting *Regan v. Time, Inc.*, 468 U.S. at 652) (emphasis added). That rule cannot be applied until we have decided whether the words that would produce a report-and-wait procedure constitute a separate "provision."

leaving a report-and-wait requirement.[5] Application of this technique to section 18(a) of the Selective Service Act would eliminate the congressional disapproval mechanism but preserve the rest of the section, thus effectively creating a report-and-wait requirement.

Chadha, however, can be distinguished from the situation we confront here. The history of the Immigration and Nationality Act indicates that Congress sought to confer substantial power on the Attorney General but also to retain some active role in the deportation process, whether or not that role involved the specific legislative veto in force at the time of *Chadha*.[6] The Court concluded on the basis of this history that the legislative veto was severable because Congress would not have simply returned to the private-bill system had it known the one-house veto to be impermissible. 462 U.S. at 934. The history also supported the conclusion that Congress was determined to retain an active role, and thus accorded with the Court's decision to sever the legislative veto so as to produce a report-and-wait mechanism. There is no similar evidence concerning the 1973 amendment to the Selective Service Act. Congress had not tinkered with the relative powers of the two branches and gave no indication that it had any strong separate interest in being involved in the decision if the legislative veto was unavailable. Under these circumstances, to change the legislative veto into a report-and-wait mechanism would represent a rewriting of the statute based on nothing more than speculation as to Congress's probable preferences. The Court's approach in *Alaska Airlines* avoids these difficulties.

To the extent the two cases are in tension, *Alaska Airlines* is authoritative, both because it is more recent and because it deals with severability in greater detail and therefore is more likely to represent the Court's considered judgment on the matter. The outcome in *Alaska Airlines* may represent a judgment (or at least an intuition) by the Court that the severance of entire legislative-veto mechanisms is less likely to produce statutes that Congress would never have written than is the speculative process of removing the portion of a single mechanism that seems to contain the legislative veto in isolation.

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[5] The legislative veto appeared in section 244(c) of the Immigration and Nationality Act, 8 U.S.C.A. § 1254(c) (1970), which has since been amended, *see* 8 U S C. § 1254(c) Section 244(c)(1) of the Act required the Attorney General to report to Congress when he suspends the deportation of an alien. 8 U.S.C. § 1254(c)(1) (1970). Section 244(c)(2) of the Act provided.

> [I]f during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law. If, within the time above specified, neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings.

8 U.S.C. § 1254(c)(2) (1970). Thus, the first subsection contained a report requirement, and the second subsection contained both a wait requirement and a disapproval mechanism In *Chadha* the Court excised the disapproval mechanism but retained the wait requirement contained in the same subsection, observing that "[w]ithout the one-House veto, § 244 resembles the 'report and wait' provision approved by the Court in *Sibbach* v. *Wilson & Co.*, 312 U.S. 1 (1941)." 462 U.S. at 935 n.9.

CONCLUSION

In sum, the one-House veto clause added to section 18(a) of the Selective Service Act in 1973 is unconstitutional. The legislative veto is severable from the remainder of the section 18(a). Under the best understanding of the Supreme Court's approach to severability, the 1973 amendment should be severed in its entirety, thus returning the statute to the form it had when originally adopted in 1948. As a matter of comity, however, you may wish to inform Congress of a contract of more than twenty-five million dollars. Moreover, depending on the urgency of the situation, you may wish to allow Congress time to decide if it wants to take legislative action concerning a contract.

JOHN C. HARRISON
Deputy Assistant Attorney General
Office of Legal Counsel

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[6] As the Court explained, Congress originally permitted deportable aliens to remain in the United States through private bills. 462 U.S. at 933. In 1940, Congress authorized the Attorney General to suspend deportations but provided that Congress could overrule a suspension by a concurrent resolution. *Id.* at 933-34. When the concurrent resolution mechanism also proved burdensome, it was replaced with the scheme at issue in *Chadha*, under which the Attorney General's decision could be overridden by a one-House resolution. *Id.* at 934.

Indemnification of Treasury Department Officers and Employees

The Department of Treasury may use its general appropriations funds to indemnify any of its officers and employees against personal liability for conduct arising out of actions taken within the course and scope of their employment, if the Department concludes that such indemnification is necessary to ensure effective performance of the Department's mission.

28 U.S.C. § 2006 and 26 U.S.C. § 7423(2) also provide specific authority for the Department of the Treasury to indemnify, in certain circumstances, officers and employees who collect tax revenue and who enforce federal tax laws.

March 4, 1991

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF THE TREASURY

This memorandum responds to your request for our opinion whether the Department of the Treasury ("Treasury") may expend funds generally appropriated to departmental "salaries and expenses" accounts to indemnify officers and employees against personal liability for actions taken within the course and scope of their employment. We agree with your conclusion that the Department of the Treasury has the authority to indemnify its officers and employees against personal liability for such conduct if it concludes that such indemnification is necessary to ensure effective performance of the Department's mission. Letter for William P. Barr, Assistant Attorney General, Office of Legal Counsel, from Robert M. McNamara, Jr., Assistant General Counsel, Department of the Treasury, (Jan. 16, 1990).

Section 2006 of title 28, United States Code, and section 7423(2) of title 26, United States Code, specifically authorize Treasury to indemnify those officers and employees who are sued for actions taken while enforcing the Internal Revenue Code. These statutes apply equally to all Treasury employees who collect tax revenue and who enforce federal tax laws. The Department of the Treasury also has the authority to expend funds from its general operating appropriations to defray necessary departmental expenses, because the Secretary may determine, as a general matter, that effective performance of Treasury's duties requires the Department to adopt an indemnification

policy covering all Department personnel for actions taken during the course and scope of their employment.

II.

The Department of the Treasury currently comprises the Departmental Offices, the Treasury of the United States, the Bureau of Engraving and Printing, the Bureau of the Mint, the Federal Financing Bank, the Fiscal Service, the Office of the Comptroller of the Currency, the Customs Service, the Internal Revenue Service, the Bureau of Alcohol, Tobacco, and Firearms, and the Secret Service. The Department performs both administrative and law enforcement functions. *See* section III, *infra*.

Because Treasury performs an increasing amount of law enforcement work, the personal liability of Department personnel has become a significant concern.[1] The Supreme Court's decision in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), permits courts to award damages against a federal employee personally if, during the course and scope of employment, the employee violates an individual's constitutional rights.

This Office has previously addressed the question whether the Department of Justice may protect its employees by indemnifying them from personal liability for actions taken in the course and scope of their employment.[2] Based upon the accepted principle that an agency may use generally appropriated funds to defray expenses that are necessary or incident to the achievement of the agency's mission and the objectives underlying the appropriation, we concluded that Justice is authorized to indemnify its employees because a clear connection exists between indemnification of the agency's employees and achievement of Justice's underlying mission. *See* 10 Op. O.L.C. at 8-9.[3] Shortly thereafter, the Department of Justice issued a policy statement describing the circumstances under which it would indemnify its employees. *See* 51 Fed. Reg. 27,021 (1986); 28 C.F.R. § 50.15 (1990).

Following the Department of Justice's lead, and referencing its rationale

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[1] When Congress enacted the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680, which waived government immunity in particular cases for torts committed by federal officers and employees, the number of tort suits against individual officers and employees decreased. In some instances, the FTCA makes suits against the government the only federal remedy available after a litigant has pursued administrative actions against the employee 28 U.S.C. § 2675. Therefore, when this memorandum addresses indemnification of officers and employees for actions taken within the course and scope of employment, it necessarily excludes from coverage all of those actions for which the government is already liable under the FTCA.

[2] *Indemnification of Department of Justice Employees*, 10 Op. O.L.C. 6 (1986); Memoranda for Alice Daniel, Assistant Attorney General, Civil Division, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel (Aug. 15, 1980 and Aug. 22, 1980) ("Daniel Memoranda").

[3] The Attorney General's plenary authority to litigate or otherwise resolve cases involving the United States and its employees provides an alternative ground for our conclusion that the Department of Justice can indemnify its employees. *See* 10 Op. O.L.C. at 6-7. *See* 5 U.S.C. § 3106; 28 U.S.C. §§ 516, 519; *Settlement Authority of the United States in Oil Shale Cases*, 4B Op. O.L.C. 756 (1980). However, the primary rationale supporting our conclusion continues to be the authority of an agency to expend appropriated funds in accordance with the mission of the agency and the objectives underlying the appropriation The application of this rationale is not limited to the Department of Justice.

for indemnification as reflected in Justice's policy statement,[4] eleven other agencies and departments have instituted employee indemnification programs.[5] At least two more plan to activate such programs in the near future.[6]

28 U.S.C. § 2006 and 26 U.S.C. § 7423(2) provide specific authority for Treasury to indemnify those officers and employees who enforce the Internal Revenue Code. Section 2006, the narrower of these two provisions, requires Treasury to indemnify "collector[s] or other revenue officer[s]" for judgments awarded against them personally for official actions, upon court certification that probable cause existed for, or that the Secretary of the Treasury directed, the action.[7] If indemnification is warranted, Treasury must pay the judgment out of the "proper appropriation." Because any recovery would be awarded against the individual employee, the judgment fund, 31 U.S.C. § 3104(a), which is only available to meet judgments against the United States, would be unavailable.[8] Payment should be made from a Treasury appropriation.

Treasury also retains discretionary authority, under 26 U.S.C. § 7423(2), to indemnify any United States officer or employee for "[a]ll damages and costs recovered against [him] . . . in any suit brought . . . by reason of anything done in the due performance of his official duty under [the Internal Revenue Code]." Because this section was intended broadly "to exempt any Government officer or employee from liability for civil damages recovered against him in the performance of his official dut[ies] [under] . . . the internal revenue laws,"[9] it omits the prerequisites for indemnification contained

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[4] 55 Fed. Reg. 4609 (1990) (Interior); 54 Fed Reg. 25,233-34 (1989) (Commodity Futures Trading Comm'n); 54 Fed. Reg. 7148 (1989) (Education); 54 Fed Reg. 5613 (1989) (Veterans Admin.); 53 Fed. Reg. 29,657 (1988) (Agency for Int'l Dev.); 53 Fed. Reg. 27,482 (1988) (Nat'l Aeronautics and Space Admin.); 53 Fed. Reg. 11,279-80 (1988) (Health and Human Services); 52 Fed. Reg. 32,533 (1987) (Small Business Admin.).

[5] 12 C.F.R. § 7.5217 (1990) (Nat'l Banks, as administered by the Comptroller of the Currency); 12 C.F.R. § 701.33 (1990) (Fed. Credit Unions); 13 C.F.R. §§ 114.110 (1990) (Small Business Admin.); 14 C.F.R. § 1261.316 (1990) (Nat'l Aeronautics and Space Admin.); 17 C.F.R. §§ 142 1-142.2 (1990) (Commodity Futures Treading Comm'n); 22 C.F.R. § 207 01 (1990) (Agency for Int'l Dev.); 32 C.F.R. §§ 516.72, 55 Fed. Reg. 10,371-72 (1990) (Army, Dep't of Defense); 34 C.F.R. §§ 60.1-60.2 (1990) (Education); 38 C.F R. § 14.514(c) (1989) (Veterans Affairs); 43 C.F.R. § 22.6, 55 Fed. Reg. 4609 (1990) (Interior); 45 C.F.R. § 36.1 (1989) (Health and Human Services).

[6] 54 Fed. Reg. 17,549 (1989) (to be codified at 12 C.F.R. § 522.72) (Fed. Home Loan Banks); 54 Fed. Reg. 16,613 (1989) (to be codified at 10 C.F.R. § 1012) (Dep't of Energy).

[7] Congress enacted this section to combat rampant fraud against the Treasury. Act of March 3, 1863, ch. 76, sec. 12, 12 Stat. 737, 741 (1863). Prior to 1863, collectors retained disputed government revenue until a court could resolve all taxpayer protests. To encourage collectors to deposit federal revenues in the Treasury, Congress required the government to indemnify collectors against personal liability for actions taken during collections. *United States v. Kales*, 314 U.S. 186, 198 (1941); *Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 380 (1933). Virtually unmodified since 1863, this section is used primarily to indemnify Customs Service employees. *See Kosak v. United* States, 465 U.S. 848, 860 (1984); *States Marine Lines, Inc. v. Shultz*, 498 F 2d 1146, 1149-51 (4th Cir. 1974)

[8] *See United States v. Nunnally Inv. Co.*, 316 U.S. 258, 263-64 (1942), *Kales*, 314 U.S. at 198-99 (1941); *Sage v. United States*, 250 U.S. 33, 37 (1919).

[9] 56 Comp. Gen. 615, 616-17 (1977) quoting; 53 Comp. Gen. 782, 783-84 (1974); *see also* 40 Comp. Gen. 95, 97 (1960).

in section 2006, requiring only that personal liability result from official actions. As with section 2006, all reimbursable judgments must be rendered personally against government personnel, and should be paid from Treasury's general appropriations rather than from the judgment fund.[10] As a practical matter, more indemnification will occur under this section than under section 2006, because section 7423(2) contains less restrictive prerequisites. However, both statutes authorize indemnification of only those Treasury employees who enforce or administer the Internal Revenue Code.

IIII.

Beyond this specific indemnification authority, we also conclude, in accordance with our previous opinion regarding the Department of Justice, that the Department of the Treasury has general authority to indemnify its employees because it could determine that indemnification is related both to its mission and to the objectives underlying its general appropriation. *See* 10 Op. O.L.C. 6; Daniel Memoranda.

As with the Department of Justice, Treasury may expend generally appropriated funds for indemnification only if those expenditures constitute "necessary expenses" which advance Treasury's broader statutory mission, and which fall within the spending limits set by Congress. *See* 10 Op. O.L.C. at 8-9; 31 U.S.C. § 1301(a) ("Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."); *Principles of Federal Appropriations Law* 3-2 to 3-9, 3-12 (GAO 1982) ("*Principles*"). A particular expenditure satisfies these requirements if it: 1) directly accomplishes the specific congressional purpose underlying the appropriation; 2) incidentally accomplishes a specific congressional purpose; or, 3) is generally "necessary" for the realization of broader agency objectives covered by the appropriation. *Principles* at 3-12, 3-13; *See also* 68 Comp. Gen. 583, 585 (1989) ("Even though a particular expenditure may not be specifically provided for . . ., the expenditure 'is permissible if it is reasonably necessary in carrying out an authorized function or will contribute materially to the effective accomplishment of that function.'") (quoting 66 Comp. Gen. 356, 359 (1987)).[11]

Numerous precedents recognize a general nexus between an agency's

[10] The Comptroller General has interpreted section 7423(2) to specifically authorize the use of general appropriations. 56 Comp. Gen. at 619-20 (overruling contrary decision in 40 Comp. Gen. 95, 97 (1960)). It must be noted that, within the executive branch, decisions of the Comptroller General, an agent of Congress, are not binding, and operate only as persuasive authority. *See Bowsher v. Synar*, 478 U.S. 714, 728-32 (1986). Nevertheless, where possible, the executive branch will accord deference to the Comptroller General's opinions.

[11] Through line items in the Treasury Appropriations Act of 1991, Congress appropriated funds to defray departmental salaries and expenses. Pub. L. No. 101-509, 104 Stat. 1389 (1990). Thus, Treasury has money available in its general accounts to expend for indemnification.

mission and indemnification of that agency's personnel.[12] As early as 1838, Attorney General Butler authorized the Navy to pay a judgment rendered against a naval officer:

> The recovery was for acts done by Commodore Elliot in the performance of his official duty, and for costs occasioned by the defence made by the United States. It is therefore one of those cases in which the officer ought to be fully indemnified.

3 Op. Att'y Gen. 306 (1838).[13] Similarly, the Comptroller General advised the Department of the Interior to defray a personal judgment rendered against two game wardens who had entered private land at the direction of their superior officers:

> They were required to act in the line of duty, and they intended faithfully to carry out the law enforcement activity of the Bureau. Under these circumstances, and especially since they were directed by their superiors, the Government is obligated to compensate them. . . .
>
> . . . Accordingly, reimbursement to the claimants should be charged to the Department of the Interior appropriation available to the Bureau for necessary expenses of its law enforcement program.

See Comp. Gen. B-168571-O.M. at 2-3 (1970).[14]

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[12] We agree with your conclusion that the specific indemnification statutes discussed in section II fail to support a negative inference that indemnification is unauthorized unless expressly provided for by law. Rather, these provisions address specific congressional objectives, and do not represent an affirmative congressional decision that indemnification of Department of the Treasury employees is not appropriate even if it is deemed necessary to promote the general efficiency of the Department. 28 U.S.C. § 2006 requires mandatory rather than discretionary indemnification when specified conditions are met, in order to facilitate a decision to have government rather than revenue agents control the sums collected as government revenue. *See supra* note 8, 26 U.S.C. § 7423(2) is not specifically focused on the Department of the Treasury, but permits indemnification of all tax enforcement personnel, whether or not those employees work for Treasury.

[13] *See also Tracy v. Swartwout*, 35 U.S. 80, 98-99 (1836) ("Some personal inconvenience may be experienced by an officer who shall be held responsible in damages for illegal acts done under instructions of a superior; but, as the government in such cases is bound to indemnify the officer, there can be no eventual hardship."); 53 Comp. Gen. 301, 305 (1973) ("It is well established that where an officer of the United States is sued because of some official act done in the discharge of an official duty the expense of defending the suit should be borne by the United States.").

[14] The Comptroller General has usually reached similar conclusions concerning the availability of general appropriations to pay for indemnification. *See* 10 Op. O.L.C. at 11-12. On occasion, the Comptroller General has suggested that indemnification requires specific statutory authorization. *See* 56 Comp. Gen. 615, 618 (1977); 40 Comp. Gen. 95, 97 (1960). Each of these opinions begins from the premise that:

> [T]he appropriations or funds provided for regular governmental operations or activities, out of which a cause of action arises, are not available to pay judgments of courts in the

Continued

Two distinct rationales are available to support your conclusion that indemnification of Treasury officials is appropiate. Treasury may conclude that its ability to attract qualified employees is threatened by applicants' fears that they risk personal financial liability for actions taken in the course of government employment. *See Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) ("The[] social costs [of constitutional claims against government officials] include the expenses of litigation, the diversion of official energy from pressing public issues, *and the deterrence of able citizens from acceptance of public office*.") (emphasis added).

Treasury may also conclude that the willingness of its employees, once hired, to make difficult government decisions, to perform fully the functions assigned to them, and to follow orders issued by their superiors, will depend upon the extent to which the employees fear personal liability imposed in "a lawsuit arising out of the good faith performance of their jobs." 67 Comp. Gen. 37, 38 (1987). The Supreme Court has repeatedly recognized the chilling effect which the threat of litigation exerts on government employees:

> 'In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. *It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint.*'

Barr v. Matteo, 360 U.S. 564, 570 (1959) (emphasis added) (quoting *Spalding v. Vilas*, 161 U.S. 483, 498-99 (1896)). *See Westfall v. Erwin*, 484 U.S. 292, 295 (1988); *Harlow*, 457 U.S. at 814. *See also Anderson v. Creighton*, 483 U.S. 635, 638 (1987) ("[F]ear of personal monetary liability and harassing litigation will unduly inhibit [FBI agents] in the discharge of their duties").

In light of the potential threat posed to Treasury's law enforcement and administrative missions by the prospect of personal employee liability, Treasury may conclude that, by removing this threat, personnel indemnification facilitates Departmental objectives.[15] *See Westfall*, 484 U.S. at 295

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[14](....continued)

absence of specific provision therefor.

56 Comp. Gen. at 618; 40 Comp. Gen. at 97. However, these statements are dicta because the Comptroller General was construing the specific indemnification provision in 26 U.S.C. § 7423, and thus did not have to consider whether indemnification of officials was justified as an expense necessary to the general efficiency of the Department.

[15] Threats of personal liability for official conduct have confronted Treasury personnel: Internal Revenue Service, *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977), *National Commodity and Barter Ass'n v. Gibbs*, 886 F.2d 1240 (10th Cir. 1989), *Liffiton v. Keuker*, 850 F.2d 73 (2d Cir. 1988); Customs Service, *Nathanson v. United States*, 290 U.S. 41 (1933), *Seguin v. Eide*, 720 F.2d 1046 (9th Cir. 1983); Secret Service, *Peppers v. Coates*, 887 F.2d 1493 (11th Cir. 1989), *Galella v. Onassis*, 487 F.2d 986, (2d Cir. 1973) ("The protective duties assigned the [secret service] agents under [§ 3056], however, require the instant exercise of judgment which should be protected.").

("[E]ffective government will be promoted if officials are freed from the costs of vexatious and often frivolous damages suits."). Thus, Treasury's indemnification plan would qualify as a necessary departmental expense, and would satisfy the prerequisites for an expenditure of funds from Treasury's general appropriations. Treasury may use the funds in its general appropriations to indemnify all Department personnel for actions taken within the course and scope of their employment.

IV.

There are three qualifications on this indemnification authority. First, in order to satisfy the requirements of the Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1)(A), Treasury must be certain, before obligating itself to indemnify a particular employee, that unexpended funds remain available in the account which Treasury intends to use for the reimbursement.[16] Second, not every personal judgment rendered against an employee is reimbursable. Where the incident which results in liability occurs during the performance of, but not as part of, an employee's official duties, the conduct falls outside the scope of employment. The individual employee must bear any fines imposed or judgments rendered because of such conduct, and Treasury must assess each case individually to determine whether the resulting liability was incident to the accomplishment of official Treasury business. 59 Comp. Gen. 489, 493 (1980). *See also* 57 Comp. Gen. 270, 271 (1978) (traffic violations); 31 Comp. Gen. 246, 247 (1952) (double parking to make a delivery is unauthorized conduct). Finally, although no annual or permanent statutory limitations currently restrict Treasury's authority to indemnify employees, Treasury must regularly canvass new legislation to ensure that Congress has not enacted a limiting provision which might prevent Treasury from expending generally appropriated funds for indemnification.

CONCLUSION

The Department of the Treasury has both specific and general authority to indemnify its officers and employees against personal liability imposed on them for actions taken within the course and scope of their employment. 28 U.S.C. § 2006 and 26 U.S.C. § 7423(2) provide specific indemnification authority for employees involved in income tax collection and enforcement. For all other employees, the Department may invoke its authority to expend funds from its "salaries and expenses" appropriations to defray "necessary

[16] The Anti-Deficiency Act prohibits employees of the United States from authorizing 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).

expenses" of the Department in the event that it concludes that such indemnification is necessary to prevent the threat of personal liability from interfering with the effective performance of the Department's mission.

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

Applicability of 18 U.S.C. § 219 to Members of Federal Advisory Committees

Section 219(a) of Title 18 of the United States Code applies to members of federal advisory committees, including the Advisory Committee for Trade Policy and Negotiations, that are governed by the Federal Advisory Committee Act.

Section 219(b) may be used to exempt advisory committee members who are "special government employees," but may not be used to exempt "representative" members, who are generally not considered government employees.

The Emoluments Clause prohibits an individual who is an agent of a foreign government from serving on an advisory committee, unless Congress has consented to such service.

April 29, 1991

MEMORANDUM OPINION FOR THE DEPUTY COUNSEL TO THE PRESIDENT

This responds to your request for our opinion whether 18 U.S.C. § 219 applies to members of federal advisory committees generally, and in particular to the Advisory Committee for Trade Policy and Negotiations ("ACTPN") Section 219(a) makes it a criminal offense for a "public official" to be or to act as an agent of a foreign principal required to register under the Foreign Agents Registration Act of 1938 ("FARA"). We conclude that section 219(a) applies to members of federal advisory committees including ACTPN, that are governed by the Federal Advisory Committee Act.

You have also asked whether the certification procedure in section 219(b) may be used to exempt members of federal advisory committees from the criminal prohibition in section 219(a). Section 219(b) may be used to exempt advisory committee members who are "special Government employee[s]," but may not be used to exempt "representative" members, who are generally not considered Government employees. Moreover, absent congressional consent, the Emoluments Clause of the Constitution independently bars any agent of a foreign *government* — as opposed to an agent of a private foreign entity — from being a member of a federal advisory committee. Granting an advisory committee appointee an exemption under section 219(b) would not satisfy the requirement of congressional consent.

Section 219(a) provides criminal penalties for any "public official, [who]

is or acts as an agent of a foreign principal required to register under the Foreign Agents Registration Act of 1938, as amended." Section 219(c) defines "public official" as a Member of Congress "or an officer or employee or person acting for or on behalf of the United States, or any department, agency, or branch of Government thereof, . . . in any official function, under or by authority of any such department, agency, or branch of Government."

Members of advisory committees governed by the Federal Advisory Committee Act ("FACA") fall within this definition. FACA provides that advisory committees are established or utilized "in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government." 5 U.S.C. app. § 3(2). Pursuant to FACA, a designated federal official calls all meetings of an advisory committee, approves the agenda, chairs or attends all meetings, and may adjourn any meeting of the committee whenever he determines it to be in the public interest. *Id.* § 10(e), (f).[1] Members of advisory committees subject to FACA thus perform their official advisory duties "for" the Government and "under" a government agency, within the meaning of section 219.[2] "Representative" members of FACA committees — described in your request as members who appear before an agency, at the agency's request, to present the views of a private organization or interest — are also "public official[s]" within the meaning of section 219: even assuming that "representative" members are chosen for committee membership only to present the views of a private interest, they nevertheless perform their official committee duties "for" the United States.[3]

ACTPN, like most advisory committees, is subject to FACA, 19 U.S.C. § 2155(f), and on that basis we conclude that members of ACTPN are subject to section 219. ACTPN's specific functions reinforce that conclusion. ACTPN was established to give "overall policy advice" on United States negotiating objectives and bargaining positions in international trade negotiations. *Id.* § 2155(b)(1). ACTPN functions under the authority of the United States Trade Representative, an officer of the United State Government. *Id.* § 2155(b). Accordingly, it is clear that members of ACTPN perform "official function[s]" for the United States "under" a federal agency, and that they are therefore "public official[s]" within the meaning of section 219.[4]

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[1] *See also id.* § 9(c)(D),(E), (F) (advisory committee charter must state "the agency or official to whom the committee reports," "the agency responsible for providing the necessary support for the committee," and "a description of the duties for which the committee is responsible"); *id.* § 12(b) (agency is responsible for providing support services for advisory committees "reporting to it").

[2] This conclusion is consistent with the judicial construction of the similar definition of "public official" in the federal bribery statute, 18 U.S C. § 201(a), on which section 219 was modeled. *See* 130 Cong. Rec. 1295 (1984) (remarks of Sen. Denton). "[P]ublic official" in section 201(a) has been broadly interpreted to include persons holding "a position of public trust with official federal responsibilities." *Dixson v. United States*, 465 U.S. 482, 496 (1984).

[3] Individuals who appear before agencies in a "representative" capacity who are not advisory committee members are more properly viewed simply as witnesses. Such witnesses have no federal "official function" and are not "public official[s]" within the meaning of section 219

[4] The same general principles govern the application of section 219 to employees, and to partners, of

Continued

The certification procedure in section 219(b), by its terms, allows an exemption from section 219(a) only for individuals who are employed by the Government as "special Government employee[s]."[5] Persons who serve on advisory committees as "representative" of private organizations generally are not considered "employees" of the United States. *See* Memorandum for C. Boyden Gray, Counsel to the President, from William P. Barr, Assistant Attorney General, Office of Legal Counsel at 2 n.5 (May 15, 1989). Accordingly, the certification procedure in section 219(b) is not available to exempt "representative" members of federal advisory committees from the prohibition in section 219(a).[6] Any other member of ACTPN could, however, be considered an "employee" of the United States, *see* Barr Memorandum at 1-2 & n.5, and if the member serves no more than 130 days in any 365-day period, could be a "special Government employee" eligible for exemption under section 219(b).

The Emoluments Clause of the Constitution, however, may constitute a bar to an individual's appointment to a federal advisory committee ab initio. The Emoluments Clause provides that absent congressional consent, a person holding an "Office of Profit or Trust" under the United States may not hold any position in, or receive any payment from, a foreign government. U.S. Const. art. I, § 9, cl. 8.[7]

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[4](....continued)
advisory committee members. We believe that an employee who assists a member only in matters that are not part of the member's advisory committee duties is not subject to section 219. We cannot categorically conclude, however, that employees of advisory committee members may not be subject to section 219 when they assist members in performing committee functions or duties. *Cf. Dixson*, 465 U.S. at 490-96 (officers of local social service corporation administering HUD program may be "public officials" within meaning of bribery statute). Whether such persons are or are not subject to section 219 will depend upon the specific facts of each case.

A partner of an advisory committee member is subject to section 219 only if the partner personally performs official functions "for" the United States. Conversely, section 219 does not implicitly disqualify an individual from serving as an advisory committee member simply because a partner or a firm of which he is a member is required by FARA to register as the agent of a foreign principal. Rule 202 of the FARA regulations provides that, where a firm or partnership has registered as an entity, a person within the firm or partnership who "does not engage directly in activity in furtherance of the interests of the foreign principal is not required to file a short form registration statement." 28 C.F.R. § 5.202(b).

[5] The term "special Government employee" is not defined in section 219, but is defined in 18 U.S.C. § 202(a) to include "an officer or employee of the executive . . . branch of the United States Government, . . . who is retained, designated, appointed or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis." Although section 202(a) provides that this definition applies "[f]or the purpose of sections 203, 205, 207, 208, and 209," we believe that the term "special Government employee" as used in section 219(b) must be understood to have the same meaning.

[6] It would arguably be possible to bring "representative" members of advisory committees within the scope of section 219(b), by formally designating them as special Government employees. Any such designation, however, might subject the designees to provisions of the criminal conflict-of-interest laws that would otherwise not be applicable. *See* Barr Memorandum at 2-3.

[7] This restriction is in many respects narrower than the prohibition in section 219(a) Section 219(a) applies to all "public official[s]," a category defined to include some persons who do not hold a federal position, whereas the Emoluments Clause applies only to persons who do hold such a position. Moreover, section 219(a), in addition to prohibiting a public official from serving as the agent of a foreign government, also prohibits such service for certain nongovernmental foreign corporations, persons, and partnerships Thus, persons not in violation of the Emoluments Clause might nonetheless violate the prohibition in section 219(a).

Federal advisory committee members hold offices of profit or trust within the meaning of the Emoluments Clause. They hold positions that are expressly created by federal authority, they are charged with federal responsibilities, and they are often entrusted with access to government information not available to the public. Therefore, the Emoluments Clause effectively prohibits an individual who is an agent of a foreign government from serving on an advisory committee, unless Congress has consented to such service. We are not aware of any provision of law that provides congressional consent to the service of foreign government agents on advisory committees. In particular, the certification procedure in section 219(b) does not provide the required congressional consent because it is only a means of exemption from the criminal prohibition in section 219(a), and therefore cannot be read to satisfy the Emoluments Clause.

DOUGLAS R. COX
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Office of Legal Counsel

Liability of the United States for State and Local Taxes on Seized and Forfeited Property

Property seized by, and ultimately forfeited to, the federal government is not subject to state and local taxes that arise after the date of the offense that leads to the order of forfeiture.*

July 9, 1991

MEMORANDUM OPINION FOR THE ASSOCIATE DEPUTY ATTORNEY GENERAL

This memorandum responds to your request for our opinion whether property seized by, and ultimately forfeited to, the federal government is subject to taxation by state and local authorities. We conclude that principles of intergovernmental tax immunity, combined with longstanding rules governing forfeiture and the express language of modern forfeiture statutes, establish that property ultimately forfeited to the federal government is not subject to state and local taxes arising after the date of an offense that leads to the order of forfeiture.[1]

Property actually forfeited to the United States is immune from taxation by state and local authorities in the absence of express congressional authorization.

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* Editor's Note: The views of the Office were later revised in light of *United States v. 92 Buena Vista Ave.*, 507 U.S. 111 (1993) (plurality and concurring opinions established that the interests of innocent owners who acquire property after commission of an act leading to forfeiture are not defeated by the forfeiture action). *See* Memorandum for Cary H. Copeland, Director and Chief Counsel, Executive Office for Asset Forfeiture, *Re: Liability of the United States for State and Local Taxes on Seized and Forfeited Property* (Oct. 18 1993) (to be published) (in civil forfeiture proceedings, the United States is obligated to pay liens for state and local taxes accruing after the commission of the offense leading to forfeiture and before the entry of a judicial order of forfeiture, if the lien-holder establishes innocent ownership of its interests, but the United States may not pay such liens in criminal forfeiture proceedings because state and local tax lien-holders are not bona fide purchasers for value of the interests they would assert). *See also* Memorandum for Cary H. Copeland, Director and Chief Counsel, Executive Office for Asset Forfeiture and James Knapp, Deputy Director, Asset Forteiture Office, Criminal Division. *Re: Authority to Pay State and Local Taxes on Property After Entry of an Order of Forfeiture* (Dec. 9 1993) (to be published) (the Attorney General has discretionary authority under the civil and criminal forfeiture statutes to compensate state and local governments for tax revenues lost as a result of a forfeiture).

[1] Currently, "[t]he [Justice] Department's position is that the doctrine of sovereign immunity precludes the payment of State and local taxes on property which has been seized for federal forfeiture." Memorandum for United States Attorneys Offices from Cary H. Copeland, Director, Executive Office for Asset Forfeiture, *Re: Forfeiture Policies* at 1 (July 3, 1990). Under this policy, the "date of the seizure marks the imposition of sovereign immunity." *Id.* at 2. The Department, therefore, "will not pay State or local taxes incurred after the property is seized for forfeiture." *Id.*

This doctrine finds its classic expression in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). As the Court has subsequently explained, under *M'Culloch* "a State cannot constitutionally levy a tax directly against the Government of the United States or its property without the consent of Congress." *United States v. City of Detroit*, 355 U.S. 466, 469 (1958). *See also Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175 (1989) ("[A]bsent express congressional authorization, a state cannot tax the United States directly."); *United States v. Allegheny County*, 322 U.S. 174, 177 (1944) (the "possessions, institutions, and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of state taxation").[2] Once property is forfeited to the United States, an attempt by a state or local government to tax that property in the absence of consent by the Congress is plainly invalid under the longstanding doctrine of intergovernmental tax immunity.[3]

The process of forfeiture presents the question whether that immunity might attach before the date on which the forfeiture is perfected by entry of an order of forfeiture. We conclude that it does, by operation of the relation back doctrine, which is codified in the major federal forfeiture statutes. For example, the provisions of federal law relating to civil forfeiture of certain drug-related property were amended by the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 2051 (1984), to provide that "[a]ll right, title, and interest in property [subject to forfeiture] shall vest in the United States upon commission of the act giving rise to forfeiture under this section." 21 U.S.C. § 881(h). *See also* 18 U.S.C. § 1963(c) (same); 21 U.S.C. § 853(c) (same).[4]

Under this principle, which by 1890 was the "settled doctrine" of the Supreme Court with respect to forfeitures,

> whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, *the forfeiture takes effect immediately upon*

[2] The federal government's tax immunity has been described as a function of the supremacy of federal law under Article VI of the Constitution, *United States v. New Mexico*, 455 U.S. 720, 733 (1982); *M'Culloch*, 17 U.S. at 436 (describing tax immunity as "the unavoidable consequence of that supremacy which the constitution has declared"); and as a function of sovereign immunity, *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 122 (1954).

[3] If seized property is not ultimately forfeited to the federal government, the owner of the property would remain liable for state and local taxes.

[4] Some courts have held that the relation back doctrine, if not expressly set forth in the statute, is simply a rule of statutory construction that applies only to those statutes making forfeiture automatic rather than permissive. *See, e.g., United States v. Thirteen Thousand Dollars in United States Currency*, 733 F.2d 581, 584 (8th Cir. 1984); *United States v. Currency Totalling $48,318.08*, 609 F.2d 210 (5th Cir. 1980). *See generally* Mark A. Jankowski, Note, *Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases*, 76 Va. L. Rev. 165, 181-83 (1990). After the adoption of express relation back provisions in the major forfeiture statutes, these holdings would appear to be of limited practical significance.

> *the commission of the act*; the right to the property then vests in the United States, although [its] title is not perfected until judicial condemnation; *the forfeiture constitutes a statutory transfer of the right to the United States at the time the offence is committed*; and the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith.

United States v. Stowell, 133 U.S. 1, 16-17 (1890) (emphases added). *See also United States v. Grundy & Thornburgh*, 7 U.S. (3 Cranch) 337, 348-54 (1806); *Florida Dealers and Growers Bank v. United States*, 279 F.2d 673, 677 (5th Cir. 1960).

Under the relation back doctrine, the United States' title to forfeited property, although not perfected until an order of forfeiture is entered, arises on the date of the offense giving rise to forfeiture. *Florida Dealers and Growers Bank*, 279 F.2d at 676 ("At th[e] moment [of the illegal act] the right to the property vests in the United States, and when forfeiture is sought, the condemnation when obtained relates back to that time . . . ."); *United States v. 6960 Miraflores Ave.*, 731 F. Supp. 1563, 1567 (S.D. Fla. 1990) ("A final judgment of forfeiture merely confirms the government's interest . . . .").* Because the interest of the United States arises on the date of the offense, the federal government's tax immunity mandates that no state and local tax obligations may attach to the property after that date absent congressional authorization.

We have identified no congressional authorization sufficient to permit payment of state and local tax obligations arising after title to the property vests in the United States. Authority to pay state and local taxes on federally-owned property requires "express congressional authorization" to waive tax immunity. *Cotton Petroleum Corp. v. New Mexico*, 460 U.S. at 175. *See also Kern-Limerick, Inc. v. Scurlock*, 347 U.S. at 122 (court will not "subject the Government or its official agencies to state taxation without a clear congressional mandate").[5] None of the relevant statutory provisions contains such authorization.

Although the statutory forfeiture provisions do contain some exceptions, none of those exceptions contemplates payment of state and local taxes. The exceptions to the criminal forfeiture statutes for a "bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture," 18

[5] An example of such an explicit authorization is 42 U.S.C. § 1490h ("All property . . . the title to which is acquired or held by the Secretary under this subchapter other than property used for administrative purposes shall be subject to taxation by a State, Commonwealth, territory, possession, district, and local political subdivisions in the same manner and to the same extent as other property is taxed . . . .").

* Editor's Note: After this opinion was issued, *Miraflores* was overruled on other grounds, *Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80 (1992).

U.S.C. § 1963(c), 21 U.S.C. § 853(c), provide no authority for payment of state and local taxes. These exceptions not only fail to contain an express waiver of tax immunity, but also do not, in their general language, reach the asserted interest of taxing authorities in the property, for those authorities do not qualify as bona fide purchasers for value.

The civil forfeiture statute's somewhat broader exception for "innocent owners," 21 U.S.C. § 881(a)(6), as the Department has traditionally interpreted it, does not waive the government's tax immunity. It consistently has been the position of the United States that one cannot qualify as an innocent owner if the asserted ownership interest (broadly construed to include liens) arose after the date of the offense at issue.[6] Given this reading, which we have no occasion to question here, there is no statutory basis for permitting state and local tax liens arising after the date of the offense to qualify for payment under the exception.

We also find no authorization for the payment of state or local taxes in either the Attorney General's authority under 28 U.S.C. § 524(c)(1)(D) to pay "valid liens" against forfeited property or his authority under 28 U.S.C. § 524(c)(1)(E) to grant remission or mitigation of forfeiture. Neither of these provisions contains the express congressional authorization necessary to pay state and local taxes on federal property. Nor do they describe a category of permissible actions that might arguably include payment of state and local tax claims. Although the lien provision may permit the Attorney General to recognize property interests -- including tax liens -- in forfeited property that existed prior to the date of the offense, it does not make valid otherwise invalid attempts by state and local taxing authorities to attach liens to property after title has vested in the federal government. In like fashion, the Attorney General's authority to grant remission of forfeiture is insufficient to permit payment of tax liens attaching after the relevant offense, for such relief can be granted only if the petitioner "has a valid, good faith interest in the seized property as owner or otherwise." 28 C.F.R. § 9.5(b)(1).[7]

Our conclusion is consistent with that of courts that have considered related questions. Most directly relevant is the Tenth Circuit's decision in *Eggleston v. Colorado*, 873 F.2d 242 (10th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990). There, the court held that the state's tax claims were invalid

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[6] *See, e.g., In Re One 1985 Nissan*, 889 F.2d 1317, 1320 (4th Cir. 1989); *United States v. 6960 Miraflores Ave.*, 731 F. Supp. at 1568 ("The Government contends . . . that the innocent owner provision only applies to claimants who owned the property at the time of the offense, and not to those who acquired the property afterward . . . ."). Most courts that have considered this position have agreed that "[t]he innocent owner exception applies only to owners whose interest vests prior to the date of the illegal act that forms the basis for forfeiture." *Eggleston v. Colorado*, 873 F.2d 242, 248 (10th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990). *See, e.g., In Re One 1985 Nissan*, 889 F.2d at 1320; *United States v. One 1965 Cessna 320C Twin Engine Airplane*, 715 F. Supp. 808, 811 (E.D. Ky. 1989); *United States v. 1314 Whiterock*, 571 F. Supp. 723, 725 (W.D. Tex. 1983) *Cf. 6960 Miraflores Ave.*, 731 F. Supp. at 1567-69.

[7] Although the criteria governing mitigation are somewhat more general (*e.g.*, "to avoid extreme hardship"), 28 C.F.R. § 9.5(c), nothing in any relevant statute or in the regulations expressly refers to state and local tax claims.

because the asserted state tax liens did not exist until after the event giving rise to federal forfeiture. Similarly, the court in *United States v. $5,644,540 in United States Currency*, 799 F.2d 1357, 1364 (9th Cir. 1986), upheld forfeiture of property against the claims of California tax authorities who were unaware of the property's existence until after the date of the offense leading to forfeiture.[8]

We conclude that the federal government's immunity from state and local taxes precludes payment of such taxes that arise after the date of an offense that gives rise to forfeiture. We have identified no authority that permits the Department to pay tax claims arising after that date.

JOHN C. HARRISON
Deputy Assistant Attorney General
Office of Legal Counsel

[8] *See also United States v. Trotter*, 912 F.2d 964, 966 n.2 (8th Cir. 1990) ("Since title vests 'in the United States,' other creditors, including state agencies, may not claim any part of the funds if the government successfully obtains forfeiture."). It should also be noted that, because tax immunity runs to the benefit of the states as against the United States, some federal courts have invalidated federal tax liens arising after the date of an offense leading to forfeiture to a state following the relation back doctrine. *Metropolitan Dade County v. United States*, 635 F.2d 512 (5th Cir. Unit B. Jan. 1981). *But see United States v. Wingfield*, 822 F.2d 1466, 1475 (10th Cir. 1987) ("[T]he doctrine of relation back under state law cannot be held to subvert the constitutional power to lay and collect taxes.").

Authority of the Nuclear Regulatory Commission to Collect Annual Charges from Federal Agencies

The Nuclear Regulatory Commission has statutory authority to collect annual charges from federal agencies that hold licenses issued by the NRC.

July 30, 1991

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
NUCLEAR REGULATORY COMMISSION

This memorandum responds to your request for our opinion whether section 6101 of the Omnibus Budget Reconciliation Act of 1990 (OBRA), Pub. L. No. 101-508, 104 Stat. 1388, 1388-298, authorizes the Nuclear Regulatory Commission ("NRC") to collect annual charges from federal agencies that hold NRC licenses. We conclude that section 6101 of OBRA does authorize the NRC to collect such charges.

I.

Section 6101(a) of OBRA requires that the NRC "shall annually assess and collect such fees and charges as are described in subsections (b) and (c)." *Id.* § 6101(a)(1), 104 Stat. at 1388-298. Subsection (b) sets forth the user fees that the NRC shall collect:

> (b) Fees for Service or Thing of Value. — Pursuant to section 9701 of title 31, United States Code, any person who receives a service or thing of value from the Commission shall pay fees to cover the Commission's costs in providing any such service or thing of value.

Id. § 6101(b), 104 Stat. at 1388-298 to 299. Section 9701 of title 31, United States Code, authorizes federal agencies to collect fees for "each service or thing of value provided by [the agency] to a person (except a person on official business of the United States Government)." 31 U.S.C. § 9701(a).

It is settled law that federal agencies may not charge other federal agencies user fees under section 9701,[1] *see* 56 Comp. Gen. 275, 277 (1977), and we understand that you are not intending to do so.

Subsection (c) of section 6101 sets forth the annual charges that the NRC is to collect:

> (c) Annual Charges. —
>
> (1) Persons Subject to Charge. — Any licensee of the Commission may be required to pay, in addition to the fees set forth in subsection (b), an annual charge.
>
> (2) Aggregate Amount of Charges. — The aggregate amount of the annual charge collected from all licensees shall equal an amount that approximates 100 percent of the budget authority of the Commission in the fiscal year in which such charge is collected, less any amount appropriated to the Commission from the Nuclear Waste Fund and the amount of fees collected under subsection (b) in such fiscal year.
>
> (3) Amount Per Licensee. — The Commission shall establish, by rule, a schedule of charges fairly and equitably allocating the aggregate amount of charges described in paragraph (2) among licensees. To the maximum extent practicable, the charges shall have a reasonable relationship to the cost of providing regulatory services and may be based on the allocation of the Commission's resources among licensees or classes of licensees.

OBRA § 6101(c), 104 Stat. at 1388-299. On April 12, 1991, the NRC published a proposed rule that would establish annual charges pursuant to section 6101(c). *See* 56 Fed. Reg. 14,870 (1991). In the proposed rule, the NRC stated its intention to levy annual charges on *all* licensees, including federal agencies. Ten federal agencies submitted comments opposing the proposed rule on the grounds that the NRC should not impose annual charges on other government agencies.[2] You then requested a legal opinion from this Office on the legality of imposing annual charges on federal agencies.[3] We

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[1] Of course, other statutes may authorize the collection of user fees from government agencies. *See* 42 U.S.C. § 2201(w) (authorizing the NRC to collect certain fees "from any other Government agency").

[2] The ten agencies are the Departments of Commerce, Energy, Interior, and Veterans Affairs, the Environmental Protection Agency, the National Aeronautics and Space Administration, the Defense Nuclear Agency, and the military Departments of the Army, Navy and Air Force.

[3] You have agreed to be bound by our opinion. *See* Letter for J. Michael Luttig, Assistant Attorney General, Office of Legal Counsel, from William C. Parler, General Counsel, Nuclear Regulatory Commission (May 20, 1991).

requested the views of the ten interested agencies and all but one have responded.[4] Two agencies (Commerce and NASA) expressed the view that the NRC lacked legal authority to impose annual charges on them. Two agencies (EPA and Veterans Affairs) took no position on the legal issue. The Department of Defense, representing five of the interested agencies, concluded that the NRC could impose annual charges. We will refer to these comments as appropriate in this memorandum.

III.

By its terms, section 6101(c)(1) provides that "*[a]ny licensee of the Commission*" may be required to pay an annual charge. The term "licensee of the Commission" is not defined in section 6101 or elsewhere in OBRA. Nevertheless, the structure of the Atomic Energy Act of 1954 as a whole makes clear that federal agencies are within the class of licensees. The Act requires "any person" to obtain a license from the Commission[5] in order to conduct activities regulated under the Act, 42 U.S.C. § 2131, and the term "person" is defined in section 11(s) of the Act to include "Government agenc[ies] other than the Commission."[6] 42 U.S.C. § 2014(s). Additionally, the Act expressly permits federal agencies authorized to engage in the production, marketing and distribution of electric energy to obtain commercial licenses. *See* 42 U.S.C. § 2020. Thus, because the NRC's regulatory authority clearly extends to the licensing of federal agencies, the term "licensee of the Commission" as used in OBRA refers to all licensees, including government agencies.

The conclusion that section 6101(c)(1) covers all licensees of the Commission is reinforced by the requirements of paragraphs (2) and (3) of that section. Paragraph (2) requires that the aggregate amount of the annual charges collected from "all licensees" approximate 100% of the Commission's budget authority (less the amount of user fees collected and other specified amounts). Paragraph (3) requires that, to the extent practicable, annual charges shall have a "reasonable relationship" to the cost of providing regulatory services to the particular licensee or class of licensees being charged. If the Commission were to exempt federal licensees, other licensees would have to bear costs not directly related to the cost of providing service to them.

[4] We requested that the Defense Nuclear Agency and the military departments consolidate their views into a single submission from the Department of Defense. The Department of Energy informed us that the views of its one interested component, Naval Reactors, would also be incorporated into Defense's submission. The Department of the Interior did not submit any views.

[5] The "Commission" referenced throughout the Atomic Energy Act is the Atomic Energy Commission, which has been abolished. *See* 42 U.S.C. § 2014(f) (defining the "Commission"); 42 U.S.C. § 5814(a) (abolishing the Commission). The functions of the Atomic Energy Commission were transferred to the NRC and the Energy Research and Development Administration in the Department of Energy. *See* 42 U.S.C. § 5841(f), (g); 42 U.S.C. § 5814(b), (c). Because all of the licensing functions are assigned to the NRC, *see* 42 U.S.C. § 5841(f), (g), we will treat all references to the "Commission" in the Atomic Energy Act as references to the NRC.

[6] "Government agency" is broadly defined to include "any executive department, . . . or other establishment in the executive branch of the Government." 42 U.S.C. § 2014(l).

Given the "reasonable relationship" requirement, it would be anomalous to construe the statute so that the Commission is *prohibited* from setting the charges based on a direct, one-to-one relationship to the costs of providing services to a licensee or class of licensees.

In its response to our request for comments, the Department of Commerce argues that the dependent clause in section 6101(c)(1), "in addition to the fees set forth in subsection (b)," limits the universe of licensees subject to the annual charge. Under Commerce's view, Congress intended that the annual charge be levied as an additional element to the user fees authorized under section 6101(b) and 31 U.S.C. § 9701. Thus, only those licensees that are subject to a user fee under 31 U.S.C. § 9701, which excludes government agencies, would be subject to the additional annual charge. We disagree.

Under the ordinary rules of English grammar, the dependent clause "in addition to" cannot be construed as modifying the subject of the sentence, "[a]ny licensee of the Commission." Rather, the clause modifies "to pay . . . an annual charge," making explicit that a licensee paying user fees under section 6101(b) must pay the annual charge in addition to the user fees and may not offset the expense of the user fees against the annual charge. A licensee that pays an annual charge but, for whatever reason, pays no user fees under section 6101(b) can still be described as paying its annual charge "in addition to the fees set forth in subsection (b)." The annual fee is "in addition to" the licensee's user fee liability, which, in the case of federal agencies, happens to be zero.

While the legislative history of OBRA does not expressly address the NRC's authority to assess annual charges against federal agencies, two statements in the legislative history tend to confirm the plain meaning of section 6101(c). First, the Conference Report states that section 6101(c) authorizes the NRC "to assess annual charges against *all* of its licensees." H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 961 (1990) (emphasis added). This statement is perhaps even more explicit than the text of section 6101(c)(1). Second, in 1986, when the first provision that authorized the NRC to collect annual charges was enacted into law, *see* the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 7601, 100 Stat. 82, 146 (1986), the conference managers explained that the annual charges were "intended . . . to establish a standard *separate and distinct* from the Commission's existing authority under [31 U.S.C. § 9701]." 132 Cong. Rec. 4887 (1986) (emphasis added) (adoption of statement in Senate); *id.* at 3797 (same in House). *See also* H.R. Conf. Rep. No. 964, at 961 (reaffirming the statement of the managers). This statement militates against construing the annual charges provision consistent with the limitations of 31 U.S.C. § 9701.

III.

Based on a plain meaning of the text of section 6101(c) of OBRA, we conclude that the NRC can impose annual charges on government agencies.

Both agencies that argued against the legality of the NRC's action, however, argued that such a result should be rejected in the absence of an explicit statement of Congressional intent. Assuming *arguendo* that the plain meaning of the text does not provide such a statement, we have searched to see if any background principle of law or canon of construction would require a clear statement of Congressional intention. We have found none.

The Department of Commerce argues that the NRC proposal violates established fiscal law. Contrary to Commerce's views, agencies that pay the annual charges out of their appropriations will not violate 31 U.S.C. § 1301(a), which requires that appropriated funds be applied only to the objects for which the appropriations were made. An agency that holds an NRC license as part of its mission already expends appropriations in obtaining the license (*e.g.*, the salary of the employee who fills out the application for the license). Paying an annual charge will be just an additional expenditure.

Nor does 31 U.S.C. § 1532, which requires authorization by law to withdraw funds from the appropriation account and credit them to another, preclude annual license charges to federal agencies where those charges are deposited into the general fund of the Treasury. The annual charges collected by the NRC are not credited to an "appropriation account" but are deposited into the general fund of the Treasury pursuant to the miscellaneous receipts statute, 31 U.S.C. § 3302(b). Funds deposited into the general fund of the Treasury are not appropriated funds and are not available for expenditure.

We have also determined that the so-called "anti-augmentation" principle is inapplicable in these circumstances. The "anti-augmentation" principle is "a general rule that an agency may not augment its appropriations from *outside sources* without specific statutory authority." *Principles of Federal Appropriations Law* 5-62 (GAO 1982) (emphasis added). The anti-augmentation principle prohibits augmentation from both government and non-government sources. This principle is not applicable here because section 6101(c) provides express statutory authority for the NRC to recover 100% of its budget authority through user fees and annual charges from outside sources. Moreover, the user fees and annual charges will not augment the NRC's budget because, as previously mentioned, they will be deposited into the general fund of the Treasury.[7]

[7] We note in passing that it is not unprecedented for one government agency to charge another for goods or services, or even to impose fines on another, even though the authorizing statutory section does not expressly reference government agencies. *See, e.g.*, *FBI Authority To Charge User Fees For Record Check Services*, 15 Op. O.L.C. 18 (1991) (concluding that Pub. L. No. 101-162, 103 Stat. 988, 998-99 (1989) authorizes the FBI to collect user fees from the State Department to process fingerprint identification records and name checks); Memorandum for J. Paul McGrath, Assistant Attorney General, Civil Division, from Ralph W. Tarr, Deputy Assistant Attorney General, Office of Legal Counsel, Re: *Recovery of Costs of Representing Copyright Royalty Tribunal in Distribution Disputes Pursuant to 17 U.S.C. § 111* (July 1, 1983) (Civil Division may charge the Copyright Royalty Tribunal for the provision of certain legal services); *Constitutionality of Nuclear Regulatory Commission's Imposition of Civil Penalties on the Air Force*, 13 Op. O.L.C. 131 (1989) (concluding that NRC could impose penalties on executive agency).

CONCLUSION

We conclude for the reasons stated that section 6101(c) of OBRA authorizes the NRC to collect annual charges from other government agencies.

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

Comptroller General's Authority to Relieve Disbursing and Certifying Officials From Liability

Statutory provisions purporting to authorize the Comptroller General, an agent of Congress, to relieve certifying and disbursing officials in the executive branch from liability for illegal or improper payments are unconstitutional.

August 5, 1991

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
JUSTICE MANAGEMENT DIVISION

This responds to your request for our advice about a proposal to amend Department of Justice Order 2110.29B (Sept. 17, 1981), which prescribes the procedures for requesting a decision of the Comptroller General pursuant to 31 U.S.C. § 3529.[1] Decisions of the Comptroller General purportedly may relieve certifying and disbursing officers from liability for illegal or improper payments. *See* 31 U.S.C. § 3527(b)(2) (disbursing officials); *id.* § 3528(b) (certifying officials). In your view, this asserted authority of the Comptroller General raises a substantial separation of powers question in light of *Bowsher v. Synar*, 478 U.S. 714 (1986). You therefore believe that DOJ Order 2110.29B should be revised to instruct such accountable officers to seek the advice of the component's General Counsel (or of this Office) whenever they are unsure of the legality of paying a particular claim. We agree with you that the statutory mechanism is unconstitutional insofar as it purports to empower the Comptroller General to relieve executive branch officials from liability. Accordingly, we agree that DOJ Order 2110.29B should be revised along the lines you suggest.

I. *The Statutory Framework*

31 U.S.C. § 3529 establishes a mechanism for certain executive branch officials to obtain the opinions of the Comptroller General. It states that

[1] *See* Memorandum for William P. Barr, Assistant Attorney General, Office of Legal Counsel, from Jams A. Sposato, General Counsel, Justice Management Division, *Re: Comptroller General's Decision Making Authority over the Executive Branch* (Apr. 16, 1990) (the "JMD Memo").

(a) A disbursing or certifying official or the head of an agency may request a decision from the Comptroller General on a question involving —

(1) a payment the disbursing official or head of the agency will make; or

(2) a voucher presented to a certifying official for certification.

(b) The Comptroller General shall issue a decision requested under this section.

Section 3529 is closely connected with the two immediately preceding sections of title 31, which purportedly authorize the Comptroller General to relieve disbursing and certifying officials from liability for mispayments. Section 3527(c) states that the Comptroller General, on his own initiative or on a written request of the head of an agency,

> may relieve a present or former disbursing official of the agency responsible for a deficiency in an account because of an illegal, improper, or incorrect payment, and credit the account for the deficiency, when the Comptroller General decides that the payment was not the result of bad faith or lack of reasonable care by the official.

Section 3528(a) sets forth the responsibilities of certifying officials, among which is that of

(4) repaying a payment—

(A) illegal, improper, or incorrect because of an inaccurate or misleading certificate;

(B) prohibited by law; or

(C) that does not represent a legal obligation under the appropriation or fund involved.

Section 3528(b) declares that the Comptroller General

> may relieve a certifying official from liability when the Comptroller General decides that . . . (i) the obligation was incurred in good faith; (ii) no law specifically prohibited the payment; and (iii) the United States Government received value for [the] payment.

The Comptroller General has taken the position that "where there is doubt as to the legality of a payment, the certifying officer's only complete protection from liability for an erroneous payment is to request and follow the Comptroller General's advance decision" under this statutory procedure. 55 Comp. Gen. 297, 300 (1975). The Comptroller General has also asserted that "in view of the certifying officer's statutory right to request and obtain an advance decision from the Comptroller General regarding the lawfulness of any payment to be certified we can see no reason for concluding that the agency's general counsel's conclusions of law regarding such payment are 'binding' on the agency's certifying officers." *Id.* In general, the Comptroller General is of the opinion that an accountable officer "is automatically liable at the moment of a loss or shortage. To mitigate this rule, however, Congress has provided a mechanism for relief. If the agency requests relief in conformity with the statutory conditions, and if [the] GAO agrees with the administrative determinations, relief will be granted." United States General Accounting Office, Office of General Counsel, *Principles of Federal Appropriations Law* 10-40 (1982); 14 Comp. Gen. 578, 583 (1935).

II. *Analysis*

We accept the Comptroller General's construction of 31 U.S.C. §§ 3527, 3528, under which those statutes purport to authorize him in appropriate cases to relieve disbursing and certifying officers from liability for improper payments. But we believe that the statutes, so construed, are unconstitutional. In our view, the Comptroller General, as the agent of Congress, cannot issue interpretations of the law that are binding on the executive branch. Moreover, the Comptroller General's assertion of the power to relieve executive branch officials from liability for improper payments usurps the Executive's prosecutorial discretion and prevents the President from exercising his inherent supervisory authority over the conduct of executive branch officers. DOJ Order 2110.29B implements this unconstitutional statutory procedure. Accordingly, it must be revised.

In *Bowsher*, the Supreme Court, relying on the fact that Congress had retained removal power as to the Comptroller General, held that that officer was an agent of the legislative branch who "may not be entrusted with executive powers." 478 U.S. at 732.[2] The Court further held that the responsibilities

[2] The Court has recently reaffirmed *Bowsher*. *See Metropolitan Washington Airports Auth. v Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 275 (1991).

assigned to the Comptroller General under the statute at issue in that case "plainly entail[ed] execution of the law in constitutional terms." *Id.* at 732-33. The Court explained that

> [i]nterpreting a law enacted by Congress to implement [a] legislative mandate is the very essence of "execution" of the law. Under § 251 [of the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038], the Comptroller General must exercise judgment concerning facts that affect the application of the Act. He must also interpret the provisions of the Act to determine precisely what budgetary calculations are required. Decisions of that kind are typically made by officers charged with executing a statute. . . . [O]nce Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly -- by passing new legislation. [Citation omitted.] By placing the responsibility for execution of the Balanced Budget and Emergency Deficit Control Act in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function. The Constitution does not permit such intrusion.

Id. at 733-34.

Similarly, when the Comptroller General reviews the decision of a disbursing or certifying officer under 31 U.S.C. § 3529 in order to determine whether that decision complies with the law, the Comptroller General is necessarily interpreting the provisions of the underlying law. This is plainly an executive rather than a legislative function:[3] the Comptroller General is engaging in the "execution of the law in constitutional terms," and is taking decisions "typically made by officers charged with executing a statute," *i.e.*, the accounting officers themselves or the agency legal counsel on whom they rely. *See Bowsher*, 478 U.S. at 732-33. It follows that the Comptroller General, as an agent of the legislative branch, cannot constitutionally perform this function. Moreover, the Comptroller General is asserting the authority to bind persons in the executive branch to his construction of the law, even in cases in which the Attorney General or other executive branch legal officers may have reached contrary conclusions. But Congress may not determine the legal rights, duties and relations of persons outside the

[3] Even assuming *arguendo* that the functions assigned to the Comptroller General could somehow be characterized as "legislative" rather than "executive," the constitutional difficulty would remain intractable. "Congress may not delegate the power to legislate to its own agents." *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. at 275.

legislative branch except by conforming to the constitutional procedures of bicameral passage of a bill and presentment to the President.[4] A fortiori the Comptroller General may not make such legal determinations.[5]

Furthermore, in purporting to authorize the Comptroller General to relieve an executive branch official from liability for an improper payment, Congress has usurped the Executive's "exclusive authority and absolute discretion to decide whether to prosecute a case." *United States v. Nixon*, 418 U.S. 683, 693 (1974). "A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.' Art. II, § 3." *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (per curiam).[6] If the Comptroller General or any other agent of the legislative branch could relieve a governmental official from liability for mispayment of public moneys, then the executive branch would be deprived of the discretion to decide whether to bring suit to recover the funds from that official. The result would be an unconstitutional invasion of the Executive's responsibility to take care that the laws be faithfully executed.[7]

Finally, under the Constitution the President has general supervisory authority over the executive branch.[8] This, of course, is specifically true of accounting officers within the Executive.[9] Because the statutes here in question would prevent the President from bringing an action to correct what in his view was an illegal payment by an executive branch official if the

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[4] *See Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. at 275; *INS v. Chadha*, 462 U.S 919, 952 (1983).

[5] This conclusion accords with our repeated view that in the event of a conflict between a legal opinion of the Attorney General and that of the Comptroller General, executive branch officers are bound to follow the opinion of the Attorney General. *See, e.g., Debt Obligations of the National Credit Union Administration*, 6 Op. O.L.C. 262, 263 & n.4 (1982).

[6] *See also Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (agency's decision not to prosecute or enforce, whether through criminal or civil process, is in general committed to its own absolute discretion; in particular, decision whether to indict "has long been regarded as the special province of the Executive Branch"); *Cuyahoga Valley Ry. v. United Transportation Union*, 474 U.S. 3, 7 (1985) (per curiam); *The Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457 (1869); *The Jewels of the Princess of Orange*, 2 Op. Att'y Gen. 482, 486-92 (1831) (Taney, A.G.); I William Blackstone, *Commentaries on the Laws of England* 243 (William D. Lewis ed., 1897) ("though the making of laws is entirely the work of . . . the legislative branch, of the sovereign power, yet the manner, time, and circumstances of putting those laws in execution must frequently be left to the discretion of the executive magistrate").

[7] *Morrison v. Olson*, 487 U.S. 654 (1988), supports this conclusion. There the Court upheld the constitutionality of the Independent Counsel, a prosecutor whose removal was "squarely in the hands of the Executive Branch." *Id.* at 686; *see also id.* at 692 n.31 (civil enforcement powers analogous to criminal prosecutorial powers vested in agencies whose officers are removable by the President for cause). As explained above, the power to remove the Comptroller General lies with Congress.

[8] *See Morrison v. Olson*, 487 U.S. at 692, 696; *Myers v. United States*, 272 U.S. 52, 135 (1926); *Sierra Club v. Costle*, 657 F.2d 298, 406 (D.C. Cir. 1981); *Inspector General Legislation*, 1 Op. O.L.C. 16, 17 (1977).

[9] *See* The Federalist No. 72 at 369 (Alexander Hamilton) (Max Beloff ed., 1987) ("the preparatory plans of finance, the application and disbursement of the public monies, in conformity to the general appropriations of the legislature . . . these, and other matters of a like nature, constitute what seems to be most properly understood by the administration of government. The persons, therefore, to whose immediate management these different matters are committed, ought to be considered as the assistants or deputies of the chief magistrate [*i.e.*, the President]; and, on this account, they ought . . . to be subject to his superintendence").

Comptroller General opined that the payment was not illegal, they would impair the President's authority to supervise the conduct of his subordinates.

Accordingly, we conclude that the Comptroller General cannot constitutionally relieve disbursing and certifying officers from liability. Because DOJ Order 2110.29B is based on the assumption that the Comptroller General has such authority, it must be rescinded.

We agree with your suggestion that a revised DOJ Order should instruct accountable officers to seek the advice of their components' general counsels whenever they are in doubt about the legality of paying or certifying a particular claim. (In cases raising significant or novel legal questions, the component general counsels are free to seek an opinion from this Office.) Furthermore, in the future, the Department should decline to process requests from accountable officials for Comptroller General opinions purporting to relieve them of liability; and the revised DOJ Order should advise such officials that it will not necessarily decline to bring suit for the recovery of funds because the Comptroller General has purported to relieve an official of liability. In addition, the revised DOJ Order should state that this Department will not bring suit against an official to recover a payment if that official has obtained from his or her component general counsel (or, where appropriate, from this Office) an opinion advising him or her that the payment could legally be made.[10] Finally, we agree with your recommendation that the revised DOJ Order should be signed by the Attorney General.

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

[10] Under 5 U.S.C. § 5512(a), the pay of an accountable official "in arrears to the United States shall be withheld until he has accounted for and paid into the Treasury of the United States all sums for which he is liable." In our view, this provision could not be applied if this Department had determined that the official was *not* liable.

Legal Obligations of the United States Under Article 33 of the Refugee Convention

Article 33 of the 1951 United Nations Convention Relating to the Status of Refugees does not impose any domestic legal obligations on the United States with respect to individuals interdicted outside its territory as part of an effort to control mass illegal migration to the United States.

December 12, 1991

MEMORANDUM OPINION FOR THE LEGAL ADVISER
DEPARTMENT OF STATE

We have reviewed your letter opinion dated December 11, 1991, in which you conclude that Article 33 of the 1951 United Nations Convention Relating to the Status of Refugees ("Refugee Convention") does not impose any domestic legal obligations on the United States with respect to individuals interdicted outside its territory as part of an effort to control mass illegal migration to the United States. Letter for Timothy E. Flanigan, Acting Assistant Attorney General, Office of Legal Counsel, from Edwin D. Williamson (Dec. 11, 1991) ("Williamson Letter"). For the reasons outlined in your letter and for the additional reasons discussed below, we concur in your conclusion.*

The United States adheres to Articles 2 through 34 of the Refugee Convention by virtue of the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223 ("the Protocol"), to which the United States acceded on November 1, 1968. The official English version of Article 33 provides in part:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

19 U.S.T. at 6276. Article 33 thus imposes an obligation on the contracting

* Editor's Note: Subsequent to the date of this opinion, the Supreme Court reached the same conclusion as this opinion in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993).

parties not to "expel or return ("refouler")" refugees under certain circumstances.

The word "expel" in Article 33 clearly refers to the treatment to be afforded potential refugees found within a state's territory. Paragraph 1 also uses the word "return," followed by the French term "refouler." As you note in your letter, the history behind the insertion of "refouler" in the Convention demonstrates that the representatives of the nations that negotiated the Convention intended that the English word "return" not be construed so as to make the treaty applicable to persons outside the territory of a contracting state. Williamson Letter at 3-5.[1] Because both "expel" and "return ("refouler")" refer only to the treatment to be afforded individuals found within the territory of a contracting state, the Refugee Convention and the Protocol do not impose any legal obligation with respect to individuals interdicted outside the United States.

The Supreme Court, in its review of the legislative history of the United States' accession to the Protocol, has also observed that the United States acceded to Article 33 based upon the view that Article 33 could be implemented through the then-existing section 243(h) of the Immigration and Nationality Act, 8 U.S.C. § 1253(h) (1976 ed.), and that section 243(h) applied *only* to deportation of refugees already in the United States. *See INS v. Stevic*, 467 U.S. 407, 415, 417-18 (1984). The legislative history of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, supports this view of Article 33: the House Committee Report states that the Refugee Convention was intended to "insure fair and humane treatment for refugees *within the territory of the contracting states*." H.R. Rep. No. 608, 96th Cong., 1st Sess. 17 (1979) (emphasis added).

Judge Edwards in *Haitian Refugee Center v. Gracey*, 809 F.2d 794 (D.C. Cir. 1987), concluded uneqivocally — and with specific reference to the Haitian interdiction program at issue here — that "Article 33 in and of itself provides no rights to aliens outside a host country's borders." *Id.* at 840 (Edwards, J., dissenting in part and concurring in part). The other two judges on the panel decided that the plaintiff lacked standing to challenge the interdiction program and decided the case on that ground, a decision from which Judge Edwards dissented. Neither of the judges in the majority, however, expressed any disagreement with or reservations about Judge Edwards' analysis of the underlying merits issues, including his discussion of Article 33 and his conclusion that it provides no rights to aliens outside a state's borders.

We note, moreover, as an independent ground for our conclusion, that the Protocol by which the United States adhered to the Convention is not self-executing for domestic law purposes. Accordingly, the Protocol itself does not create rights or duties that can be enforced by a court.

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[1] Your Department has also formally communicated to Congress its view that Article 33 extends only to persons who have gained entry into a territory of a contracting state. *Haitian Detention and Interdiction: Hearing Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 101st Cong., 1st Sess 36-43 (1989) (statement of Alan J. Kreczko, Deputy Legal Adviser, Department of State).

Under the Supremacy Clause of the Constitution, treaties made pursuant to the Constitution's procedures are part of the "supreme Law of the Land . . . ." U.S. Const. art. VI, cl. 2. Some treaties, however, merely impose obligations under international law that the United States, as a contracting party, must perform particular acts, without themselves creating any obligations under domestic law. In such cases the international obligation must be "executed" through domestic legislation before the obligation becomes effectively the law of the land. Thus, in *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829), Chief Justice Marshall recognized that not all treaties are self-executing:

> [A treaty] is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.

See also Memorandum for Michael J. Matheson, Deputy Legal Adviser, Department of State, from Ralph W. Tarr, Acting Assistant Attorney General, Office of Legal Counsel at 4-5 (Mar. 19, 1985) ("Tarr Memorandum").

Whether a treaty is self-executing is controlled by the intent of the United States as a contracting party. *See British Caledonian Airways Ltd. v. Bond*, 665 F.2d 1153, 1160 (D.C. Cir. 1981); *United States v. Postal*, 589 F.2d 862, 876 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979); *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976). "The parties' intent may be apparent from the language of the treaty, or, if the language is ambiguous, it may be divined from the circumstances surrounding the treaty's promulgation." *Postal*, 589 F.2d at 876.

The language of the Protocol by which the United States adhered to the Refugee Convention demonstrates that the United States did not intend that the Convention, as adhered to, would be self-executing. In particular, Article III of the Protocol provides that the signatories are to communicate to the United Nations the "laws and regulations which they may adopt to ensure the application of the present Protocol." 19 U.S.T. at 6226. *Cf. Postal*, 589 F.2d at 876-77 (treaties that "expressly provide for legislative execution" are "uniformly declared executory" and therefore require further legislative action to bring the treaty into effect). Moreover, such a provision would have been unnecessary if the Refugee Convention were self-executing. *Cf.* Protocol, art. VI(b), 19 U.S.T. at 6227 (any signatory with federal form of government obligated to bring the articles of Refugee convention to

the notice of the constituent states if those articles come within the states' exclusive legislative jurisdictions). Thus, the Protocol by its own terms plainly contemplates the need for implementing legislation by its signatories.

Furthermore, the understanding of the President and the Senate in adopting the Protocol was that the United States' obligations under the Refugee Convention, pursuant to the Protocol, would not be self-executing. Specifically, the President and Senate clearly believed that pre-existing domestic law governing refugees — which applied only to persons already in the United States — would suffice to implement the Refugee Convention and the Protocol.[2] *See also Stevic*, 467 U.S. at 417-18. We also note that the Second Circuit, the only circuit court to address the question directly has concluded that the Protocol is not self-executing. *Bertraud v. Sava*, 684 F.2d 204, 218-19 (2d Cir. 1982).

Because the Protocol is not self-executing, its provisions cannot be enforced by a private right of action in a United States court.[3] It is well-established that individuals may directly seek enforcement of a treaty's provisions only when "the treaty . . . expressly or impliedly provides a private right of action." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 470 U.S. 1003 (1985). *See also Head Money Cases*, 112 U.S. 580, 598-99 (1884); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (7th Cir. 1985) ("if not implemented by appropriate legislation [treaties] do not provide the basis for a private lawsuit unless they are intended to be self-executing"); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1298 (3d Cir. 1979); *Linder v. Calero Portocarrero*, 747 F. Supp. 1452, 1462-63 (S.D. Fla. 1990); *Haitian Refugee Cent. Inc. v. Gracey*, 600 F. Supp. 1396, 1405-06 (D.D.C. 1985), *aff'd on other grounds*, 809 F.2d 794 (D.C. Cir. 1987).

A one-page opinion of this Office, and one sentence in another Office of Legal Counsel opinion, might be read to suggest that refugees interdicted on the high seas enjoy certain rights under the Protocol adopting the Refugee Convention. *See Proposed Interdiction of Haitian Flag Vessels*, 5 Op. O.L.C. 242, 248 (1981) ("Individuals who claim that they will be persecuted . . . must be given an opportunity to substantiate their claims [under Article 33]."); Memorandum for the Associate Attorney General from Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel (Aug. 5, 1981) ("Those who claim to be refugees must be given a chance to substantiate

[2] *See, e.g.*, S. Exec. Doc K, 90th Cong., 2d Sess. III (1968) (message from Pres. Johnson) ("most refugees in this country already enjoy the protection and rights which the Protocol seeks to secure for refugees in all countries"); *id.* at VIII (report of secretary of State Rusk) ("[Article 33] is comparable to Section 243(h) of the Immigration and Nationality Act . . . and it can be *implemented* within the administrative discretion provided by existing regulations") (emphasis added); S. Exec. Rep. No. 14, 90th Cong., 2d Sess. 4 (1968) (testimony of Laurence A. Dawson, State Dept. official) ("refugees in the United States have long enjoyed the protection and the rights which the protocol calls for").

[3] Of course, even were the Protocol deemed to be self-executing, the Protocol would need to be examined to see if it conferred any legally enforceable rights upon individuals interdicted outside the territory of the United States. *See also* Tarr Memorandum at 4 n.5. We have already concluded above that the Protocol does not confer any legally enforceable rights upon such individuals.

their claims [under Article 33]."). Among other things, those memoranda did not address whether the Protocol adopting the Refugee Convention is self-executing. To the extent that those memoranda could be read to suggest that Article 33, as adopted by the Protocol, imposes a judicially enforceable obligation on the United States with respect to individuals interdicted beyond its territorial boundaries, those memoranda are incorrect.

TIMOTHY E. FLANIGAN
Acting Assistant Attorney General
Office of Legal Counsel

Permissibility of Recess Appointments of Directors of the Federal Housing Finance Board

Where the Senate has failed to act during a Session of Congress on the nomination of a person to an office, and that person is then serving in that office by recess appointment, the President may make a second recess appointment of that person to the position when the previous recess commission expires.

Although the payment of compensation to successive recess appointees is generally deemed prohibited by 5 U.S.C. § 5503(a), that prohibition does not apply to positions that are not paid out of appropriated funds.

December 13, 1991

MEMORANDUM OPINION FOR THE DEPUTY COUNSEL TO THE PRESIDENT

This responds to your memorandum of September 4, 1991, concerning the recess appointment of the directors of the Federal Housing Finance Board ("FHFB").[1] The President made recess appointments of four current directors of the FHFB during the last intersession recess of the Senate. You ask whether he may recess appoint these directors when their recess commissions expire at the end of the present session of the Senate.[2] You also ask whether these directors may receive their salaries if the President recess appoints them at that time. We believe that the President may recess appoint these directors when their present commissions expire and that they may receive their salaries if so appointed.

Congress established the FHFB in 1989 to "succeed to the authority of the Federal Home Loan Bank Board ("FHLBB") with respect to the Federal Home Loan Banks." 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)(1)). The FHFB is managed by a

[1] Memorandum for Timothy E. Flanigan, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from John P. Schmitz, Deputy Counsel to the President, *Re: Recess Appointment of FHFB Members* (Sept. 4, 1991).

[2] Congress adjourned on November 27, 1991, and will stand adjourned until 11:55 a.m. on January 3, 1992, unless sooner called to reassemble by the Speaker of the House of Representatives and the Majority Leader of the Senate. *See* H.R. Con. Res. 260, 102d Cong., 1st Sess., 137 Cong. Rec. H11,857, H11,873 (daily ed. Nov. 26, 1991). Unless Congress "by law appoint[s] a different day," *its next session* will begin at noon on January 3, 1992. U.S. Const. amend. XX, § 2. Consequently, it appears that the present session of the Senate will end at some time between 11.55 a.m. and noon on January 3, 1992.

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). Each of the directors, other than the Secretary, serves a term of seven years; initial terms are staggered. *Id.* § 1422a(b)(1)(B), (3). The President designates one of the directors, other than the Secretary, to serve as Chairperson of the Board. *Id.* § 1422a(c)(1).

The FHFB does not receive appropriated monies. Its funds derive primarily from semiannual assessments it imposes on the Federal Home Loan Banks. *Id.* §§ 1422b(c), 1438(b).[3] The FHFB deposits its funds, which it uses to pay the directors' salaries, in the Treasury of the United States. *Id.* § 1422b(c). By law, the directors' "[s]alaries . . . shall not be construed to be Government Funds or appropriated monies, or subject to apportionment for the purposes of chapter 15 of title 31, or any other authority." *Id.* The Department of the Treasury has advised us that it maintains the FHFB's funds in a special deposit account and that it does not commingle them with appropriated monies.[4]

In 1990, during the second session of the 101st Congress, the President nominated four persons to serve as directors of the FHFB: Daniel F. Evans, Jr.; Larry U. Costiglio; William C. Perkins; and Marilyn R. Seymann. The Senate failed to act on any of the nominations during the 101st Congress, and the President subsequently recess appointed the nominees on December 16, 1990. Pursuant to the Recess Appointments Clause, these appointments will expire at the end of the present session of the Senate. U.S. Const. art. II, § 2, cl. 3.[5] Earlier this year, during the current session of the Senate, the President again nominated these persons to serve as directors; at this writing, the Senate has not acted on the nominations.

You ask whether the President may recess appoint these persons as directors if their recess commissions expire before the Senate acts on their nominations.[6] We believe that he may. As we have explained in the past, "there is no bar to granting . . . a second recess appointment [to a position] even though [the person to be recess appointed] is already serving as a recess appointee in that position. It is well-established that the President may make successive recess appointments to the same person." Memorandum for C. Boyden Gray, Counsel to the President, from William P. Barr,

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[3] By law, the FHFB succeeded to all funds held by the FHLBB in a special deposit account at the Treasury. FIRREA, § 725, 103 Stat. 429 (codified at 12 U.S.C. § 1437 note). These funds do not consist of appropriated monies. Like the FHFB, the FHLBB derived its funds from assessments on the Federal Home Loan Banks. 12 U.S.C. §§ 1438(b), 1439 (1988).

[4] Telephone Interview of John E. Bowman, Assistant General Counsel, Banking and Finance, Office of the General Counsel, Department of the Treasury, by Mark L. Movsesian, Attorney-Advisor, Office of Legal Counsel (Oct. 23, 1991) (*Telephone Interview*).

[5] The Recess Appointments Clause provides that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."

[6] You have not inquired regarding, and we do not here address, the implications of the "holdover" provision of 12 U.S.C. § 1422a(d)(1).

Assistant Attorney General, Office of Legal Counsel at 2 (Nov. 28, 1989). *See Power of President to Fill Vacancies*, 2 Op. Att'y Gen. 525 (1832). Accordingly, the President may grant these four directors successive recess appointments if the Senate fails to act on their nominations by the end of its current session.

You also ask whether these persons may receive their salaries if the President recess appoints them under these circumstances. We believe that they may. The only relevant restriction on the payment of salaries to recess appointees is contained in 5 U.S.C. § 5503(a),[7] which provides:

> Payment for services may not be made from the Treasury of the United States to an individual appointed during a recess of the Senate to fill a vacancy in an existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until the appointee has been confirmed by the Senate.

By express terms, this prohibition does not apply "if, at the end of the session, a nomination for the office, other than the nomination of an individual appointed during the preceding recess of the Senate, was pending before the Senate for its advice and consent." *Id.* § 5503(a)(2).

Although its language is far from clear, section 5503(a) has been interpreted as prohibiting the payment of compensation to successive recess appointees. *See Recess Appointments Issues*, 6 Op. O.L.C. 585, 586 (1982) (relying on opinions of the Comptroller General); *Recess Appointments*, 41 Op. Att'y Gen. 463, 472, 474, 480 (1960) (same analysis under predecessor statute). The legislative history of section 5503(a) supports this interpretation. *See* S. Rep. No. 1079, 76th Cong., 1st Sess. 1 (1939). Nonetheless, we do not believe that section 5503(a) would prohibit the payment of compensation to the directors in this case. Section 5503(a) prohibits only payment "from the Treasury." No such payment is at issue here.

As we discussed above, the directors' salaries do not derive from appropriated funds. *See supra* p. 92. Rather, they derive from non-appropriated funds that the FHFB has deposited in a special Treasury account. The Treasury pays the directors with checks drawn on this account. *Telephone Interview*. It strictly segregates the FHFB's funds from its own "general funds," which it makes available to other agencies. It does not commingle the FHFB's funds with appropriated monies. *Id.*

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[7] A provision in the annual Treasury, Postal Service, and General Government appropriations bill prohibits the payment of appropriated funds "to any person for the filling of any position for which he or she has been nominated after the Senate has voted not to approve the nomination of said person." Treasury, Postal Service and General Government Appropriations Act, 1992, Pub. L. No. 102-141, § 610, 105 Stat. 834, 869 (1991). This provision will not apply if, as we assume for purposes of this analysis, the Senate merely fails to act on the directors' nominations. In any event, the directors are not paid with appropriated funds. *See infra* p. 93.

In a 1984 opinion involving the Federal Deposit Insurance Corporation, we concluded that section 5503(a)'s prohibition against payments "from the Treasury" should be construed to apply only to payments from the Treasury's general funds, and not to payments from non-appropriated funds on deposit with the Treasury. *See* Memorandum for Fred F. Fielding, Counsel to the President, from Robert B. Shanks, Deputy Assistant Attorney General, Office of Legal Counsel (Aug. 24, 1984) (section 5503(a) would not prohibit payment of salary, from non-appropriated funds deposited with the Treasury, to recess appointee to the Federal Deposit Insurance Corporation). Relying on standard principles of the law of negotiable instruments, we reasoned that when the Treasury pays checks drawn on a special account maintained with the Treasury, it acts merely as the depositor's agent, and incurs no liability itself. *Id.* at 8. We see no reason to depart from that conclusion in this case. Accordingly, we conclude that when the Treasury pays the FHFB's directors with checks drawn on the FHFB's own account, it does not make payments "from the Treasury" within the meaning of section 5503(a). Consequently, section 5503(a) would not prohibit payment of the salaries in the circumstances you have described.

TIMOTHY E. FLANIGAN
Acting Assistant Attorney General
Office of Legal Counsel