OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

OF THE

UNITED STATES DEPARTMENT OF JUSTICE

CONSISTING OF SELECTED MEMORANDUM OPINIONS
ADVISING THE

PRESIDENT OF THE UNITED STATES
THE ATTORNEY GENERAL
AND OTHER EXECUTIVE OFFICERS OF THE FEDERAL GOVERNMENT

IN RELATION TO

THEIR OFFICIAL DUTIES

EDITOR
LEON ULMAN

VOLUME 1

JANUARY 27, 1977—DECEMBER 31, 1977

WASHINGTON
1980

For sale by the Superintendent of Documents, U.S Government Printing Office
Washington, D.C 20402.
Stock No 027-000-00801-1

Attorney General

Griffin B. Bell

Assistant Attorney General
Office of Legal Counsel

John M. Harmon

Deputy Assistant Attorneys General
Office of Legal Counsel

Larry A. Hammond
Leon Ulman
Mary C. Lawton

OFFICE OF LEGAL COUNSEL

Attorney-Advisers

(1977)

Kenneth C. Bass
Sara Sun Beale
Mary O. Eastwood
H. Miles Foy
Kathryn S. Fuller
William F. Funk
John N. Gavin
Jack M. Goldklang
Savery M. Gradoville
James M. Hirschhorn
Edwin S. Kneedler
David B. Marblestone
Herman Marcuse
Thomas C. Newkirk
John L. Ray
Robert L. Saloschin
Larry L. Simms
B. Newal Squyres
Ronald Scott Taylor
Henry G. Watkins
Judith W. Wegner

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 for the convenience of the professional bar and the general public.* Only opinions as to which the addressee has agreed to publication are included. The 73 opinions published in this volume constitute approximately one-quarter of the written legal opinions rendered by the Office in 1977.

The authority of the Office of Legal Counsel and its predecessors 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. In 1924 the Attorney General was authorized to render opinions requested by the Administrator of Veterans' Affairs. 39 U.S.C. § 211(b). Opinions signed by the Attorney General are called formal opinions and are printed and published in the 42 volumes designated as Opinions of the Attorneys General. *See* 28 U.S.C. § 521.

Pursuant to 28 U.S.C. § 510 the Attorney General has delegated to the Office of Legal Counsel the following duties: preparing the formal opinions of the Attorney General, rendering informal opinions to the various Federal agencies, assisting the Attorney General in the performance of his function as legal adviser to the President, and rendering opinions to the Attorney General and the heads of the various organizational units of the Department of Justice. 28 CFR § 0.25.

The duties of the Office of Legal Counsel originated in 1925, at which time the Attorney General assigned to the Office of the Solicitor General the task of preparing his opinions. This arrangement continued until 1933, when the Office of Assistant Solicitor General was established. In 1950 a new Assistant Attorney General was added to replace the Assistant Solicitor General. For a brief period the office was known as the Executive Adjudications Division. Later, its title was changed to Office of Legal Counsel. *See, generally,* Cummings and McFarland,

---

*The Editor acknowledges the assistance of Joseph Foote, Esq., in preparing these opinions for publication.

Federal Justice, at 514; and Deener, the United States Attorneys General and International Law, at 73.

The establishment of the Office of Legal Counsel and its predecessors resulted from necessity. Over the years, the functions of the Attorney General as head of the Department of Justice (established as an executive department in 1870) underwent a rapid expansion so that he required assistance in the performance of his opinion function. Nor could he personally review and sign each opinion. Moreover, many opinions did not require his personal attention. The number of so-called informal opinions has greatly exceeded those signed by the Attorney General, but until now they have never been printed and published generally. Attorney General Bell, shortly after taking office in January 1977, believed that their value as precedents and as a body of executive law on important matters would be enormously enhanced by publication and distribution in a manner similar to those of the formal opinions of the Attorneys General. The current publication is the first volume of the Opinions of the Office of Legal Counsel and publication of additional volumes will take place on an annual basis.

Office of Legal Counsel
United States Department of Justice
Washington, D.C. 20530

Memorandum Opinions in This Volume

Number	*Contents*	*Page*
77-1	Conflict of Interest—Former United States Attorney (January 27, 1977)	1
77-2	Legality of a Certain Proposed Composition of a Multiemployer Pension Fund Board of Trustees (January 27, 1977)	4
77-3	Conflict of Interest—Litigation Involving a Corporation Owned by Government Attorney (January 28, 1977)	7
77-4	Conflict of Interest—Propriety of Using a Leased Airplane for Personal and Official Purposes (January 29, 1977)	8
77-5	Conflict of Interest—Propriety of Appearance of a Former Justice Department Attorney in a Condemnation Case (January 31, 1977)	10
77-6	Federal Register Act—Date of "Promulgation" of Law Enforcement Assistance Administration Regulations (February 10, 1977)	12
77-7	Power of a State Legislature to Rescind its Ratification of a Constitutional Amendment (February 15, 1977)	13
77-8	Inspector General Legislation (February 21, 1977)	16
77-9	Conflict of Interest—Status of an Informal Presidential Advisor as a "Special Government Employee" (February 24, 1977)	20
77-10	Drug Enforcement Administration's Authority to Impose Civil Penalties (March 4, 1977)	24
77-11	Provision of Transportation and Other Services to Former Presidents and Vice Presidents (March 4, 1977)	26

Number	Contents	Page
77–12	Appointment of Deputy Director of the Council on International Economic Policy (CIEP) by Its Executive Director (March 21, 1977)	28
77–13	Washington, D.C., Hostage Situation: Basis for Federal Jurisdiction (March 22, 1977)	31
77–14	Effect of Presidential Pardon on Aliens Who Left Country to Avoid Military Service (March 24, 1977)	34
77–15	Liability of Government for Retroactive Veterans' Benefits Where Discharges Are Upgraded (March 29, 1977)	46
77–16	Authority of Bureau of Prisons Physicians to Perform Autopsies (March 31, 1977)	48
77–17	Standards of Conduct—Service of Assistant Section Chief as Reporter on American Law Institute Project (April 1, 1977)	52
77–18	Application of the Hatch Act to the Vice President's Staff (April 6, 1977)	54
77–19	Interpretation of Grandfather Clause in 18 U.S.C. § 709—Use of Word "Federal" in Name of Insurance Company (April 11, 1977)	60
77–20	Section 212(a)(27) of the Immigration and Nationality Act—Exclusion of Certain Aliens—Rhodesia (April 11, 1977)	64
77–21	Proposals Regarding an Independent Attorney General (April 11, 1977)	75
77–22	Proposed Tax Assessment Against United States Postal Service (April 22, 1977)	79
77–23	Congressional Access to Tax Returns—26 U.S.C. § 6103(f) (May 2, 1977)	85
77–24	Control of Production of *Papaver Bracteatum*—Drug Enforcement Administration (May 9, 1977)	93
77–25	Status of Baggers as Federal Employees—Fair Labor Standards Act (May 9, 1977)	102

Number	Contents	Page
77–26	Detail of Department of Justice Attorneys to Congressional Committees (May 16, 1977)	108
77–27	Interchange of Counsel Project—Assistant United States Attorneys and Assistant Public Defenders (May 17, 1977)	110
77–28	Standards of Conduct—Application Pursuant to 28 CFR § 45.735-9(c) (May 24, 1977)	116
77–29	President's Authority to Appoint an Acting Chairman of the Civil Aeronautics Board (May 24, 1977)	119
77–30	Determination of Date of Commencement of Service of Federal Officers—Renegotiation Board (May 24, 1977)	121
77–31	United States Attorney, Virgin Islands—Hatch Act Applicability (May 31, 1977)	123
77–32	"Office under the United States"—National Commission on Neighborhoods (June 2, 1977)	125
77–33	Constitutionality of S. 1397—Federal National Mortgage Association (June 3, 1977)	126
77–34	Reprogramming—Legislative Committee Objection (June 7, 1977)	133
77–35	Rental Fees for Spaces in Military Trailer Parks (June 8, 1977)	137
77–36	State Jurisdiction to Regulate Pollutant Emissions (June 10, 1977)	141
77–37	Request of Federal Employee—Appearance on Behalf of His Daughter in IRS Audit (June 14, 1977)	148
77–38	Power of the President to Designate Acting Member of the Federal Home Loan Bank Board (June 15, 1977)	150
77–39	Borrowing Practices of Bank Examiners (June 21, 1977)	154
77–40	Damage Claims Under the Atomic Energy Act (June 23, 1977)	157
77–41	Retirement Benefits of Tax Court Judges (July 7, 1977)	164
77–42	Compensation of Court-Appointed Expert Witnesses (*United States* v. *R. J. Reynolds Tobacco Company*) (July 20, 1977)	168

Number	Contents	Page
77–43	Compensation of Court-Appointed Witnesses (July 20, 1977)	175
77–44	Disposition of Nixon Memorabilia (July 28, 1977)	180
77–45	National Commission on Neighborhoods—Appointment of Members (July 28, 1977)	183
77–46	Legal Questions Raised by the Library of Congress Critique of Reorganization Plan No. 1 of 1977 (August 12, 1977)	186
77–47	Price Support for Sugar Producers—Agriculture Act of 1949 (August 18, 1977)	190
77–48	*Weissman* v. *Central Intelligence Agency*—District of Columbia Circuit—Effect of Decision (September 1, 1977)	194
77–49	Proposed District of Columbia Uniform Controlled Substances Act (September 12, 1977)	199
77–50	Transfer of Authority of the Secretary of the Navy to the Secretary of Energy—Naval Petroleum Reserve (September 19, 1977)	201
77–51	Law Enforcement at San Onofre Nuclear Generation Plant (September 22, 1977)	204
77–52	Rehabilitation Act of 1973—Nondiscrimination Provision (September 23, 1977)	210
77–53	Constitutionality of 18 U.S.C. § 1302—Lotteries (September 26, 1977)	214
77–54	Transfer of Watergate Special Prosecution Force Records to the National Archives—Income Tax Information—26 U.S.C. § 6103(a) (September 27, 1977)	216
77–55	Dues-Paying Practices of Private Clubs—Discriminatory Practices (September 27, 1977)	220
77–56	Role of the Solicitor General (September 29, 1977)	228
77–57	Impact of Panama Canal Zone Treaty on the Filling of the Vacancy in the Office of the District Judge for the United States District Court for the District of the Canal Zone (October 5, 1977)	236

Number	Contents	Page
77-58	Personal Tort Liability of Regional Fishery Management Council Members and Staff (October 14, 1977)	239
77-59	Members of Congress Holding Reserve Commissions (October 18, 1977)	242
77-60	Travel and Subsistence Expenses for the Director-designate of the Federal Bureau of Investigation (October 19, 1977)	246
77-61	President's Authority to Promulgate a Reorganization Plan Involving the Equal Employment Opportunity Commission (October 20, 1977)	248
77-62	Richard Helms' Eligibility Under 5 U.S.C. § 8314 to Receive an Annuity or Retired Pay (November 3, 1977).	252
77-63	Immigration Status of Persons Employed by Nonappropriated Fund Instrumentalities of the United States (November 3, 1977)	258
77-64	Participation of Antitrust Division Attorney in "Armored Car" Cases (November 10, 1977)	261
77-65	Acceptance of Cash Prize by Federal Deposit Insurance Corporation Examiner (November 17, 1977)	264
77-66	Reorganization of Equal Employment Enforcement Authority—Concurrent Authority (December 2, 1977)	266
77-67	Disclosure of Documents to the House Committee on Government Operations—Boycotts—Export Administration Act (December 7, 1977)	269
77-68	Conspiracy to Impede or Injure an Officer of the United States, 18 U.S.C. § 372 (December 14, 1977)	274
77-69	Presidential Approval of Naval Petroleum Reserve Contract NOd 4219-2664 (December 14, 1977)	278
77-70	Effect of Agency Interpretation of Regulations—Confidentiality of Alcohol and Drug Abuse Patient Records (December 14, 1977)	280
77-71	Termination of Federal Financial Assistance Under the Civil Rights Act of 1964 (December 16, 1977)	282
77-72	Conflict of Interest—Former United States Attorney (December 21, 1977)	285
77-73	Status of the Acting Director, Office of Management and Budget (December 22, 1977)	287
Index		291

January 27, 1977

77-1 MEMORANDUM OPINION FOR A UNITED STATES ATTORNEY

Conflict of Interest—Former United States Attorney

This letter is to confirm the opinion expressed in a telephone conversation between this Office and your Office regarding the propriety of the representation of a corporation by a law firm in the case of ————. The question arises because Mr. A, who until recently was a United States Attorney, is now associated with the law firm. The case was pending in the U.S. Attorney's Office at the time of Mr. A's departure.

Mr. A states in his letter to this Office that he has no present recollection of the case, although he assumes that he reviewed the file for purposes of determining its nature and assigning it to an Assistant U.S. Attorney. He also states that he has no recollection of any conversations with the assistant regarding the case. The assistant informed this Office that he, not Mr. A, signed the complaint and that Mr. A did not receive any confidential information regarding it.

On the basis of the facts presented to us, it appears that Mr. A is personally barred by 18 U.S.C. § 207(b), for one year from the date he left the U.S. Attorney's Office, from appearing as agent or attorney in the case because it was under his "official responsibility" (as that term is defined in 18 U.S.C. § 202(b)) during his tenure as U.S. Attorney. But this statutory bar is not imputed to the partners and associates of his firm. It does not appear, however, that Mr. A's participation in the matter was sufficiently substantial to give rise to the permanent bar in 18 U.S.C. § 207(a).

Under Disciplinary Rule 9-101(B) of the American Bar Association (ABA) Code of Professional Responsibility, which we assume is applicable here, *see* Local Rule 4(f), a lawyer may not accept private employment in a matter in which he had "substantial responsibility" as a public employee. The disqualification is generally imputed to the partners and associates of the former Government lawyer, *see* ABA Code of Professional Responsibility, DR 5-105(D), although a recent opinion of the ABA Committee on Professional Ethics concludes that

this imputed disqualification may be waived by the Government in certain situations if appropriate safeguards are followed. *See* ABA Formal Opinion 342, 62 A.B.A.J. 517. The Department of Justice in general supports an interpretation of the Code of Professional Responsibility that permits the Government to waive the imputed disqualification in appropriate cases. Safeguards adopted by the Department in such cases in the past have included: (1) an undertaking by the firm and by the disqualified attorney that such attorney would have no personal involvement with the matter and would not discuss it within the firm; (2) a reasonable basis for concluding that the undertaking could be observed, considering such factors as the competence of the remaining members of the firm to handle the matter and the size of the firm; (3) a requirement that in general the representation predate the hiring of the disqualified lawyer, so as to eliminate any possible suggestion that the firm was retained because of his presence; (4) and undertaking that the disqualified attorney will not share in any fees generated by the representation; and (5) disclosure to the court or agency before which the matter is pending.

The Department's position is that the questions of Mr. A's personal disqualification under DR 9-101(B) and whether the Government should waive the imputed disqualification of the entire law firm if Mr. A is barred under that provision, are essentially for your Office to determine, in conjunction with the Federal agency involved—or for the court, on a motion to disqualify. However, we offer the following opinion on the matter for your information.

Because Mr. A apparently intends to disqualify himself from personal participation in the case in any event, the applicability of DR 9-101(B) to him is relevant only in deciding either that the Government must grant a formal waiver to permit other members of Mr. A's firm to represent the corporation in the case or, on the other hand, that there is no basis under the Code of Professional Responsibility to object to representation by other members of the firm.

Formal Opinion 342 of the ABA Committee on Professional Ethics, to which Mr. A refers in his letter, takes a rather narrow view of what constitutes the "substantial responsibility" that gives rise to personal disqualification under DR 9-101(B). Under the ABA interpretation, in order to be disqualified under DR 9-101(B), the former Government lawyer must either have been personally involved in the investigative or deliberative processes regarding the matter "to an important, material degree" or have had a "heavy responsibility" for the matter, which suggests that he probably did become so involved. *See* 62 A.B.A.J. at 520. Under this standard, DR 9-101(B) may well be wholly inapplicable here.

However, the Department has taken the position that the term "substantial responsibility" should be given a broader reading, requiring that a Government attorney at the supervisory level be charged with such

responsibility for all but the most routine matters under his jurisdiction even if he did not participate personally in them. In our view, this construction of DR 9-101(B) is necessary to avoid the appearance of impropriety in an attorney's representing a private party in a matter in which he previously had the power to affect the Government's position. *See* I. Kaufman, "The Former Government Attorney and the Canons of Professional Ethics," 70 Harv. L. Rev. 657,666 (1957). We believe that the factors to be considered in determining whether from an ethical standpoint a former Government attorney may personally represent a party in a matter that was under his official responsibility, but in which he did not participate personally, include: (1) whether his relationship to the matter was merely formal; (2) whether the subject matter was routine and involved no policy determination or was not otherwise of particular significance; and (3) whether there were intervening levels of responsibility or other indications that the matter was not of a type with which the attorney would or should ordinarily have had personal involvement. *See, generally, Kesselhaut* v. *United States,* (March 29, 1976), slip opinion at 24-29 *rev'd on other grounds* (May 18, 1977); Opinion 889 of the Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York. For example, if Mr. A's apparent assignment of the case to his assistant in effect constituted a determination by him that the complaint should be filed as requested by the Federal agency, this would suggest that Mr. A did have "substantial responsibility" in the case. Indeed, if this were the fact, he would in our view have participated personally and substantially in the case and be barred under 18 U.S.C. § 207(a).

As pointed out above, whether or not Mr. A is personally barred under the Department's construction of DR 9-101(B) is a factual determination for your Office to make in light of the foregoing. If he is, he must forgo any share of the fees in the case as a condition of his firm's handling the case. Of course, such a waiver decision is ultimately for your Office to make as well.

If Mr. A's personal disqualification instead derives from 18 U.S.C. § 207(b) alone, the only restriction on his receiving fees is the prohibition in 18 U.S.C. § 203 against sharing in compensation received by the firm for services rendered by its members before a Government agency (but not a court) in this or other cases during the time that he was U.S. Attorney; there would be no prohibition against Mr. A's sharing in fees for services still to be performed in the case.

LEON ULMAN
Acting Assistant Attorney General
Office of Legal Counsel

January 27, 1977

77-2 MEMORANDUM OPINION FOR THE SECRETARY OF LABOR

Legality of a Certain Proposed Composition of a Multiemployer Pension Fund Board of Trustees

This Office has been asked to respond to your predecessor's request for an opinion as to the legality of a certain proposed composition of a multiemployer pension fund board of trustees. Specifically, the question is whether a board composed of an equal number of labor and management trustees, but with a majority of neutral trustees chosen jointly by the union and employer representatives, would comport with Section 302(c)(5) of the Labor Management Relations Act (LMRA), 29 U.S.C. § 186(c)(5) (Supp. V). For the reasons that follow, we conclude that it would.

In broad outline, Section 302(a) of the LMRA prohibits payments or loans by an employer to any representative of any of his employees. It may be that, under the reasoning set forth in *Independent Association of Mutuel Employees* v. *New York Racing Association,* 398 F. 2d 587 (2d Cir. 1968), Section 302 would not even be applicable to the contemplated board. However, we proceed on the basis that Section 302 does apply here, and our opinion rests on the ground that the proposal falls within the exception provided in Section 302(c)(5). That provision exempts from Section 302(a)'s broad prohibition certain trust funds complying with specified requirements; the requirements relevant in this situation are set out in Section 302(c)(5)(B), reading as follows:

> Provided That . . . (B) the detailed basis on which such [trust fund] payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee group deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of

their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement.

In our opinion the proposed board of trustees would not contravene any of the above specified requirements. The provision sets forth no requirement that the employee and employer representatives must together remain in control of the board, or that the neutral trustees cannot constitute a majority. Instead, the statute itself, in its language referring to "neutral persons," explicitly allows for more than one neutral person on the board; it also explicitly contemplates that the neutral parties may often control the course the board takes, as may be the case under the Labor Department's proposal.

The core of the problem here is whether the statute allows neutral parties to be in control of the fund at all times (presuming they agree) or only in instances where the employers and employees deadlock. The statute, in its reference to the language "in the event that employer and employee group deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock," might be taken to suggest that the role of neutral parties is to break deadlock. We think, however, that this interpretation would elevate the quoted language from what it is—*i.e.*, a specification of a contingency—into a requirement that is simply not within the statute. The statute, for present purposes, requires only two things: (1) a written agreement specifying the basis on which payments are to be make; and (2) employees and employers must be equally represented in the administration of the fund. The requirement that the parties must *agree* as to the detailed basis on which payments are to be made, while directed at mandating a specification of the terms of employee benefits, *See* 92 Cong. Rec. 5345–46 (1946) (remarks of Senator Ball), nonetheless seems broad enough to sanction an agreement on the composition of the board that is to be in overall administration of the trust. The provision allowing the employee and employer representatives to "agree upon" neutral trustees more directly addresses this issue; it appears sufficiently open-ended to support any agreement as to the specification of "neutral persons" even to the extent of allowing them to come into control of the fund.

Nor do we find that the legislative history of the provision undermines this conclusion. To be sure, there are references in the debates to the fact that the funds under the new law would be under the "joint administration" of employers and employees. *See, e.g.*, 93 Cong. Rec. 4747 (1947) (remarks of Senators Revercomb and Taft), 93 Cong. Rec.

4749 (1947) (remarks of Senator Murray). While these statements could suggest that Congress contemplated that the employers and employees together would control the operation of the trust, we do not believe such to be necessarily the case. In our view, it is also reasonable to suppose that the statements were made with reference to what Congress assumed would be the normal, but not mandatory, situation; the fact that there is no reference in the statute to joint *control* supports this view. In addition, references in other parts of the debates indicate that the legislation was designed to secure employer "participation," *See* 93 Cong. Rec. 4748, 4751-52 (1947) (remarks of Senators Taft and Morse) or "voice," 92 Cong. Rec. 4892, 5180-81 (1946) (remarks of Senators Byrd and Overton) in the administration of the funds. These remarks suggest that the employer (and the employees, by virtue of the equal representation requirement) need not necessarily be one of the fund's controlling forces, but might take a lesser part in the administration of the fund.

More importantly, the "joint administration" of the fund was by no means an underlying purpose of the legislation; rather, it was a means to secure Congress' ultimate goal. 93 Cong. Rec. 4747 (1947) (remarks of Senator Taft), 92 Cong. Rec. 5337 (1946) (remarks of Senator Tydings). This goal was to ensure that the trust funds would be used for the purposes for which they were established, 93 Cong. Rec. 4678 (1947) (remarks of Senator Ball), 92 Cong. Rec. 5336, 5346 (1946) (remarks of Senators Knowland and Ball); we are informed that the Department's proposal is designed to accomplish this same result. As such, we do not believe that the proposal here should be barred by vague references in the legislative history to methods that Congress did not see fit to include within the statutory language.

For the foregoing reasons, we conclude that the proposed board of trustees would comply with the requirements set forth in Section 302(c)(5).

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

January 28, 1977

77-3 MEMORANDUM OPINION FOR ASSISTANT ATTORNEY GENERAL, LAND AND NATURAL RESOURCES DIVISION

Conflict of Interest—Litigation Involving a Corporation Owned by Government Attorney

This is in response to a request for our opinion as to whether there is any potential conflict of interest in a situtation involving Mr. A, an attorney in your Division.

It appears that Mr. A is the sole stockholder of a corporation that leases boatyard premises from the Department of the Interior. You state that the leased property in question is now the subject of an action to quiet title instituted by the Department of Justice at the request of the Department of the Interior. You further state that the quiet title litigation is being handled by the General Litigation Section of your Division and that it is not within Mr. A's area of responsibility.

Mr. A presumably has a financial interest in the outcome of the quiet title action; but since he does not intend to participate in the litigation on behalf of the United States, there is no problem raised under 18 U.S.C. § 208 or 28 CFR 45.735-5(a). Similarly, we assume that Mr. A does not intend to act as agent or attorney on behalf of the corporation in the litigation, action that would be prohibited by 18 U.S.C. § 205(2) and 28 CFR 45.735-6(a)(2). And finally, since the quiet title action is not even being handled by Mr. A's section, we see no reason why his ownership of stock in a corporation that could be affected by its outcome creates any real or apparent conflict of interest with his duties and responsibilities. *See* 28 CFR 45.735-4(c).

LEON ULMAN
Acting Assistant Attorney General
Office of Legal Counsel

January 29, 1977

77-4 MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

Conflict of Interest—Propriety of Using a Leased Airplane for Personal and Official Purposes

You have asked whether there would be any conflict of interest or other legal problem if an executive branch official leased an airplane at his own expense and for his own use as the need arises.

There would appear to be no conflict of interest or other legal problem whatever in the use of a leased airplane for purely personal reasons. The conflict-of-interest statutes applicable to officers and employees of the executive branch, 18 U.S.C. §§ 201 *et seq.*, and the Standards of Conduct regulations covering officers and employees of the agency involved, contain no express or implied prohibition against using a leased airplane for private purposes, and we can see no reason why there would be even an appearance of impropriety in the official's doing so. Using a private airplane for personal use is no different from using a private automobile in the same way—whether the vehicle in question is leased or owned outright.

The conflict-of-interest statutes and the Standards of Conduct for the agency involved do not prohibit the use of a leased or privately owned airplane or other vehicle for travel on official business. Indeed, Parts 1-4.2 and 1-4.3 of the Federal Travel Regulations specifically provide that a Government employee may be reimbursed for the use of a privately owned airplane for official business, rather than commercial transportation, where such use is determined to be "advantageous to the Government" or where it is "an authorized or approved exercise of the employee's preference." Similarly, Part 1-3.2 of the Federal Travel Regulations permits an employee to rent an airplane for official travel if it has been authorized or approved as being "advantageous to the Government." We have been informed by the Office of the General Counsel of the General Accounting Office that use for official purposes of a vehicle that an employee has leased on a long-term basis for personal as well as Government use would be covered by Parts 1-4.2

and 1–4.3 of the Federal Travel Regulations, discussed above, which govern reimbursement for use of a privately owned airplane.

When it is determined that the use of a privately owned airplane is advantageous to the Government, an employee is entitled to reimbursement at the mileage rate fixed by the agency that will be adequate to compensate its employees for necessary expenses, up to a maximum of 12 cents per mile. Federal Travel Regulations, Part 1–4.2. If the employee uses a private airplane as an authorized or approved exercise of his preference in lieu of common carrier transportation, reimbursement is calculated according to the same formula, with the added restriction that the mileage payment may not exceed the constructive cost of coach accommodations for the same trip by commercial carrier. Federal Travel Regulations, Part 1–4.3.

The only legal issue that might arise in using a leased airplane for official business (other than the requirement that it be "advantageous to the Government" or "an authorized or approved exercise of the employee's preference") is whether the official involved would be required to seek reimbursement from the Government for his expenses. The Comptroller General has ruled that unless an agency has statutory authority to accept gifts (which the agency apparently does not have), neither the agency nor its employees may accept payment or reimbursement from private sources for expenses incurred while on official business. 46 Comp. Gen. 689 (1967). This restriction is embodied in the Standards of Conduct of the agency. The theory of this prohibition is that acceptance of payment or reimbursement of travel expenses from private sources constitutes an unauthorized augmentation of the agency's appropriations that are available for official travel. The Comptroller General's decision and the agency's regulation do not deal with the question whether an employee is prohibited from paying his own travel expenses, but the rationale of preventing unauthorized augmentation of appropriations may well apply in this situation as well—especially where the employee expects to use his own vehicle for official business on a number of occasions. This would seem to be, however, a matter for the Comptroller General rather than for the Attorney General.

We should also point out that the Comptroller General has ruled that a top-level Government officer is regarded as being on official business for purposes of the prohibition against reimbursement from private sources whenever the activity is "reasonably related to his office." 46 Comp. Gen. 689 (1967).

EDWIN S. KNEEDLER
Attorney-Adviser
Office of Legal Counsel

January 31, 1977

77-5 MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, LAND AND NATURAL RESOURCES DIVISION

Conflict of Interest—Propriety of Appearance of a Former Justice Department Attorney in a Condemnation Case

This is in response to your request for our opinion regarding the propriety of Mr. A's representing the property owner in a condemnation proceeding.

We understand that Mr. A was a supervisory attorney in your Division, but that he resigned in 1975. He states that the case was filed on June 4, 1975, and that it was under his official responsibility prior to his resignation. However, since his resignation apparently became effective more than one year ago, he is not prohibited by 18 U.S.C. § 207(b) from appearing in the matter even though it may have been under his "official responsibility" (as that term is defined in 18 U.S.C. § 202(b)) during the year preceding his resignation.

Nor does Mr. A's proposed representation appear to be prohibited by 18 U.S.C. § 207(a). That section precludes later representation only in matters in which the former Government employee participated "personally and substantially." He states that he has no personal recollection of the case or of any conversations with other attorneys in the office about it. He also states that the Department attorney handling the case examined the file and found no indication of any involvement by Mr. A. The Department attorney confirmed this in a telephone conversation with this Office and further informed us that the case was at a preliminary stage when Mr. A was in office and that it is therefore unlikely that Mr. A would have become involved in it. On the basis of these representations, it seems that Mr. A had no personal involvement in the case whatever and thus is not barred by 18 U.S.C. § 207(a).

You did not mention the American Bar Association (ABA) Code of Professional Responsibility in your memorandum. As you know, Disciplinary Rule 9-101(B) of the Code prohibits an attorney from accepting employment in a matter in which he had "substantial responsibility" as

a public employee. Formal Opinion 342 of the ABA Committee on Professional Ethics takes a rather narrow view of this provision, concluding that an attorney had substantial responsibility for a matter and is therefore barred under DR 9-101(B) only if he was personally involved in the investigative or deliberative processes regarding it "to an important, material degree" or had a "heavy responsibility" for it, which suggests that he probably did become so involved.

This Department has taken a much broader view of the disqualification requirement. It has been our position that a former Government attorney who practiced at the supervisory level must infrequently be charged with "substantial responsibility" for at least all significant matters that were under his supervision, whether or not he participated personally in them. In our opinion, this construction of DR 9-101(B) is necessary to avoid the appearance of impropriety in the attorney's representing a private party in a matter in which he had the power to affect the Government's position when he was with the Government. *See* I. Kaufman, "The Former Government Attorney and the Canons of Professional Ethics," 70 Harv. L. Rev. 657, 666 (1957). Factors that we think should be considered in determining whether, from an ethical standpoint, a former Government attorney may properly represent a party in a matter that was under his official responsibility when he was with the Government include: (1) whether his relationship to the matter was merely formal; (2) whether the subject matter was routine and involved no policy determination or was not otherwise of particular significance; and (3) whether there were intervening levels of responsibility or other indications that the matter was not of a type with which the attorney would or should ordinarily have had personal involvement. *See, generally, Kesselhaut* v. *United States,* (March 29, 1976), slip opinion at 24–29, *rev'd on other grounds* (May 18, 1977); Opinion 889 of the Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York. In the present situation, we think that it might also be relevant that the case was apparently not yet at a stage at which Mr. A would have been likely to have had any real involvement with it.

Whether Mr. A is personally barred by DR 9-101(B) is essentially a factual determination to be made by your Division, applying the standards outlined above. If he is, it is the Department's position that the entire law firm is also disqualified unless the Department consents to its representation with appropriate safeguards for Mr. A's insulation from personal or financial participation in the case.

LEON ULMAN
Acting Assistant Attorney General
Office of Legal Counsel

February 10, 1977

77-6 MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

Federal Register Act—Date of "Promulgation" of Law Enforcement Assistance Administration Regulations

Under the provisions of Section 521(d) of the Omnibus Crime Control and Safe Streets Act of 1968, as added by § 127 of Pub. L. 94–503, 42 U.S.C.A. § 3769d (Supp. 1976), the Law Enforcement Assistance Administration is required to "promulgate" regulations on processing of civil rights complaints within 120 days after enactment (October 15, 1976). The question has been raised whether, as a matter of law, "promulgation" takes place at the time of publication in the Federal Register or at the time of filing at the Office of the Federal Register. In our opinion, it is clear that promulgation takes place when documents are officially filed at the Office of the Federal Register regardless of when they are published.

The Federal Register Act provides for formal filing of regulations that are required to be published and the noting of the time and date of filing. Upon filing, regulations are immediately available for public inspection. 44 U.S.C. § 1503. The Act further provides that *filing* with the Federal Register is constructive notice to persons subject to or affected by the regulation. 44 U.S.C. § 1507. Thus, under the terms of the statute, it seems clear that filing with the Federal Register constitutes promulgation of a regulation even though publication may not occur until a later date. *See* 38 Op. A.G. 359 (1935).

MARY C. LAWTON
Deputy Assistant Attorney General
Office of Legal Counsel

February 15, 1977

77-7 MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

Power of a State Legislature to Rescind its Ratification of a Constitutional Amendment

In connection with the consideration by the States of the Equal Rights Amendment, the question arises whether a State has the power to rescind its prior ratification of a constitutional amendment. The same question was presented in 1868 in connection with the adoption of the Fourteenth Amendment. Congress decided at that time that the States lacked that power. The historical development, however, was such that the Amendment would have been adopted even without that legislative decision.

In 1868, the year the Fourteenth Amendment was pending for ratification by the States, there were 37 States. Twenty-eight were required to constitute the majority of three-quarters required by Article V of the Constitution. By July 1868, 29 of the States had ratified the Amendment. In two of them, however, Ohio and New Jersey, the legislatures had passed resolutions withdrawing their consent to the Amendment.

On July 20, 1868, Secretary of State Seward issued a proclamation to the effect that the Amendment had been ratified by the required number of States, and had become valid as a part of the Constitution of the United States on the condition that there be a determination that

> "the resolutions of the legislatures of Ohio and New Jersey ratifying the aforesaid amendment are to be deemed as remaining of full force and effect, notwithstanding the subsequent resolutions of the legislatures of those States, which purport to withdraw the consent of said States from such ratification." 15 Stat. 706–707.

On the following day, July 21, 1868, Congress adopted a concurrent resolution [1] to the effect that the Fourteenth Amendment had been adopted by the legislatures of three-quarters of the States and that the Amendment was "hereby declared to be a part of the Constitution of the United States." Cong. Globe, 40th Cong., 2d Sess. 4266, 4295–4296 (1868). The resolution enumerates 29 States, including New Jersey and Ohio, as having ratified the Amendment.

The same day, Georgia ratified the Amendment. 15 Stat. 708. Unofficial news of that action reached the House of Representatives during its deliberations on the concurrent resolution. The House, however, did not include Georgia among the ratifying States.

On July 28, 1868, Secretary Seward, in compliance with the concurrent resolution, issued a proclamation declaring the Amendment to have been adopted. He listed Georgia, New Jersey, and Ohio among the 30 ratifying States. 15 Stat. 708–711.

As the result of the ratification of the Amendment by Georgia, it had been approved by 28, *i.e.,* the requisite number of States, even if New Jersey and Ohio were disregarded. To that extent the issue as to whether a State may withdraw its ratification became moot. The question, however, was still alive when Congress made its determination. There is substantial authority to the effect the power of Congress to control the submission of constitutional amendments to the States and to determine whether they have been validly adopted is exclusive. *Coleman* v. *Miller,* 307 U.S. 433, 449–450 (opinion of the Court), 457–458 (concurring opinion) (1939), *approved in, Baker* v. *Carr,* 369 U.S. 186, 214 (1962).

If the issue should arise in connection with the Equal Rights Amendment, it seems virtually certain that the question will be put to Congress again. The functions of the Secretary of State with respect to constitutional amendments have been statutorily conferred on the Administrator of General Services. 1 U.S.C. §§ 106b, 112. However, the very fact that this function is vested in the GSA Administrator is indicative of its ministerial nature. The Constitution of the United States, Analysis and Interpretation, S. Doc. No. 82, 92d Cong., 2d Sess. 860 (1973), would either have to follow the precedent established by Congress in 1868, *i.e.,* that a State cannot withdraw its ratification, or submit the issue to Congress.

Various commentators have agreed with the 1868 congressional ruling. Cooley, General Principles of Constitutional Law 257 (4th ed.) and Watson, The Constitution of the United States 1317–1318 (1st ed. 1910), support the ruling on the basis of precedents in the fields of municipal bond elections or votes on special assessments where it has

[1] The submission of a constitutional amendment to the States need not be presented to the President. *See, Hollingsworth* v. *Virginia,* 3 Dall. 378 (1798). It therefore would appear that a congressional determination as to whether an amendment has been adopted by the requisite number of States can be passed as a concurrent resolution that is not presented to the President.

been held that an affirmative vote is final and conclusive. Jameson, A Treatise on Constitutional Conventions 632 (4th ed. 1972), suggests an element of promissory estoppal, namely, that when a State ratifies an amendment, it induces like action by other States. It also suggests on the basis of certain historical precedents that ratifications of a constitutional nature are absolute and unconditional. Jameson, at 629–630. *See also* Watson, *supra,* at 1315–1317.

While Cooley's General Principles of Constitutional Law, *supra,* supports the action taken by Congress, Judge Cooley's note on the Fourteenth Amendment in Story, II Commentaries on the Constitution of the United States, 677, 680 n. 1 (5th ed. 1891), questions its correctness and doubts whether a State should be held to its affirmative vote on an amendment to the Constitution if there should be total change of circumstances long after that vote was taken. The answer to that argument seems to be that the Equal Rights Amendment must be approved within 7 years after its submission to the States. The commitment of a State to its affirmative vote or an amendment during that period does not appear to involve any undue hardship.

JOHN M. HARMON
Acting Assistant Attorney General
Office of Legal Counsel

February 21, 1977

77-8 MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

Inspector General Legislation

Certain questions exist concerning the constitutionality of H.R. 2819, which would establish an Office of Inspector General in six executive departments [1] and five other executive establishments.[2] It is our opinion that the provisions in this bill, which make the Inspectors General subject to divided and possibly inconsistent obligations to the executive and legislative branches, violate the doctrine of separation of powers and are constitutionally invalid. This memorandum briefy outlines the major provisions of the bill, discusses the constitutional problems presented by those provisions, and recommends modifications to remedy those problems.

A. Description of the Inspector General Legislation Pending Before Congress

H.R. 2819 was introduced on February 1, 1977, by Representatives Fountain and Brooks and has been referred to the Committee on Government Operations. The bill combines and reorganizes the present internal audit and investigative units in each of the 11 agencies that are the subject of the bill into a single office with certain additional responsibilities. The primary functions of the Inspector General's Office would be: (1) to develop and supervise programs (including audits and investigations) in the agency to promote efficiency and to prevent fraud and abuse; (2) to keep both the head of the agency *and* Congress fully informed regarding these matters; and (3) to recommend and report on the implementation of corrective actions.

Each Inspector General is required to prepare and submit to Congress, as well as to the head of the agency, a variety of reports, and is

---

[1] The Departments included are Agriculture, Commerce, Housing and Urban Development, Interior, Labor, and Transportation.

[2] The other establishments are the Energy Research and Development Administration, the Environmental Protection Agency, the General Services Administration, and the National Aeronautics and Space Administration.

required to supply additional documents and information to Congress on request. These reports are required to be submitted directly to Congress without clearance or approval by the agency head or anyone else in the executive branch. The Inspector General is authorized to have access to a broad range of materials available to the agency and is given subpoena power to obtain additional documents and information.

The Inspectors General are to be appointed by the President (with the advice and consent of the Senate) "without regard to political affiliation," and whenever the President removes an Inspector General from office, the bill would require the President to notify both Houses of the reasons for removal.

The bill is modeled on Title II of Pub. L. No. 94-505, 90 Stat. 2429, which establishes an Office of Inspector General in the Department of Health, Education, and Welfare (HEW). No Inspector General for HEW has been appointed to date.

B. Constitutional Objections

1. As a threshold matter, the Justice Department has repeatedly taken the position that continuous oversight of the functioning of executive agencies, such as that contemplated by the requirement that the Inspector General keep Congress fully and currently informed, is not a proper legislative function. In our opinion, such continuing supervision amounts to an assumption of the Executive's role of administering or executing the laws. However, at the same time it must be acknowledged that Congress has enacted numerous statutes with similar requirements, many of which are currently in force.

2. An even more serious problem is raised, in our opinion, by the provisions that make the Inspectors General subject to divided and possibly inconsistent obligations to the executive and legislative branches, in violation of the doctrine of separation of powers. In particular, the Inspector General's obligation to keep Congress fully and currently informed, taken with the mandatory requirement that he provide any additional information or documents requested by Congress, and the condition that his reports be transmitted to Congress without executive branch clearance or approval, are inconsistent with his status as an officer in the executive branch, reporting to and under the general supervision of the head of the agency. Article II vests the executive power of the United States in the President. This includes general administrative control over those executing the laws. *See, Myers* v. *United States,* 272 U.S. 52, 163-164 (1926). The President's power of control extends to the entire executive branch, and includes the right to coordinate and supervise all replies and comments from the executive branch to Congress. *See, Congress Construction Corp.* v. *United States,* 314 F. 2d 527, 530-532 (Ct. Cl. 1963).

3. Under the bill, the Inspector General has an unrestricted access to executive branch materials and information. He has an unqualified and

independent obligation to provide such materials and documents to the Congress as it may request. Obviously the details of some investigations by the Inspector General (or by the Justice Department) might well, under settled principles, require them to be withheld from Congress through the assertion of executive privilege. But the bill as written would preclude that assertion in view of the Inspector General's duty to make requested materials and information available to Congress.

4. Finally, we are of the opinion that the requirement that the President notify both Houses of Congress of the reasons for his removal of an Inspector General constitutes an improper restriction on the President's exclusive power to remove Presidentially appointed executive officers. *Myers* v. *United States*, *supra*. Although Congress has the authority to limit the President's power to remove quasi-judicial or quasi-legislative officers, *Wiener* v. *United States*, 357 U.S. 349 (1958), *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), the power to remove a subordinate appointed officer within one of the executive departments is a power reserved to the President acting in his discretion.[3]

C. Suggested Modifications

We believe that the constitutional problems raised by the proposed legislation could only be cured through modification that would clearly establish the Inspector General as an executive officer responsible to the head of the agency.

The principal problem with the proposed legislation is that the Inspector General is neither fish nor fowl. While the Inspector General is supposed to be under the general supervision of the agency head, the Inspector General reports directly to Congress. He is to have free access to all executive information within the agency, yet he is not subject to the control of the head of the agency or, for that matter, even to the control of the President.

In our opinion, the only means by which this bill could be rendered constitutional would be to modify it so as clearly to establish the Inspector General as an executive officer subject to the supervision of the agency head and subject to the ultimate control of the Chief Executive Officer. We recommend the following modifications:

1. Reports of problems encountered and suggestions for remedial legislation may be required of the agencies in question, but those reports must come to Congress from the statutory head of the agency, who must reserve the power of supervision over the contents of these reports.

2. The constitutional principle of executive privilege must be preserved. The provision in the bill requiring reports to Congress

[3] We also question the validity of the requirement that the President appoint each Inspector General "without regard to political affiliation." This implies some limitation on the appointment power in addition to the advice and consent of the Senate.

of all "flagrant abuses or deficiencies" within 7 days after discovery would risk jeopardizing ongoing investigations by the agency and the Justice Department, many of which would be subject to a claim of privilege. That provision should be qualified by a specific reference to the possibility of a claim of privilege, or deleted entirely from the bill.

3. Finally, the power of the President to remove subordinate executive officers must remain intact. The requirement in the bill that the President report to Congress the reasons for his removal of an Inspector General would infringe on this power and should be eliminated.

JOHN M. HARMON
Acting Assistant Attorney General
Office of Legal Counsel

February 24, 1977

77-9 MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

Conflict of Interest—Status of an Informal Presidential Advisor as a "Special Government Employee"

A question has arisen as to whether Mr. A should be regarded as a special Government employee for purposes of the Federal conflict-of-interest laws. Generally, Mr. A advises the President almost daily, principally on an informal basis. This essentially personal relationship would not in itself result in Mr. A's being a Government employee or special Government employee. However, as explained in the latter part of this memorandum, Mr. A should be designated as a special Government employee in connection with his work on a current social issue that is of concern to the Administration.

The term "employee" is not defined in the conflict-of-interest laws, but it was no doubt intended to contemplate an employer-employee relationship as that term is understood in other areas of the law. Perhaps the most obvious source of a definition under Federal law is in the civil service laws. For purposes of Title 5 of the United States Code, a person is regarded as an "officer" or "employee" of the United States if he or she (1) is appointed in the civil service by a Federal officer or employee; (2) is engaged in the performance of a Federal function under authoriy of law; and (3) is subject to the supervision of a Federal officer or employee while engaged in the duties of his or her position. *See* 5 U.S.C. §§ 2104, 2105. A review of our files and other available material reveals that variants of these same three factors have, in fact, been utilized in one context or another under the conflict-of-interest laws.

For example, the first criterion under the civil service test—that the person be appointed in the civil service [1]—is analogous to the definition of the term "special Government employee" for purposes of the con-

[1] The "civil service" includes all appointive positions in the executive branch. 5 U.S.C. § 2101.

flict-of-interest laws: an officer or employee "who is retained, designated, appointed, or employed" to perform duties not to exceed 130 out of the next 365 calendar days. 18 U.S.C. § 202(a). The quoted phrase connotes a formal relationship between the individual and the Government. *See* B. Manning, Federal Conflict of Interest Law, 27, 34 (1964). In the usual case, this formal relationship is based on an identifiable act of appointment. *Id.*,[2] However, an identifiable act of appointment may not be absolutely essential for an individual to be regarded as an officer or employee in a particular case where the parties omitted it for the purpose of avoiding the application of the conflict-of-interest laws or perhaps where there was a firm mutual understanding that a relatively formal relationship existed. We are not aware that Mr. A has been officially "retained, designated, appointed, or employed" as an adviser to the President or that there is any other basis for inferring a relatively formal relationship insofar as Mr. A's advising the President is concerned.

The second criterion under the civil service laws is that the person be engaged in the performance of a Federal function under authority of law. It seems doubtful that Mr. A's essentially personal advice on a wide variety of issues would be regarded as a Federal function under this test.

The third civil service factor—that the individual work under the supervision of a Federal officer or employee—is closely related to the second. It has been of importance in the conflict-of-interest area primarily in determining whether an individual is an independent contractor rather than an employee and therefore not subject to the conflict-of-interest laws. For example, if a person is hired to conduct a study using his own judgment and resources and then turn over the end product to the agency, he would probably be regarded as an independent contractor. On the other hand, if a person works on Government premises under the direction of Government personnel and performs work of a kind normally handled by Government employees, he is probably an employee. Manning, *supra,* at 32–33. The question is obviously one of degree, but the distinction between an employee and an independent contractor, based primarily on the element of supervision and the nature of the work, is well recognized in other areas of the law. *See, e.g., United States* v. *Orleans,* 425 U.S. 807 (1976) (tort claims); *NLRB* v. *Hearst,* 322 U.S. 111 (1944) (Labor). We have taken this same approach in the past under the conflict-of-interest laws. *See also* Manning, *supra,* at 32–33. Again, given the largely personal relationship between the President and Mr. A, apparently based on mutual respect rather than an assignment of duties, it seems doubtful that Mr. A ordinarily consults with the President under the latter's supervision,

[2] Appendix C to Chapter 735 of the Federal Personnel Manual provides detailed guidelines for agencies to follow in appointing consultants and other temporary employees, principally to ensure that they are officially designated as special Government employees. These guidelines of course reinforce the requirement of a formal relationship.

direction, or control as that concept is applied in the conflict-of-interest and similar laws or engages in the type of work ordinarily performed by Government employees.

It is our conclusion, for the reasons given above, that Mr. A does not have to be designated as a special Government employee and abide by the restrictions of the conflict-of-interest laws applicable to such employees solely by virtue of his informal consultations with the President.

The conclusion is, for the most part, consistent with the position of Professor Manning, a noted commentator on the conflict-of-interest laws:

> One does not become an "employee of the United States" merely by voicing an opinion on government matters to a federal official at a cocktail party. The distinction may be shadowy in a particular case, and each situation must be judged on its own facts. Formalities can play an important part. In the ordinary situation, a person will not be considered to be a consultant-employee if he does not bear a formal appointment, is not enrolled on the personnel roster of the relevant agency, has no government personnel file in his name, and has not been sworn in or signed the customary oath of a government employee. Other factors that might be relevant can be conjectured. Is the person's advice solicited frequently? Is it sought by one official, who may be a personal friend, or impersonally by a number of persons in a government agency that needs expert counsel? Do meetings take place during office hours? Are they conducted in the government office, and does, perhaps, the adviser maintain a desk or working materials in government facilities? Manning, *supra,* at 29–30.

This conclusion is also consistent with the prior position of this Office. By letter dated April 10, 1968, we advised the Acting Director of the Office of Foreign Direct Investments in the Department of Commerce that if he were to turn on occasion to a single expert or a group of such experts for informal advice on a particular regulation or policy, that would not make the experts "employees" for conflict-of-interest purposes.

As mentioned earlier, Mr. A speaks with the President almost every day by telephone, and these discussions cover a wide range of policy issues. The passage just quoted from Professor Manning's book and our 1968 memorandum both appear to attach some significance to the frequency of consultation. But we do not believe the mere fact that Mr. A speaks with the President on a regular basis in itself alters the fundamentally personal nature of the relationship that is apparently involved here, just as Mrs. Carter would not be regarded as a special Government employee solely on the ground that she may discuss governmental matters with the President on a daily basis.

Mr. A, however, seems to have departed from his usual role of an informal adviser to the President in connection with his recent work on a current social issue. Mr. A has called and chaired a number of meetings that were attended by employees of various agencies, in relation to this work, and he has assumed considerable responsibility for coordinating the Administration's activities in that particular area. Mr. A is quite clearly engaging in a governmental function when he performs these duties, and he presumably is working under the direction or supervision of the President. For this reason, Mr. A should be designated as a special Government employee for purposes of this work—assuming that a good faith estimate can be made that he will perform official duties relating to that work for no more than 130 out of the next 365 consecutive days. If he is expected to perform these services for more than 130 days, he should be regarded as a regular employee. In either case, he should be formally appointed and take an oath of office. This formal designation would not necessarily affect the conclusion that Mr. A's other consultations with the President are of a personal rather than official nature. Should Mr. A assume governmental responsibilities in other areas, as he has done with his work on the above project, he should be regarded as a Government employee for these other purposes as well.

JOHN M. HARMON
Acting Assistant Attorney General
Office of Legal Counsel

March 4, 1977

77-10 MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

Drug Enforcement Administration's Authority to Impose Civil Penalties

This is in response to your memorandum posing the question whether the Administrator of the Drug Enforcement Administration (DEA) has the power to fix and settle civil penalties under 21 U.S.C. § 842(c)(1), as amended by the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 402(c)(1), 84 Stat. 1236, 1262, without instituting litigation to obtain an enforceable judgment. We are of the opinion that it does not.

Under § 842(c)(1), which imposes a civil penalty, the Federal district courts have jurisdiction to enforce the penalty. That jurisdiction is both original and exclusive, as appears from the face of the Act and from its legislative history. The House Report on the Comprehensive Drug Abuse Prevention and Control Act of 1970 described jurisdiction to enforce § 402 in the following terms:

> "The U.S. District Court or otherwise proper U.S. court having jurisdiction of matters of this nature shall have jurisdiction to enforce this paragraph." H.R. Rep. No. 91-1444 (Part 1), 91st Cong., 2d Sess. 47 (1970), reprinted in [1970] U.S. Code Cong. & Ad. News 4566, 4615.

Moreover, it is evident from the structure of the Act that Congress intended penalties to be imposed through the courts rather than through administrative action by the Attorney General or his designees.

For example, § 508 of the Act, listing powers of enforcement personnel, does not include any authority whatever to adjudicate violations of the statute or to impose penalties. Section 511, respecting forfeitures of property, requires that they be made in accordance with governing rules of judicial procedure unless incident to a valid warrant, arrest, prior judgment, or equivalent authority. Section 512(a) authorizes the courts—but not the Attorney General or the Administrator—to issue injunctions to forbid violations of Title II of the Act (which includes

§ 402), in accordance with the Federal Rules of Civil Procedure. Section 512(b) provides jury trials for violators. As a final example, § 513 authorizes persons threatened with enforcement action to show cause why they should not be prosecuted. The House Report states that "[t]his proceeding is generally intended to cover technical violations by registrants, and allows for administrative compliance, if possible, before court action is initiated."

Only the courts of the United States can impose the penalties described in § 402; the Act contains no indication to the contrary. Therefore, the Administrator may not rely on the authority of 31 U.S.C. §§ 952 and 953 to "settle, compromise, or close claims" arising out of the activities of DEA. While those provisions would support DEA action to collect a civil penalty once imposed, they do not empower the Administrator to levy it himself. The claims-collection procedure cannot be invoked until a penalty has been imposed by a court of proper jurisdiction.[1]

In summary, the Administrator is not authorized to adjudicate violations of 21 U.S.C. § 842 or to impose civil penalties under § 842(c)(1). Jurisdiction to do so is vested exclusively in the courts of the United States. The appropriate means to enforce the civil penalties provided for in that section are through a civil action in district court. If a judgment and penalty result, the Administrator may then proceed to collection or settlement.

JOHN M. HARMON
Acting Assistant Attorney General
Office of Legal Counsel

[1] The term "claims" has a more restricted meaning than might at first be thought. 4 CFR § 102.6, for example, does not serve to define "claims" generally. It simply states that agencies seeking the collection of statutory penalties, forfeitures, or debts provided as an enforcement aid should consider suspension or revocation of licenses on the part of violators who delay in making payment. A number of Federal agencies have express statutory authority to adjudge violations of law or regultion and to impose statutory penalties. DEA does not.

March 4, 1977

77-11 MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

Provision of Transportation and Other Services to Former Presidents and Vice Presidents

The President has asked for advice as to the proper way to handle requests from former Presidents and Vice Presidents for transportation, Secret Service protection for overseas trips, and personal use of the services of Government employees.

For reasons stated more fully hereafter, we conclude that both transportation and limited use of Government employees may be provided to all former Presidents during their lifetime and to former Vice President Rockefeller until July 20, 1977, if such transportation and usage of employees is directly connected with, and required for, Secret Service protection of these persons.

I. Secret Service Protection

Under 18 U.S.C. § 3056, Secret Service protection is to be made available to all former Presidents during their lifetime. The Presidential Assistance Act of 1976, Pub. L. No. 94-524, 90 Stat. 2475, expanded the Secret Service's authority by granting the Secretary of the Treasury and the Director of the Secret Service wide discretion to determine what services are necessary to ensure the adequate protection of the former Presidents and to call on other agencies of the Government for assistance. Under Pub. L. No. 95-1, 91 Stat. 3, enacted January 19, 1977, that protection may be extended to Vice President Rockefeller until July 20, 1977. The following discussion of the former Presidents' use of Government-furnished transportation and employees' services applies equally to Mr. Rockefeller until July 20, 1977.

II. Transportation and Use of the Services of Government Employees

The Director of the Secret Service has statutory authority to furnish transportation and other services to former Presidents if he determines that such transportation and services are required in connection with

the protection of those persons. In a previous memorandum responding to an inquiry from the White House, we specifically advised that a determination by the Director of the Secret Service that military aircraft may be used to transport former President Ford on personal business in order to facilitate Secret Service protection, could furnish an adequate basis for the detail of available military aircraft to fly the former President.

The above guidelines are equally valid whether the transportation is within or without the United States, the crucial inquiry being whether, according to the Director, such transportation by other than common carrier is required in order to protect the former President.

Similarly, in that memorandum we concluded that a Government employee—in that case a medical corpsman—could be assigned to the former President traveling on personal business only upon a determination that the assignment was necessary to maintain Secret Service protection. We take the same view with respect to any other Government employees who might be detailed to the former President.

We would emphasize that the authority to administer the statutes relating to the protection of former Presidents and others eligible for Secret Service protection is vested by statute in the Secretary of the Treasury and the Director of the Secret Service. Those officials are charged with the responsibility for deciding whether to grant particular requests for transportation or use of the services of Government employees on a case-by-case basis.

John M. Harmon
Acting Assistant Attorney General
Office of Legal Counsel

March 21, 1977

77-12 MEMORANDUM OPINION FOR THE COUNCIL OF ECONOMIC ADVISERS

Appointment of Deputy Director of the Council on International Economic Policy (CIEP) by Its Executive Director

This is in response to your memorandum in which you inquire whether the former Executive Director of the Council on International Economic Policy (CIEP), was authorized to appoint Mr. A as the "Deputy Director"[1] of CIEP, and, if not, by what means may someone be named to carry on CIEP's function absent the appointment of an Executive Director of CIEP by the President, by and with the advice and consent of the Senate.

Pursuant to 22 U.S.C. § 2847(b) (Supp. V 1975), the Executive Director of CIEP has the power to appoint such staff personnel as he deems necessary with the approval of the Council. Thus, the Executive Director had the power to appoint Mr. A as the Deputy Executive Director of CIEP provided he had secured the approval of the Council.

As we understand your letter you are, however, less concerned with Mr. A's status as Deputy Executive Director than with his authority to act as Executive Director of CIEP and perform the functions of that official. The CIEP statute does not provide for a Deputy Executive Director and is silent on the question as to who is to perform the duties of the office of Executive Director in the event of a vacancy. Hence, assuming that Mr. A was validly appointed Deputy Executive Director, that fact alone would not enable him to perform those functions that are exclusively vested in the Executive Director of CIEP.

We are aware of the memorandum dated January 11, 1977, to the Heads of Departments and Agencies from Mr. James E. Connor, Secretary to the Cabinet and Staff Secretary to President Ford, entitled "Resignation of Presidential Appointees," par. 4 of which provides:

[1] While your memorandum uses the term "Deputy Director," we assume that Mr. A was actually appointed Deputy Executive Director.

> In order to make certain there is no interruption in responsibility after January 20, President Ford's transition officer for each department and agency and the President-elect's transition officer for that department and agency should reach agreement on the designation of a Ford-appointed subordinate officer who would have the power and responsibility of acting secretary until the appropriate officer of the new administration is confirmed and sworn in.

It does not appear from the papers submitted to us whether Mr. A was designated pursuant to that authority to act as Executive Director pending the appointment of such officer by and with the advice and consent of the Senate. Moreover, it is questionable whether having been appointed during the very last days of the Ford Administration, Mr. A would be a "Ford-appointed subordinate officer" within the scope of that memorandum.

However, if Mr. A was appointed Deputy Executive Director with the approval of the Council and if he was designated Acting Executive Director in accordance with the provisions of the January 11, 1977, memorandum, it can be said that this designation was made at the direction of President Ford and that it was ratified by President Carter.

This gives rise to the problem of whether President Ford had the authority to make an *ad interim* designation to a position that requires Senate confirmation. The U.S. District Court for the District of Columbia in *Williams* v. *Phillips,* 360 F. Supp. 1363 (D.D.C., 1973), held that such an "appointment" cannot be made without statutory authorization. In its ruling on the Government's application for a stay of the decision, the Court of Appeals indicated that at best the President would have an implied power "to appoint an acting director [of the Office of Economic Opportunity] for a reasonable period before submitting the nomination of a new director to the Senate." The Court of Appeals suggested that the 30-day period of the Vacancy Act (5 U.S.C. § 3348)[2] was an indication of what constituted a reasonable period. *Williams* v. *Phillips,* 482 F. 2d 669, 670–671 (D.C. Cir. 1973). Here the vacancy has lasted for nearly twice that period.

Another difficulty here is presented by Mr. A's subsequent appointment as Chairman of the Council of Economic Advisers. As such, Mr. A is an *ex officio* member of the CIEP Council. This raises the question whether Mr. A's position as a member of the CIEP Council and Deputy Executive Director and Acting Executive Director of CIEP are compatible offices.

Earlier prohibitions against dual officeholding were repealed in 1964 and replaced by legislation that, with a few exceptions, merely prohibits the dual compensation of persons holding two offices. 5 U.S.C. § 5533. That legislation, however, is not to be read as also overcoming the basic legal doctrine prohibiting the holding of incompatible offices. *See,*

[2] The Vacancy Act does not apply to CIEP because that Act is limited to "Executive departments" and CIEP is not an executive department. 5 U.S.C. § 101.

Crossthwaite v. *United States*, 30 C. Cl. 300, 308 (1895), *rev'd on other grounds*, 168 U.S. 375; *Lopez* v. *Martinelli*, 59 F. 2d 176, 178 (1st Cir. 1932); 22 Op. A.G. 237, 238 (1898); Throop, Public Officers (1892), 37–38. Perhaps the most important public policy consideration in this area is the principle that no public official should be a judge in his own cause, or review in one capacity actions that he has taken in another capacity.

As a member of the CIEP Council, Mr. A would be in a position in which he would have a role in the Council's review or approval of decisions, personnel actions, and other management functions made by him as Acting Executive Director of CIEP. 22 U.S.C. § 2847 (Supp. V 1975). Hence, it might be said that Mr. A should be regarded as having vacated by operation of law his position as Acting Executive Director of CIEP, by virtue of his appointment as Chairman of the Council of Economic Advisers.

On the basis of the above analysis, it is our opinion:

(1) That the President should designate a person, other than Mr. A, to be Acting Executive Director, CIEP. If the designee is not chosen from the CIEP staff, it would be desirable that the designee (a) be a person who has been appointed to some other position by and with the advice and consent of the Senate, and (b) not be a member of the CIEP Council.

(2) That the President should nominate a permanent Executive Director as soon as possible.

John M. Harmon
Acting Assistant Attorney General
Office of Legal Counsel

March 22, 1977

77-13 MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

Washington, D.C., Hostage Situation: Basis for Federal Jurisdiction

The United States Attorney for the District of Columbia is under the immediate supervision of the Attorney General, in a chain of command sense, because of the Federal Government's responsibility for the District and the U.S. Attorney's role as chief prosecutor of crimes arising under the District of Columbia Code. For this reason, and apart from any consideration of Federal jurisdiction based on violations of Federal law, the Attorney General has a basis on which to participate with the U.S. Attorney in formulating a response to situations such as this. Section 533 of Title 28 provides that the Attorney General may appoint officials to conduct investigations regarding official matters under the control of the Department of Justice. In our opinion, this statute provides the Attorney General, at least, with authority to provide investigative support to local officials in connection with actions of a local nature within the District. This conclusion arises from the relationship between the U.S. Attorney and the Department of Justice. This statute does not, of course, provide a basis for the assertion of Federal jurisdiction based on the commission of a substantive Federal offense.

In addition, with respect to the use of Justice Department personnel (the Federal Bureau of Investigation (FBI), for example) in the investigative stages of the hostage incident, it is our conclusion that the FBI guidelines do permit the Bureau to conduct an investigation to determine whether a Federal substantive offense has been committed.

Finally, it is the conclusion of this Office that four Federal statutes furnish a possible basis for Federal jurisdiction, and they are as follows:

1. Under 18 U.S.C. § 922(d)(4) it is unlawful for any person who has been adjudicated a mental defective or who has been committed to any mental institution to receive any firearm or ammunition that has been shipped or transported in interstate commerce. Firearms are not manufactured in the District. According to information we received, the leader of the group apparently responsible for this situation had been

declared a mental defective. On the basis of these facts, it would appear that this statute was violated or that, at least, there was a reasonable basis for investigating to determine whether it had been violated.

2. Under 18 U.S.C. § 231(a)(2) it is a Federal offense for one to transport in commerce a firearm knowing or having reason to know or intending that it will be used unlawfully in furtherance of a civil disorder. "The term 'civil disorder' means any public disturbance involving acts of violence by assemblages of three or more persons, which cause an immediate danger of or results in damage or injury to the property or person of any other individual." 18 U.S.C. § 232(1). Our information established that there were more than three persons involved in this incident and clearly the remaining requirements of this definition were met. Likewise, the transportation-in-commerce requirement was met by virtue of the definition of that term in 18 U.S.C. § 232(2) which provides as follows:

> The term 'commerce' means commerce (A) between any State or the District of Columbia and any place outside thereof; (B) between points within any State or the District of Columbia, but through any place outside thereof; or (C) wholly within the District of Columbia.

Again, the facts available to us indicate that this statute had been violated.

3. The Riot Statute, 18 U.S.C. § 2101(a)(1), provides as follows:

> Whoever travels in interstate or foreign commerce or uses any facility of interstate or foreign commerce, including, but not limited to, the mail, telegraph, telephone, radio, or television, with intent—(A) to incite a riot; or (B) to organize, promote, encourage, participate in or carry on a riot; or (C) to commit any act of violence in furtherance of a riot; or (D) to aid or abet any person in inciting or participating in or carrying on a riot or committing any act of violence in furtherance of a riot; and who either during the course of any such travel or use or thereafter performs or attempts to perform any other overt act for any purpose specified in subparagraph (A), (B), (C), or (D) of this paragraph [is guilty of a federal offense].

Our information was that the U-Haul truck used by those persons instigating this incident was rented in College Park, Maryland, thus apparently fulfilling the requirement of § 2101(a)(1). The term "riot" is defined in § 2102(a) in such a manner as to include the actions of those involved in this incident because there were acts of violence by an assemblage of at least three persons that constituted a clear and present danger of damage or injury to the person or property of other individuals. Therefore, it again appeared that, based on the information available to us, a Federal crime had been committed under this statute.

4. One of the Civil Rights statutes, 18 U.S.C. § 245, may also come into play here because of the apparently religious-based motives of the perpetrators of this incident, and because of the implications of their choice of the B'nai B'rith building and The Islamic Center and the occupants thereof as targets for their actions. It should be noted that this statute provides the weakest basis for the assertion of Federal jurisdiction. This is because this statute is designed to cover federally protected activities, such as voting, employment, jury duty in the United States courts, participation in Federal programs, education, travel and the use of certain facilities in connection with travel. It does not appear, or at least we did not have facts indicating, that these so-called federally protected activities were implicated by this incident except in perhaps a tangential manner.

JOHN M. HARMON
Acting Assistant Attorney General
Office of Legal Counsel

March 24, 1977

77-14 MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

Effect of Presidential Pardon on Aliens Who Left the Country to Avoid Military Service

You have asked us to examine the question of whether the President's Proclamation and accompanying Executive order granting a pardon to all those who violated the Military Selective Service Act between August 4, 1964, and March 28, 1973, will have the effect of removing the exclusion of aliens who departed from or remained outside the United States to avoid or evade training or service in the Armed Forces. We agree with the Immigration and Naturalization Service (INS) that the pardon should be given that effect. We also agree with INS that whether an alien seeking readmittance should be regarded as a permanent resident alien returning from a temporary visit abroad, is a question of fact that should be decided on a case-by-case basis. But we believe that the terms of the statute and the case law construing it permit more flexibility in making this determination than the INS appears to suggest. Finally, we do not believe that an expatriated citizen may properly be regarded as an alien lawfully admitted for permanent residence.[1]

I. Applicability of the Pardon to 8 U.S.C. § 1182(a)(22)

An alien is excluded from entry into the United States if he or she is within any of the classes enumerated in 8 U.S.C. § 1182(a).[2] Among the aliens excluded under this provision are:

> Aliens who are ineligible to citizenship, except aliens seeking to enter as nonimmigrants; or persons who have departed from or who have remained outside the United States to avoid or evade training or service in the armed forces in time or war or a period declared by the President to be a national emergency, except aliens

[1] The Attorney General subsequently approved these conclusions.

[2] The Immigration and Nationality Act, 66 Stat. 166 (1952) codified at Title 8, United States Code.

> who were at the time of such departure nonimmigrant aliens and who seek to reenter the United States as nonimmigrants. 8 U.S.C. § 1182(a)(22).

Proclamation 4483, issued by the President on January 21, 1977, grants a pardon to everyone "who may have committed any offense between August 4, 1964 and March 28, 1973 in violation of the Military Selective Service Act." 13 Weekly Comp. Pres. Doc. 90. The Proclamation does not on its face purport to pardon the "offense" of departing from or remaining outside the United States to avoid or evade military training or service in the Armed Forces and thereby to remove the sanction of exclusion from the United States.

Executive Order 11967, also issued by the President on January 21, 1977, implements the pardon by, *inter alia,* instructing the Attorney General to seek dismissal of indictments for offenses covered by the pardon. *Id.* Section 3 of the order provides:

> Any person who is or may be precluded from reentering the United States under 8 U.S.C. 1182(a)(22) or under other law, by reason of having committed or apparently committed any violation of the Military Selective Service Act shall be permitted as any other alien to reenter the United States.

The Executive order and the Proclamation together evince a clear intent to remove the exclusion imposed by 8 U.S.C. § 1182(a)(22). Because the Proclamation itself only mentions violations of the Military Selective Service Act, and the Executive order by its terms seems to lift the exclusion only where it would otherwise apply "by reason of" an underlying violation of that Act, it would appear that the intent was to lift the exclusion only derivatively by removing a consequence of having violated the Military Selective Service Act. However, as explained below, 8 U.S.C. § 1182(a)(22) was probably not intended to apply to any conduct that is not also unlawful under the Selective Service Act. The pardon therefore will have the same effect whether it operates derivatively or directly—*i.e.,* by pardoning the separate "offense" created by 8 U.S.C. § 1182(a)(22). *See* footnote 8, *infra.*

The present § 1182(a)(22) was first enacted in 1944 in an Act that had only one other section: the predecessor to the recently repealed 8 U.S.C. § 1481(a)(10),[3] which provided that any person who was a national of the United States would lose his nationality by departing from or remaining outside the jurisdiction of the United States in time of war or during a national emergency for the purpose of avoiding or evading training and service in the military forces of the United States. 58 Stat. 746. It is evident that the two sections of the 1944 Act merely applied different sanctions for the same underlying conduct of leaving

[3] 8 U.S.C. § 1481(a)(10) was repealed by Pub. L. No. 94-412, 90 Stat. 1258 (1976).

or remaining outside the country to avoid military training or service.[4] Indeed, by virtue of the interaction between the two provisions, a U.S. national who left the country to avoid or evade training or service was expatriated and, as an alien, would then be excluded from entry into the United States. *See, Jolley* v. *INS,* 441 F. 2d 1245, 1255 n. 17 (5th Cir. 1971).

The Attorney General described the purpose of the expatriation section of the bill in his letter to Senator Russell:

> The files of this Department disclose that at the present time there are many citizens of the United States who have left this country for the purpose of escaping service in the armed forces. While such persons are liable to prosecution for violation of the Selective Service and Training Act of 1940, if and when they return to this country, it would seem proper that in addition they should lose their United States citizenship. Persons who are unwilling to perform their duty to their country and abandon it during its time of need are much less worthy of citizenship than are persons who become expatriated on any of the existing grounds. S. Rep. No. 1075, *supra.*

The Attorney General's statement that persons subject to expatriation under the bill would be "liable to prosecution for violation of the Selective Service and Training Act of 1940" if and when they returned, indicates that the expatriation provision was to apply where the underlying conduct also violated that Act. His description of the sanction of expatriation as being "in addition" to criminal penalties for the conduct further supports this view.[5]

The view that the expatriation section of the 1944 Act applied only to conduct that gave rise to liability under the Selective Service and Training Act also is reflected in the Supreme Court's opinion in *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144 (1963), which held that the expatriation provision was penal rather than regulatory in nature and was therefore unconstitutional because it automatically deprived a citizen of his nationality without the procedural protections required in a criminal trial. One of the factors the Court cited as ordinarily being useful in determining whether a sanction is penal or regulatory—and

---

[4] In a letter dated February 16, 1944, to Senator Russell, Chairman of the Senate Committee on Immigration, the Attorney General stated:

> I invite your attention to the desirability of enacting legislation which would provide (1) for the expatriation of citizens of the United States who in time of war or during a national emergency leave the United States or remain outside thereof for the purpose of evading service in the armed forces of the United States, and (2) for *the exclusion from the United States of aliens who leave this country for the above-mentioned purpose.* S. Rep. No. 1075, 78th Cong., 2d Sess., 2 (1944). [Emphasis added].

[5] The Attorney General's description also indicates that the bill was intended to close a gap in the coverage of existing criminal provisions by imposing a sanction upon those who had removed themselves beyond the criminal jurisdiction of the United States. *See* 90 Cong. Rec. 7628–29 (1944).

one that suggested that the expatriation provision was penal in nature— was "whether the behavior to which it applies is already a crime." *Id.* at 168.[6] Justice Brennan explicitly stated in his concurring opinion that it was obvious that the expatriation provision "does not reach any conduct not otherwise made criminal by the selective service laws." *Id.* at 191 n. 5. Because the expatriation section and the section that was the predecessor of the present 8 U.S.C. § 1182(a)(22) applied to the same underlying conduct, it follows that the latter provision similarly should be regarded as intended to apply only to conduct that also gives rise to criminal liability under the Military Selective Service Act.[7] In our opinion, the President's Proclamation of pardon of offenses arising under the Military Selective Service Act may properly be given the effect intended in Section 3 of Executive Order 11967 of lifting the exclusion from the United States which may result from the same conduct.

The leading case regarding the effect of a Presidential pardon is *Ex parte Garland,* 71 U.S. 333 (1866). In 1865, Congress enacted a statute providing that no person could be permitted to practice in Federal court unless he took an oath asserting that he had never voluntarily borne arms against the United States or given aid or comfort to enemies of the United States. In holding that a Presidential pardon granted to a Confederate sympathizer for all offenses committed during the Rebellion had the effect of removing the bar imposed by the statute, the Court stated:

> A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that

[6] The Court did note that the elements of the "crime" created by the expatriation provision and that created by the Selective Training and Service Act were not identical, 372 U.S. at 167 n. 21, but this observation appears to have been based on the conclusion that the Immigration and Nationality Act contained an *additional* element not found in the other Act—*i.e.,* departing from or remaining outside the country for the purposes declared to be unlawful. The Court did not suggest that expatriation would occur even if the underlying conduct did not constitute a violation of the Selective Training and Service Act.

Also, the expatriation section, as reenacted in the Immigration and Nationality Act, provided that failure to comply with any provision of the compulsory service laws of the United States raised the presumption that a citizen departed or remained outside the country for the purpose of evading or avoiding service. 8 U.S.C. § 1481(a)(10). This underscores the nexus to criminal conduct.

[7] Section 11 of the Selective Training and Service Act of 1940, 54 Stat. 894, which contained the criminal provisions of that Act, is in all material respects identical to the principal provision defining offenses and penalties under current law. See 50 U.S.C. App. § 462(a). Thus, the present connection between the exclusion provision and the Selective Service Act appears to be as direct as it was in 1944.

> in the eye of the law the offender is as innocent as if he had never committed the offense. *Id.* at 380.[8]

See also, Knote v. *United States,* 95 U.S. 149, 153 (1877). The language in *Ex parte Garland* is now generally believed to be too sweeping. E. Corwin, The President: Office and Powers, 1787-1957 (1957), at 166-67; W. H. Humbert, The Pardoning Power of the President (1941), at 76-78. For example, the Court held in *Carlesi* v. *New York,* 233 U.S. 51 (1914), that a Presidential pardon of a Federal offense did not prevent a State court from considering that offense for purposes of sentencing the defendant under a second offender statute. The Court was careful to note, however, that the New York statute did not purport to authorize additional punishment for the pardoned offense, but only prescribed penalties for the later offense taking into account the character of the offender, including his past conduct. *Id.* at 57. In fact, *Ex parte Garland* may itself be viewed as a case in which the disability actually was imposed as a penalty rather than as a regulation of the practice of law. Humbert, *supra,* at 78 n. 95.[9] The President's constitutional authority to pardon offenses carries with it the power to release all penalties and forfeitures that accrue from the offenses. *Osborn* v. *United States,* 91 U.S. 474 (1875); 36 Op. A. G. 193 (1930). Thus, whether a pardon removes a particular disability depends on whether the statutory provision is thought to impose a penalty for an offense or merely to prescribe a qualification for a Government benefit. 31 Op. A. G. 225, 226-27 (1918). *See also* 39 Op. A. G. 132, 134-35 (1938); 36 Op. A. G. 193 (1930); 22 Op. A. G. 36 (1898).

Many of the grounds for exclusion provided by 8 U.S.C. § 1182(a) could properly be regarded as establishing qualifications for entry, rather than punishment for past acts, and as such they would presumably be unaffected by a Presidential pardon. This, however, cannot be said of the ground for exclusion in 8 U.S.C. § 1182(a)(22). The companion provision for expatriation of a citizen who departed or remained outside the country to avoid or evade military training or service was specifically found to be penal rather than regulatory in character, in *Kennedy* v. *Mendoza-Martinez, supra,* after an exhaustive consideration of the language and legislative history of the 1944 Act and its predecessors. The evidence of a punitive intent in the legislative history and antecedents of the 1944 Act apply equally to the corollary provision for the exclusion of aliens now contained in 8 U.S.C. § 1182(a)(22). Similarly, the various factors the Court identified as suggesting that the sanc-

---

[8] The four dissenters contended that the Act was merely intended to establish qualifications for the practice of law before Federal courts. In their view, the pardon could relieve the beneficiary from the penalty the law inflicted for his offense, but not from meeting appropriate tests of fitness to engage in the practice of a profession. 71 U.S. at 396-97.

[9] This interpretation of *Ex parte Garland* is supported by the Court's alternative holding that the professional disqualification was intended by Congress as punishment for past acts and therefore was unconstitutional as *ex post facto* legislation. 71 U.S. at 376-380.

tion of expatriation was punitive on its face also apply to the sanction of exclusion of aliens who engage in the very same conduct. 372 U.S. at 168–69. Exclusion from the United States certainly involves an affirmative restraint, and it is analogous to the devices of banishment and exile that "have throughout history been used as punishment." *Id.* at 168 n. 23. From the nature of the provision it seems evident that exclusion may be imposed only upon a finding of scienter, *see, e.g., Riva* v. *Mitchell,* 460 F. 2d 1121 (3d Cir. 1972); *Jolley* v. *INS,* 441 F. 2d 1245 (5th Cir. 1971), and its operation promotes the traditional aims of punishment—retribution and deterrence. The other factors mentioned by the Court are also satisfied here.

Because it appears that Congress has imposed the sanction of exclusion as additional or alternative punishment for conduct that also violates the Military Selective Service Act, rather than as a regulatory measure to establish the qualifications of aliens who enter the United States, we agree with the conclusion of the INS that the President has the constitutional power to lift that exclusion as a consequence of his grant of a pardon for violations of the Military Selective Service Act.[10]

II. Authority for Regarding an Expatriated Citizen as a Lawful Permanent Resident.

INS suggests that a United States citizen who voluntarily relinquished his citizenship can be regarded as an alien lawfully admitted for permanent residence. On its face, this seems to be a strained result, at least as it applies to a native-born citizen. The term "lawfully admitted for permanent residence" is defined under the Immigration and Nationality Act to mean "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." 8 U.S.C. § 1101(a)(20). A native-born citizen would never have been accorded the privilege of residing permanently in the United States "as an immigrant," so it is difficult to see how he could be thought to revert to the status of permanent resident alien by renouncing his citizenship. A naturalized citizen presumably has been accorded the privilege of residing permanently in the United States as an immi-

[10] In our view, the clear punitive purpose of 8 U.S.C. § 1182(a)(22) might well support a conclusion that the section itself defines an offense that may be pardoned by the President, without reference to parallel provisions in the Military Selective Service Act. In *Kennedy* v. *Mendoza-Martinez,* the Court stated that "Congress has plainly employed the sanction of deprivation of nationality as a punishment—*for the offense of leaving or remaining outside the country to evade military service*—without affording the procedural safeguards guaranteed by the Fifth and Sixth Amendments." 372 U.S. 165–66 [emphasis added]. Long before the Supreme Court's decision in *Kennedy* v. *Mendoza-Martinez,* Acting Attorney General John W. Davis advised the Secretary of the Navy that an earlier version of the expatriation statute created an offense and that the disabilities imposed were therefore lifted by an unconditional pardon. 31 Op. A. G. 225, 231–32 (1918). The underlying "offense" of departing from or remaining outside the United States to avoid military service under 8 U.S.C. § 1182(a)(22) is the same, and it could therefore be argued that the penalty of exclusion can be lifted by a pardon intended to have this result. But in view of the conclusion reached in the text, we need not decide here whether 8 U.S.C. § 1182(a)(22) itself states a pardonable offense.

grant at some point prior to his naturalization. But, by the terms of 8 U.S.C. § 1101(a)(20), an alien permitted to reside permanently in the United States may possess that immigrant status only as long as the status does not change. When a permanent resident alien becomes a naturalized citizen, he loses his status as an alien altogether. Thus, the language of 8 U.S.C. § 1101(a)(20) does not appear to contemplate that the initial permanent resident status can be resurrected once it has been lost.

As the INS memorandum points out, the Board of Immigration Appeals held in *Matter of Vielma-Ortiz,* 11 I&N Dec. 414 (1965), that a naturalized citizen who had been admitted for permanent residence prior to naturalization reverted to the status of permanent resident alien when he automatically lost his citizenship by voting in a foreign election.[11] The Board specifically noted that the expatriating act of voting in a Mexican election "had nothing to do with the continuance of the status as a lawful permanent resident of the United States," *Id.* at 416, presumably meaning that the individual's act of voting in the particular case did not manifest an intention to abandon his actual residence in the United States.[12]

It is evident that the Board interpreted the phrase "such status not having changed" in 8 U.S.C. § 1101(a)(20) to mean only that the alien must not have abandoned his actual residency in the United States. We do not believe that this construction is appropriate in light of subsequent developments. In *Gooch* v. *Clark,* 433 F. 2d 74, 79 (9th Cir. 1970), the court held that "the definition [in 8 U.S.C. § 1101(a)(20)] refers not to the actuality of one's residence but to one's *status* under the immigration laws" [emphasis in original]. The status involved is that of an *alien* lawfully admitted for permanent residence. A person ceases to be an alien altogether when he becomes a naturalized citizen, and his status as an alien therefore does not remain unchanged as required by 8 U.S.C. § 1101(a)(20).[13]

It also should be noted that the Board's decision in *Matter of Vielma-Ortiz* preceded the Supreme Court's decision in *Afroyim* v. *Rusk,* 387 U.S. 253 (1967), which held that citizenship may be forfeited only

---

[11] A brief passage in Justice Brennan's concurring opinion in *Kennedy* v. *Mendoza-Martinez* lends some support to the result in *Vielma-Ortiz.* He observed that the Government could argue that a citizen who fled the country to avoid military service, "although expatriated, is a resident alien subject to compulsory military service." 372 U.S. at 195 n. 7.

[12] The evidence established that the appellant obtained a voter registration card and voted in a Mexican election primarily to further his business dealings there and that he intended to return to his family in the United States on each occasion that he went to Mexico.

[13] The Supreme Court later stated in *Saxbe* v. *Bustos,* 419 U.S. 65, 72 (1975), that it "read the Act as did the Ninth Circuit in the *Gooch* case to mean that the change in status which Congress had in mind was a change from an immigrant lawfully admitted for permanent residence to the status of a *nonimmigrant* pursuant to 8 U.S.C. § 1257" [emphasis in original]. This passage only speaks of two different statutes that an alien may occupy. It does not suggest that a person might come within 8 U.S.C. § 1101(a)(20) if he was not even an alien for a period of time.

though a voluntary act of relinquishment. The decision in *Vielma-Ortiz* may have stemmed from a desire to soften the harsh impact of automatic expatriation for voting in a foreign election. The decision in *Afroyim* v. *Rusk* removes this pressure for a liberal construction of the statute; the requirement that a person who has renounced his citizenship must assume the position of an alien and apply anew for an immigrant visa or permanent resident status is now but a necessary consequence of a voluntary act. Also, as a practical matter, it would probably be rare that a person who voluntarily renounced his citizenship,[14] with all the severing of ties that implies, would nevertheless be thought to have retained a permanent residence in the United States to which he might now be returning from a "temporary" visit abroad. *See* Part III, *infra.* Therefore, little would probably be gained by regarding an expatriated citizen as an alien lawfully admitted for permanent resident.

For the foregoing reasons, it is our opinion that the result in *Vielma-Ortiz* should not be followed with respect to persons covered by the pardon who have renounced their citizenship.[15]

III. Standard for Determining Whether an Alien is Returning from a Temporary Visit Abroad.

We agree with the position of INS that the determination whether an alien seeking to enter the United States is "an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit aboard" under 8 U.S.C. § 1101(a)(27)(A) should in general be determined on a case-by-case basis. Judicial and administrative decisions arising under this section have generally looked to the facts of the

[14] The INS memorandum, at pp. 10–11, notes that those who have been effectively expatriated either applied for and obtained naturalization in a foreign country or formally renounced their citizenship. 8 U.S.C. §§ 1481(a) (1) and (6). A formal renunciation will usually be unambiguous in regard to subjective intent to relinquish citizenship. *See, e.g., Jolley* v. *INS,* 441 F. 2d 1245 (5th Cir. 1971). But it appears that even an application for and obtaining of naturalization in a foreign country or taking an oath of allegiance to a foreign country will not be regarded as an effective act of expatriation unless it is accompanied by an intent to abandon United States citizenship. *United States* v. *Matheson,* 532 F. 2d 808 (2d Cir. 1976); *King* v. *Rogers,* 463 F. 2d 1188 (9th Cir. 1972).

[15] Section 3 of Executive Order 11967 provides that any person precluded from reentering the United States under 8 U.S.C. § 1182(a)(22) shall be permitted "as any other alien" to reenter the United States. An expatriate who left the country to avoid military service or training is barred from reentry under this section. However, because such an individual could not be regarded as a returning resident alien, the provision for him to reenter "as any other alien" should be construed to mean that he must reenter in the same manner as an alien who no longer has the status of an alien lawfully admitted for permanent residence. He must therefore satisfy all entry requirements, including applicable quota limitations.

particular case to determine whether a given absence was temporary.[16] It would be a departure from the usual approach in this area to follow Option A contained in the draft statement prepared by INS for the Attorney General. Under Option A, any alien covered by the pardon who had been lawfully admitted for permanent residence would automatically be regarded to be returning from a temporary visit abroad and therefore eligible for a waiver of documentation requirements under 8 U.S.C. § 1181(b).

Option B proposed by INS would require a case-by-case determination for each alien, and it further states that it "is likely that most aliens in this category will be precluded by the length and circumstances of their absence from qualifying as returning permanent residents." This is apparently based on INS' conclusion (at p. 12 of Commissioner Chapman's memorandum) that the rule established by the cases is that lengthy absence without an explanation amounting to a legal excuse results in loss of returning resident status. We believe INS takes too narrow a view of the concept of a "temporary visit abroad," especially in placing determinative emphasis on the duration of the visit and apparently attaching little significance to the intent of the alien.[17]

The cases considering the question of what constitutes a temporary visit abroad are not entirely consistent; the most important factor that emerges from the cases, however, is whether the alien had a continuing intent to return to the United States—*animus revertendi. See, Matter of Kane,* I&N, Interim Dec. #2371 (April 1, 1975), at 6–8.[18] As stated in the most frequently cited case in this area, "the intention of the departing immigrant must be to return within a period relatively short, fixed

[16] 8 U.S.C. § 1181(b) provides that the Attorney General may waive the documentary requirement for returning resident immigrants "in such cases or in such classes of cases and under such conditions as may be by regulations prescribed." The reference to "classes of cases" might suggest that a case-by-case determination is not absolutely necessary. But the statute refers to classes of "returning resident immigrants"; in order to be included in such a class in the first place, an alien must be returning from a temporary visit abroad. *See* 8 U.S.C. § 1101(a)(27)(A). An individualized determination would seem to be required on this point.

[17] At one time, regulations implementing the waiver of the documentary requirement in 8 U.S.C. § 1181(b) provided that a waiver would be considered only if the temporary visit abroad was for 1 year or less. *See, Tejeda* v. *INS,* 346 F. 2d 389, 391 (9th Cir. 1965). The regulation was amended on May 7, 1969, 29 Fed. Reg. 6002, and it no longer contains the 1-year limitation. *See* 8 CFR 242.7a. Waiver is now permitted for temporary visits of longer duration.

[18] In this regard, it may be useful to consider a temporary visit abroad as being in contradistinction to a permanent visit. *Cf.* 8 U.S.C. § 1101(a)(31). Viewed in this light, reference to a temporary visit may be only a label for the more probing question of whether the alien has retained his essential ties to the United States or abandoned them. Many permanent resident aliens who left the country to avoid military service no doubt retained closer personal ties to the United States than to the country to which they fled.

by some early event." *United States ex rel. Lesto* v. *Day*, 21 F. 2d 307, 308–09 (2d Cir. 1927).[19]

Other cases are to the same effect.[20] For example, in *Santos* v. *INS*, 421 F. 2d 1303 (9th Cir. 1970), the court held that a permanent resident alien who left Guam after 12 years to seek other employment was not returning from a temporary visit abroad when he sought entry in San Francisco some 5 years later. The court noted the Special Inquiry Officer's finding that the alien had left with no definite intention either of staying away permanently or of returning, but rather with a purpose to let future events run their course. Thus, there was no evidence of *animus revertendi*. Similarly, in *United States ex rel. Alther* v. *McCandless*, 46 F. 2d 288, 290–91 (3d Cir. 1931), the court held that the mere absence of an intent to remain abroad permanently was not sufficient if there was no evidence of an affirmative intent to return to the United States. It is important to note, however, that the court considered the alien's intent in determining whether his visit abroad was temporary even though he had been out of the country for more than 8 years. *See also, Gamero* v. *INS*, 367 F. 2d 123 (9th Cir. 1966) (alien away 17 years held to have abandoned any intent he may once have had to return to the United States); *United States ex rel. Polymeris* v. *Trudell*, 49 F. 2d 730, 732 (2d Cir. 1931) (absence of 7 years); *Barrese* v. *Ryan*, 203 F. Supp. 880, 888–89 (D. Conn. 1962) (intent of alien controls where it can be ascertained); *Matter of Montero*, 14 I&N Dec. 399, 400 (1973). These cases at least establish that the extent of the visit is not controlling where the intent of the alien may reasonably be questioned. *United States ex rel. Polymeris* v. *Trudell*, *supra*, 49 F. 2d at 732; *Matter of Kane*, *supra*, at 6–7.

It is true that courts have cited factors in addition to the intent of the alien in determining whether a given visit was temporary. Others considered have included the duration of the visit and whether the alien has a residence, family ties, property holdings, employment, or business in the United States. *See, e.g., Alvarez* v. *District Director, INS*, 539 F. 2d 1220, 1224–25 (9th Cir. 1976); *Santos* v. *INS*, *supra; United States ex rel. Lesto* v. *Day*, *supra; United States ex rel. Alther* v. *McCandless*, *supra; Matter of Castro*, 14 I&N Dec. 412, 494 (1973). But it is not apparent

[19] The court also held that mere retention of domicile is insufficient, standing alone, to make a visit temporary. 21 F. 2d at 308. This conclusion seems sound, because a person retains his prior domicile until he affirmatively establishes a new one, even if he has no intention of returning to the place of domicile. Restatement (Second) of Conflict of Laws § 19.

[20] We also find no requirement articulated in the cases that when an alien's absence is protracted he must have an explanation amounting to a "legal excuse." Rather, when a stay is protracted, the courts appear to look for an explanation that would permit a conclusion that the alien had the intent to return and that his visit was therefore "temporary" despite its duration. The State Department regulation providing that a protracted visit is not temporary, unless it was caused by reasons beyond the alien's control and for which he was not responsible, does not control here. The applicable INS regulation only requires a "temporary absence," without the additional limitations contained in the State Department regulation. *See* 8 CFR 242.7a.

whether these factors are cited merely as objective manifestations of the alien's *animus revertendi* (or lack thereof), or whether they are meant to have independent legal significance. For the most part, we think they are primarily useful as indicia of the alien's intent. *See, Matter of Kane, supra,* at 7–8. Of these additional factors, we are inclined to attach substantive significance solely to the duration of the stay abroad, if only because the word temporary connotes an element of duration. *Cf., Gamero* v. *INS, supra,* 367 F. 2d at 127.[21] The view that there are ultimate durational limits on a "temporary visit" is evident in the passage from *United States ex rel. Lesto* v. *Day,* quoted earlier, that "the intention of the departing immigrant must be to return within a period relatively short, fixed by some early event." 21 F. 2d at 308–09.

It seems likely that many permanent resident aliens who left the country to avoid military service did so with the specific intent of staying away "for the duration" and returning to the United States when it was possible to do so without incurring criminal liability. In our view, the formulation in *United States ex rel. Lesto* v. *Day* is sufficiently flexible to permit the Department to regard the "duration" as a "period relatively short" under the special circumstances present here, with that period being fixed by the "early event" of a Presidential pardon, whenever it might come. *Cf., Gamero* v. *INS, supra,* 367 F. 2d at 126. This approach is particularly justified here because the principal deterrent to the aliens' return—and therefore the principal reason why their visits abroad became protracted—was the fact that they had committed offenses that could give rise to criminal liability.[22] The pardon excuses these very offenses. It is consistent with the purposes of the pardon to insure that its beneficiaries are not penalized by attaching undue significance to the duration of the visit, which resulted from the commission of the pardoned offenses.

This is not to say that every pardoned alien who was once lawfully admitted for permanent residence must automatically be regarded as a permanent resident returning from a temporary visit abroad. A factual question may still exist in some cases as to whether the alien possessed the requisite *animus revertendi* during his absence. Because of the pardon, the Attorney General might wish to consider instructing INS to adopt a liberal policy in this regard or to make clear that a protracted stay due to the possibility of criminal liability will be regarded as a temporary visit abroad if the alien intended to return when he could do so without incurring criminal liability. It might even be possible, as a

[21] Thus, if an alien left the country with a fixed intention to return to the United States after 20 years, the conceded presence of *animus revertendi* for that period would probably not alone permit the alien's visit abroad to be regarded as "temporary." But that will not be the situation with many permanent resident aliens who will benefit from the pardon. *Cf., Matter of Castro,* 14 I&N Dec. 492, 494 (1973).

[22] Thus, aliens who remained out of the country because of their possible criminal liability have an explanation for their protracted stay that is consistent with an intent to return to the United States as soon as they could. *Cf., United States* v. *Trudell,* 49 F. 2d at 732; *Matter of Kane, supra,* at 7. *See* note 18, *supra.*

procedural matter, to adopt a presumption that a permanent resident possessed the intent to return during his absence, although this would to some extent be in derogation of the case-by-case approach normally followed.

JOHN M. HARMON
Acting Assistant Attorney General
Office of Legal Counsel

March 29, 1977

77-15 MEMORANDUM OPINION FOR THE SPECIAL ASSISTANT OFFICE OF THE SECRETARY OF DEFENSE

Liability of Government for Retroactive Veterans' Benefits Where Discharges Are Upgraded

We have reviewed the proposed Discharge Review Program sent to the Attorney General by your letter of March 9, 1977, with regard to the question of the Government's liability to pay retroactive veterans' benefits to recipients of upgraded discharges who become entitled to such benefits by reason of their receipt of an upgraded discharge. As more fully explained below, it is our opinion that the issuance of upgraded discharges under the Discharge Review Program will not impose any substantial liability on the Government for retroactive veterans' benefits.

Section 3010 of Title 38, United States Code, establishes the basic rules for determining the effective dates of awards of veterans' benefits. In effect, for purposes of the Discharge Review Program, this section divides all potential recipients of upgraded discharges who are entitled to veterans' benefits into two categories: (1) those who have previously applied for benefits and have had their claims denied because of the character of their discharges; and (2) those who never applied for benefits prior to their receipt of upgraded discharges, presumably because they knew they were not entitled to benefits due to the dishonorable character of their discharges.

A veteran within the first category who becomes eligible for veterans' benefits by reason of the Discharge Review Program will be entitled to benefits commencing on whichever of the following is later: (1) when he files for review of his discharge under the Discharge Review Program; or (2) the date when the disallowed claim was filed. 38 U.S.C. § 3010(i). Thus, such a veteran would not be entitled to retroactive benefits for the period preceding his application for an upgraded discharge. Of course, under § 3010(i) he would be entitled to retroactive benefits for the interval between his filing for a discharge review and the award of a discharge qualifying for veterans' benefits,

assuming, as would most likely be the case, that his disallowed claim preceded his application for review of his discharge. A further limitation in this subsection provides that no retroactive award may be made for any period more than one year prior to the reopening of the claim; *i.e.*, if the newly eligible veteran delays in reopening his claim for veterans' benefits more than one year after he applied for his upgraded discharge, any retroactive benefits awarded will be limited to 1 year.

With respect to the second category, benefits generally will be payable from a time not "earlier than the date of receipt of application therefor." 38 U.S.C. § 3010(a). Thus, with respect to most new claims for benefits from recipients of upgraded discharges who had not previously sought benefits, no claim for retroactive benefits will lie. However, certain types of benefits may be awarded retroactive to the event giving rise to the entitlement for benefits provided the claim is filed within one year of such event. 38 U.S.C. § 3010(b)-(h), (j)-(l), (n). However, since the veterans in question all were discharged on or before March 28, 1973, most of the events giving rise to an entitlement for benefits will have taken place more than a year ago and hence even the limited one-year retroactivity entitlement is barred. In those unusual cases where the event giving rise to benefits occurred within the past year, such as where an old service-connected injury resulted in permanent and total disability within the past year (§ 3010(b)(2)), or when an old service-connected injury resulted in death during the past year (§ 3010(g)) (assuming that the Discharge Review Program will consider applications on behalf of decedents), the possibility exists of an award of benefits back to the date of the event, if within 1 year. We understand that the Veterans Administration estimates that the proportion of veterans who would be entitled to any such retroactive payments would be small.

JOHN M. HARMON
Acting Assistant Attorney General
Office of Legal Counsel

March 31, 1977

77-16 MEMORANDUM OPINION FOR THE DIRECTOR OF THE BUREAU OF PRISONS

Authority of Bureau of Prisons Physicians to Perform Autopsies

This is in response to your memorandum requesting our opinion on whether wardens of Federal prisons can be empowered to authorize autopsies of deceased inmates without regard to State laws requiring consent of next of kin or approval by State officials. We have examined the question, and we conclude that legislation is necessary for this purpose. In addition, we suggest the lines that a proposed statute might follow.

The rights of a surviving spouse or next of kin in a dead body derive from the common law. While the details vary among the States, a survey of the law of the District of Columbia and a geographically diverse sample of State law (California, Georgia, Kansas, Massachusetts, and Texas) shows agreement on general principles. The surviving spouse, if any, and otherwise the next of kin have only a right to the reasonably prompt possession on the *intact* body for purpose of burial or cremation. Although this right is not considered a property right, damages may be awarded for unauthorized interference with the body, including an unauthorized autopsy. *See, e.g., Steagall* v. *Doctors' Hospital,* 171 F. 2d 352 (D.C. Cir. 1948); *Pollard* v. *Phelps,* 56 Ga. App. 408 (1937); *Weingast* v. *State,* 44 Misc. 2d 824, 254 N.Y.S. 2d 952 (1954); *Aetna Casualty & Surety Co.* v. *Love,* 132 Tex. 280, 121 S.W. 2d 986 (1939). *See, generally, Annotation,* 83 A.L.R. 2d 956 (1961).

The right, however, is subject to public necessity as defined by State statute. As a general rule, if the proper State administrative or judicial officer determines in good faith that the statutory grounds for an autopsy exist, he or she may proceed without the consent of the spouse or next of kin. *See, e.g.,* California Health & Safety Code § 7113; California Government Code § 27491.4; Code of Georgia § 21-203(3); Massachusetts General Laws Annotated, Ch. 38, § 6; New York Public Health Law § 4210; *Gahn* v. *Leary,* 318 Mass. 425, 61 N.E. 2d 844, (1945); *Gray* v. *State,* 55 Tex. Cr. 90, 114 S.W. 635 (1908).

State statutory grounds for autopsy vary, but generally include any sudden, violent, unexplained, or otherwise possibly criminally caused death. *See, e.g.*, California Government Code § 27491; Code of Georgia § 21-205; New York Public Health Law § 4210; Texas Code of Criminal Procedure, Art. 49.01. Three of the States surveyed (California, Georgia, and Texas) specifically provide for autopsies in the case of any death in prison, and New York authorizes the Commissioner of Corrections to procure an autopsy at his discretion. California Government Code § 24791; Code of Georgia § 21-205(2); New York Public Health Law § 4210; Texas Code of Criminal Procedure, Art. 49.01.

Our partial examination of State law leads us to conclude that the right of the spouse or next of kin to control the disposition of a dead body is subject to public necessity as defined by one with authority to do so. The statutory power of local officials to order autopsies is given in the furtherance of a state interest, usually the investigation of crime or the protection of public health.

Because the Attorney General and the Bureau of Prisons are responsible for the custody, discipline, and welfare of Federal prisoners, 18 U.S.C. §§ 4001, 4042(3), Congress can, of course, confer on them the specific authority to conduct autopsies without consent when reasonably necessary to perform these functions.[1] *See, generally, Ex parte, Siebold,* 100 U.S. 371, 383-86 (1879); *McCulloch* v. *Maryland,* 17 U.S. 316, 408-17 (1819). By analogy with California, Georgia, New York, and Texas law, a statute can provide autopsy authority for any death occurring in prison.

More circumscribed authority might be desired to preclude autopsies for scientific or medical reasons unrelated to prison administration. If so, a statute could appropriately authorize an autopsy in the event of homicide, suicide, fatal illness or accident, or other unexplained death of an inmate if the Bureau determines one is necessary to detect crime, maintain discipline, protect the health or safety of the inmates, remedy official misconduct, or defend the United States or its employees from tort liability arising from the administration of a Bureau institution.

You have suggested that the authority to perform autopsies without consent might be equally permissible by regulation promulgated pursuant to the authority conferred by 5 U.S.C. § 301.[2] Such regulations

---

[1] Under 49 U.S.C. § 1441(c), for example, the National Transportation Safety Board (NTSB) is empowered to conduct an autopsy of any person who was aboard an aircraft involved in a fatal crash. Congress concluded that although autopsies were a valuable tool in air crash investigations, their use had been hindered by the provisions of various State laws. Accordingly, the legislation was enacted to enable the NTSB to "proceed promptly with autopsies . . . with a minimum of delay and thus to overcome difficulties where autopsy information is dependent upon the consent of next of kin or compliance with state procedure . . . ." H.R. Rep. No. 2487, 87th Cong., 2d Sess. 5 (1962).

[2] That section provides, in pertinent part:

> The head of an Executive . . . department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use and preservation of its property.

It has been in substantially this form since its origin as § 161 of the Revised Statutes.

have the force of law if within the scope of the relevant statute. *Georgia* v. *United States*, 411 U.S. 526, 536 (1973); *Smith* v. *United States*, 170 U.S. 372, 377–78 (1898). However, § 301 does not confer authority to change the substantive rights of persons not connected with the Government. Regulations purporting to do so are valid only if consistent with independent statutory authority. Compare *United States* v. *Morehead*, 243 U.S. 607 (1917), with *United States* v. *George*, 228 U.S. 14 (1913); *see*, *Georgia* v. *United States*, *supra*; 36 Op. A.G. 21, 25 (1929); 17 Op. A.G. 524, 525 (1883). It is therefore unlikely that a regulation relying solely on § 301 could legally alter the State law rights of third persons.

The only pertinent substantive statute here is 18 U.S.C. § 4001.[3] Subject to constitutional limits, this section authorizes the Attorney General to restrict access of third parties to prisoners in the interest of prison management. *See, e.g.*, *Saxbe* v. *Washington Post Co.*, 417 U.S. 843 (1974); *Carter* v. *United States*, 333 F. 2d 354 (10th Cir. 1964). It can be argued that the power to operate the prison system includes the power to retain and perform an autopsy on the body of a deceased prisoner without consent when necessary to preserve discipline or protect the health and safety of surviving prisoners. The Armed Forces, which exercise a similar degree of authority over their members, conduct nonconsensual autopsies without express statutory authority.[4]

On the other hand, we believe that the weight of authority speaks against the validity of such a regulation premised on 18 U.S.C. § 4001. As your request points out, no other Federal civilian agency performs autopsies without consent unless authorized by statute. Congress has specifically provided for autopsies of prisoners without consent in one limited situation.[5] As noted above, it has also empowered the National Transportation Safety Board to conduct autopsies without consent.[6] It can be inferred from these precedents that statutory authority is required to override a claimant's right to the body of a prisoner. Moreover, the consensus of State decisions is that consent is necessary unless

[3] In pertinent part, it provides:

> The control and management of Federal penal and correctional institutions . . . shall be vested in the Attorney General, who shall promulgate rules for the government thereof . . .

[4] For example, Army Reg. 40–2, para. 4–4, empowers the commander to have an autopsy performed on any member of the armed forces who dies on active duty "when it is considered necessary for the protection of the military community to determine the true cause of death . . . ." The authority for this regulation is 10 U.S.C. § 3012, which authorizes the Secretary of the Army to prescribe regulations for its government, and the Department of Defense Appropriation Act of 1977, § 740, which authorizes the Army to provide medical care.

[5] 18 U.S.C. § 3567 permits the court, as part of a death sentence, to order the dissection of the body of a prisoner convicted of first degree murder or rape.

[6] *See* 49 U.S.C. § 1441(c).

an explicit statute is to the contrary.[7] Finally, as stated above, several States have found it necessary to provide specifically for autopsies without consent in prison deaths. We conclude therefore that 18 U.S.C. § 4001 does not provide the authority you desire and that legislation is required to authorize nonconsensual autopsies.

In addition, it would appear that legislation is needed to resolve two technical difficulties. First, it could provide the clear authority to employ outside medical personnel instead of Bureau personnel hired under the authority of 18 U.S.C. § 4001 or Public Health Service (PHS) doctors detailed under 18 U.S.C. § 4005. Second, it could limit the tort liability of Bureau personnel or other persons for any wrongful autopsy by restricting claimants to the Federal Tort Claims Act.

Finally, it should be noted that certain religions forbid an autopsy of their adherents. Any statute that dispenses entirely with consent may be attacked by a claimant of a body as an infringement on the free exercise of religion. In such a case, the constitutionality of the regulation would turn on the balance between the claimant's First Amendment rights and the Federal interest in conducting the autopsy. *See, Wisconsin* v. *Yoder,* 406 U.S. 205, 213–15 (1972); *Cruz* v. *Beto,* 405 U.S. 319, 321–22 (1972). The governmental interests in the discipline, safety, and health of prisoners are probably stronger than the incidental offense to the claimant's beliefs. *See, Prince* v. *Massachusetts,* 321 U.S. 158 (1944); *Winters* v. *Muller,* 306 F. Supp. 1158, 1166 (D. N.Y. 1969); *Jehovah's Witnesses in the State of Washington* v. *King County Hospital Unit No. 1,* 278 F. Supp. 488, 503–05 (D. Wash. 1967), *prob. juris. declined,* 390 U.S. 598 (1968); *cf., Jacobson* v. *Massachusetts,* 197 U.S. 11, 27–30 (1905). *But cf., Wisconsin* v. *Yoder, supra.* It would be advisable to minimize the problem, however, by providing by statute or regulation that religious scruples will be respected when investigative needs permit. *See, e.g.,* 49 U.S.C. § 1441(c).[8]

JOHN M. HARMON
Acting Assistant Attorney General
Office of Legal Counsel

[7] *E.g., Donnelly* v. *Guion,* 467 F. 2d 290 (2d Cir. 1972); *Crenshaw* v. *O'Connell,* 235 Mo. App. 1085, 150 S.W. 2d 489 (1941); *Darcy* v. *Presbyterian Hospital,* 202 N.Y. 259, 95 N.E. 695 (1911); *Gurganious* v. *Simpson,* 213 N.C. 613, 197 S.E. 163 (1938); *Frick* v. *McClelland,* 384 Pa. 597, 122 A. 2d 43 (1956); *Aetna Casualty & Surety Co.* v. *Love,* 132 Tex. 280, 121 S.W. 2d 986 (1939). *See, generally, Annotation,* 83 A.L.R. 2d 956.

[8] 42 U.S.C. § 233 provides this protection to Public Health Service employees. Similar protection for private physicians who might perform autopsies and for Bureau personnel who authorize them may be desirable.

April 1, 1977

77-17 MEMORANDUM OPINION FOR AN ASSISTANT ATTORNEY GENERAL FOR A DEPARTMENT OF JUSTICE DIVISION

Standards of Conduct—Service of Assistant Section Chief as Reporter on American Law Institute Project

You have asked us whether Mr. A, Assistant Chief of a section of a Department of Justice Division, may serve as reporter for an American Law Institute (ALI) project relating to the development of peer review standards. We understand that Mr. A would receive monetary compensation for his services.

Under 28 CFR § 45.735.9(a), no employee of the Department of Justice is permitted to engage in the outside practice of law unless he first obtains the approval of the Deputy Attorney General. We have previously taken the position that teaching does not constitute the outside practice of law. We believe that Mr. A's proposed service as a reporter more clearly resembles teaching than the practice of law, and as such, does not require the approval of the Deputy Attorney General. There is, moreover, no prohibition against the receipt of compensation for the work, assuming that nonpublic official departmental information is not used on the project.

In addition, 28 CFR § 45.735.9(d) provides:

> No employee shall engage in any employment outside his official hours of duty or while on leave status if such employment will:
>
> (1) In any manner interfere with the proper and effective performance of the duties of this position;
>
> (2) Create or appear to create a conflict of interest, or
>
> (3) Reflect adversely upon the Department of Justice.

The reference to activities permitted outside one's "official hours of duty" may, by negative implication, be read to mean that *no* outside activities are permitted during regular office hours. Mr. A states in his memorandum to you that he believes a minimal amount of reportorial work, such as talking to people and mailing drafts, will have to be done during regular office hours. In our opinion, 28 CFR § 45.735.9(d) need not be construed so narrowly as to prohibit all such incidental activities

if they in fact take only a small amount of time and if you have no objection. However, it may be advisable to make some assurances, perhaps through a formal or informal compensatory time arrangement, that Mr. A will devote the time required to his official duties. If leave is required in connection with his ALI work, we recommend that annual leave or compensatory time be used, in view of the fact that Mr. A will receive compensation. Use of official or administrative leave provides a sufficiently close nexus to his official duties that the receipt of compensation from the ALI, in part covering the same activities, would raise questions under 18 U.S.C. § 209 and 28 CFR § 45.735.12(a).

We believe that all identifiable expenses of the project such as postage, stationery, and telephone costs should be borne by ALI or some other nongovernmental source. Any significant secretarial services should also be reimbursed if appropriate arrangements can be made. On the other hand, under the unique circumstances present here, the Department's particular interest in Mr. A's project might permit limited secretarial services to be made available to him for the project.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

April 6, 1977

77-18 MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

Application of the Hatch Act to the Vice President's Staff

In a previous memorandum to the President's Counsel regarding political trips, we indicated that the exception in 5 U.S.C. § 7324(d)(1) for employees paid "from the appropriation for the Office of the President" did not apply to persons paid from the separate line item in the Executive Office Appropriation Act of 1977 for "expenses necessary to enable the Vice President to provide assistance to the President in connection with specially assigned functions." When our Office contacted the Hatch Act section of the General Counsel's Office at the Civil Service Commission, we were informed that the issue of the application of the Hatch Act to the Vice President's staff had apparently not arisen before. Because the Civil Service Commission had no official views on the subject, we conducted our own study of the question and concluded on the basis of the legislative history of both the Hatch Act and the Appropriation Act that the Vice President's Office was covered.

We read a copy of a letter written by a former Civil Service Commission General Counsel, stating that his Office "has interpreted the language found in 5 U.S.C. § 7324(d)(1) to be applicable to employees paid from the appropriation for the White House Office or from appropriations made to provide assistance to the President in connection with special functions or projects." On this basis, and without further discussion, it was concluded that the Vice President's Special Counsel was exempt. We do not believe this conclusion is consistent with the original intent of the Hatch Act.

The predecessor of 5 U.S.C. § 7324(d) was introduced in 1939 in the House as a floor amendment to be substituted for the original § 9 of the

Hatch bill, S. 1871. 84 Cong. Rec. 9625.[1] In introducing the amendment, Representative Dempsey explained that its purpose was to allow the President, the Vice President, and other policymaking officials to defend their actions in public. 84 Cong. Rec. 9626; *see, id.* at 9630. To serve this purpose, he continued, "the amendment . . . clearly exempts . . . the staff of the President and those who obtain their salaries from the appropriation made for White House purposes." *Id.*

At the time of the enactment of the Hatch Act in 1939, the appropriation for the "Office of the President," which provided for "personal services in the office of the President," was the only appropriation for personnel under the heading "Executive Office." [2] Later that year the Executive Office of the President was established, and the Bureau of the Budget and other agencies were transferred to it.[3] To reflect the change in organization, the next Appropriation Act carried a general heading for "Executive Office of the President." Instead of "Office of the President," the item covering "personal services" was entitled "White House Office." [4] With changes in form, the appropriation for the President's personal staff has been carried under this item since then.[5]

In other words, the current item for the "White House Office" is the lineal descendant of the only appropriation for Presidential staff that existed when the Hatch Act was passed. As new functions and agencies have been added to the Executive Office of the President, this item has continued as the source of the salaries of the inner circle of personal

---

[1] In pertinent part, the amendment, as enacted in 1939, reads:

For the purposes of this section the term "officer or employee" shall not be construed to include (1) the President or Vice President of the United States; (2) persons whose compensation is paid from the appropriation for the office of the President; (3) heads and assistant heads of executive departments; (4) officers who are appointed by the President with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relations with foreign powers or in the Nation-wide administration of Federal laws. 53 Stat. 1148.

Clause (1) has since been stricken as unnecessary. *See* 5 U.S.C. § 7324, Historical and Revision Note.

[2] The item for "Office of the President" read:

Salaries: For personal services in the office of the President, including the Secretary to the President, and two additional secretaries to the President at $10,000 each: $136,500: Provided, that employees of the executive departments and other establishments of the government may be detailed from time to time to the office of the President of the United States for such temporary assistance as may be deemed necessary. 53 Stat. 524.

[3] Reorganization Plan No. 1 of 1939, 53 Stat. 1423. The Plan does not mention the Office of the President or the White House Office.

[4] Independent Offices Appropriation Act of 1941, 54 Stat. 112. Except for an additional authorization for six administrative assistants, the language was identical to the prior act. The President's message supporting the reorganization plan, the legislative response to the plan, and the legislative history of the Appropriation Act do not discuss the change.

[5] The current item reads:

For expenses necessary for the White House office as authorized by law, including not to exceed $3,850,000 for . . . other personal services without regard to the provisions of law regulating the employment and compensation of persons in the Government service; . . ." Executive Office Appropriation Act of 1977., Pub. L. No. 94-363, 90 Stat. 966.

advisers to the President. It is this group of advisers, assistants, and speech writers whom the sponsor of the exemption viewed as adjuncts to the President in his role as a political officer.

During the debate on the 1939 amendment, Representative Michener raised the issue whether personnel of agencies such as the Bureau of the Budget, which would be transferred to the Executive Office of the President under the proposed Reorganization Plan of 1939, would be covered by the "Office of the President" exemption. 84 Cong. Rec. 9633. To clarify this point, he offered an amendment that would have restricted the exemption to positions in the Office of the President "as classified prior to the Reorganization Act of 1939." *Id.* When Mr. Michener's time expired, no Member of the House, including Representative Dempsey, attempted to address the point. There was no debate, and the proposal was never voted on. 84 Cong. Rec. 9634. The indifference of the House to the point suggests that the House considered the amendment unnecessary, as it understood that the exemption clearly applied only to what Mr. Michener called "the President's secretariat and incidental employees," *i.e.,* employees in "the Office of the President."[6]

It is for these reasons that we conclude that the exemption to the Hatch Act in 5 U.S.C. § 7324(d)(1) was intended to apply only to persons paid from the item for the "White House Office." This office has previously advised the White House that the "Office of the President" is the equivalent of the White House Office.[7]

It should be noted that persons detailed from other agencies to the White House are ordinarily subject to the Hatch Act because they are not paid out of the White House Office appropriation.[8] In the Executive Office Appropriation Act of 1971, 84 Stat. 866, Congress significantly increased the appropriation for the White House Office by transferring Special Projects from the item. The reason the transfer was requested was to pay Presidential staff who had been essentially on permanent detail from other agencies out of this item.[9] Although the point was not raised in the legislative history of the 1971 Act, it is reasonable to conclude that the White House realized that the change would enlarge the number of employees who were clearly exempt from the Hatch Act.

---

[6] There is no discussion of the applicability of the Hatch Act in the legislative history of the 1941 appropriation for the President's Office.

[7] We previously advised the White House that Office of Management and Budget (OMB) personnel were subject to the Hatch Act and that Domestic Council staff paid under a separate item were subject to the Hatch Act.

[8] We have also advised the White House that detailed employees may be subject to the Hatch Act even if paid from this appropriation. Authority to detail is provided by 3 U.S.C. § 107.

[9] Hearings Before a Subcommittee of the Appropriations Committee of the House of Representatives, Executive Office Appropriations for 1971, 91st Cong., 2d Sess., pp. 5-7 *See also* H.R. Rep. 91-994, 91st Cong., 2d Sess.

In the same statute, a separate line item for "expenses necessary for the Vice President to provide assistance to the President in connection with specially assigned functions" was added for the first time. The spokesman for the Administration testified before the House Committee that over the years the responsibility of the Vice President in assisting the President had increased and that he had been provided with a sufficient staff only by a detail of employees from other agencies. The purpose of the appropriation, he explained, was to give the Vice President an explicit source of staff support for his governmental responsibilities in the executive branch.[10] The legislative history does not discuss the applicability of the Hatch Act to these employees.

In light of the legislative history discussed above, it would not appear that persons paid from this item are within the scope of 5 U.S.C. § 7324(d)(1). If either the Administration or Congress had wanted them exempted from the Hatch Act, it could have explicitly done so by following the procedure used at the same time for detailed Presidential staff, such as shifting expenses from other appropriations to the "White House Office" item. Instead, a separate line item was requested and given. In the case of Vice President Mondale, he was able to retain his legislative staff, who were not covered by the Hatch Act.[11] Because his legislative appropriation was not decreased in 1971 and subsequent years, it could have been expected that his political staff would be paid from this source.[12] Finally, because the Administration requested staff assistance for the Vice President in performing his functions within the executive branch,[13] it is reasonable to conclude that Congress intended to provide a staff only for those functions.

The Office of the Vice President has argued that 5 U.S.C. § 7324(d)(1) applies because the item in question provides "for expenses necessary to enable the Vice President to provide assistance to the President in connection with specially assigned functions." In other

---

[10] Hearings before a Subcommittee of the Appropriations Committee of the House of Representatives, Executive Offices Appropriations for 1971, 91st Cong., 2d Sess., pp. 185–89. *See also* H.R. Rep. 91–994, 91st Cong., 2d Sess.

[11] In 1971, the Vice President's appropriation for executive staff was $700,000. Executive Offices Appropriation Act of 1971, Pub. L. No. 91–422, 84 Stat. 872. For "clerical assistance to the Vice President," he received $367,263 under the Legislative Branch Appropriation Act of 1971 Pub. L. No. 91–382, 84 Stat. 807. This was an increase from the prior year. For 1977, the Vice President received $1,246,000 for executive staff and $615,015 for legislative staff. *See* 90 Stat. 966, 967.

[12] In 1971, the Vice President's legislative staff numbered 23 persons, clerical and otherwise. Hearings of a Subcommitee of the Senate Appropriation Committee, Executive Offices Appropriation of 1971, 91st Cong., 2d Sess., p. 1255. There is no discussion of their duties in the legislative history.

[13] Among the Vice President's functions cited as requiring staff were his membership in the Cabinet, the National Security Council, and the Council on Environmental Quality; his duties as head of the Office of Intergovernmental Relations; and his membership on various advisory committees and councils. Hearings by a Subcommittee of the Appropriation Committee of the House of Representatives, Executive Office Appropriation of 1971, 91st Cong., 2d Sess., pp. 185–86. The testimony concentrated on the need for staff support if the Vice President were to function as an adviser and official spokesman. *Id.* at 187–89.

words, it is asserted that the status of the Vice President's staff is derived from the duties assigned to the Vice President. But this argument proves too much. The Vice President has no active executive responsibilities under the Constitution, and the President has no constitutional duty to assign him any. The Vice President's status as an assistant to the President is therefore the same as that of other policy-making officials or advisers who are not subject to the Hatch Act.[14] If it is argued that employees who furnish him with staff assistance derive an exemption on the basis of his functions, there is no reason why the same should not be true of the staff of the Office of Management and Budget, the Domestic Council, and other agencies within the Executive Office of the President whose heads are exempt. This result would be contrary to the congressional intent underlying 5 U.S.C. § 7324(d) and to its settled construction. Had Congress considered derivative exemption possible under the Act, it would not have been necessary for the Dempsey amendment to provide specifically for the President's personal staff after having exempted the President or to exempt assistant heads as well as heads of departments.

In conclusion, it is our opinion that the legislative intent behind 5 U.S.C. § 7324(d)(1) was to exempt from the Hatch Act a limited number of close personal advisers to the President and their staff members. This was accomplished by basing the exemption on the appropriation for the "Office of the President," from which this inner circle was paid. At the same time, this was the only appropriation for personnel directly under the President's control. As other agencies were added to the Executive Office of the President and nomenclature changed, the White House Office was the only lineal descendant of the former Office of the President. The remaining employees in the Executive Office of the President are subject to the Hatch Act unless covered by another exemption. Nothing in the legislative history of the appropriation for the Vice President's executive staff shows a congressional intent to treat those employees differently from other staff in the Executive Office of the President outside the White House Office. In our opinion, there is no rational basis for doing so that will distinguish the Vice President's staff from other staffs that are not exempt.

It has been suggested that this interpretation is archaic and anomalous because the staffs of the President and Vice President are for practical purposes intermingled. It is true that when Congress enacted the Hatch Act it did not consider the role of the Vice President's staff, because the Vice President had no role in the executive branch at that time. Circumstances have changed, and Presidents now use Vice Presidents as both political spokesmen and policy advisers. It may be desir-

---

[14] The original version of the Hatch Act specifically exempted the President and Vice President. *See* U.S.C. § 7324, Historical and Revision note; Act of August 2, 1937, § 9(a), 53 Stat. 1148. Heads and assistant heads of executive or military departments and policy-making officials appointed subject to advice and consent by the Senate are exempt. 5 U.S.C. § 7324(d)(2)-(3).

able to have the Vice President's staff as freely available for political duties as the President's. If so, legislation will be necessary. One approach would be to incorporate the appropriation for the Vice President's staff in the general appropriation for the White House Office, thereby removing all doubts on the matter. The other, more direct, solution would be to amend the Hatch Act specifically to exempt the Vice President's staff.

JOHN M. HARMON
Acting Assistant Attorney General
Office of Legal Counsel

April 11, 1977

77-19 MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION

Interpretation of the Grandfather Clause in 18 U.S.C. § 709—Use of Word "Federal" in Name of Insurance Company

This memorandum is in response to a request for this Office to resolve a difference of opinion within the Criminal Division concerning the correct interpretation of 18 U.S.C. § 709. For the reasons stated hereafter, we have concluded that the grandfather clause enacted as part of the predecessor of § 709 should be construed narrowly to protect only the proprietary interest already in existence in 1926 with regard to the full name of a firm.

I. Background

A dispute documented in various memorandums submitted to this office has arisen with regard to whether an insurance company presently using the word "Federal" in its name may continue the use of the word "Federal" in the name given to the corporate entity to be created after the merger or consolidation of the insurance company with another company. This new name would not be identical to the insurance company's present name. The Criminal Division has, in the past, issued letters to various institutions declaring that such name changes as the one contemplated here are not in violation of 18 U.S.C. § 709, which reads, in pertinent part, as follows:

> Whoever . . . uses the words "national", "Federal", "United States", "reserve", or "deposit insurance" as part of the business or firm name of a business entity engaged in the . . . insurance . . . business [shall be punished as a misdemeanant].
>
> * * * * * * *
>
> This section shall not make unlawful the use of any name or title which was lawful on the date of enactment of this title.

The essence of the difference appears to be whether the grandfather clause applies to all name changes where both the new and old names contain one or more of the prohibited words.

II. The Pertinent Statute and Its Legislative History

Although the various memorandums generated within the Criminal Division, as well as correspondence from the insurance company's counsel, focus to a great extent on the language and meager legislative history of 18 U.S.C. § 709, we think that focus is somewhat misplaced.

Section 709 is a conglomerate provision assembled from other statutes as part of the 1948 revision of the Federal Criminal Code. Being part of that 1948 revision, interpretation of § 709 is governed by principles laid down by the Supreme Court in *Muniz* v. *Hoffman,* 422 U.S. 454 (1975). The basic principle established by *Muniz* relevant here is that the 1948 code revision did not change the substance of any legislation that was placed in the criminal code by that revision. *Id.* at 468–70.

Thus, we proceed to analyze the question on the assumption that the relevant law is not strictly § 709 as it presently reads, but rather its predecessor, which was enacted in 1926. Section 2 of the 1926 Act, 44 Stat. 628, provided, in pertinent part:

> That no . . . firm . . . engaged in the . . . insurance . . . business shall use the word "Federal", the words "United States", or the word "reserve", or any combination of such words, as a portion of its corporate, firm or trade name or title . . . . *Provided, however,* that provisions of this section shall not apply to . . . any . . . firm . . . actually engaged in business under such name or title prior to the passage of this Act.

The question is whether the grandfather clause was intended by Congress to exempt from the prohibition established by § 2 changes in the name of an institution or business covered by that section so long as the old name contained one of the prohibited words. We believe that the answer to this question turns upon the meaning to be ascribed to the words "actually engaged in business under such name or title prior to the passage of this Act."

With regard to this critical language in § 2, we think that the most natural reading of the words "such name or title" is that they refer to the complete name of an entity that contained in 1926 one or more of the words prohibited from future use by § 2. If Congress in 1926 had intended to exempt not only existing names but new and different names, so long as the new name was created by an entity previously bearing an exempted name, it could have done so in language much more explicit than the language it used. Indeed, if the exemption was intended to go to the entity, rather than the name, language appropriate to achieve that result could easily have been used.

We also think that the language actually used must be interpreted in context, *i.e.*, as part of a grandfather clause exempting certain conduct from criminal sanctions that would otherwise be subject to sanctions.

As a general proposition, grandfather clauses are designed to preserve the rights of persons who would otherwise be divested of those rights by the operation of a new law.[1] Although they may be included by a legislature to avoid any constitutional "taking" problem with regard to new legislation, they may also be simple acts of grace on the part of a legislature or represent otherwise rational policymaking on the part of the legislature. *See, generally, City of New Orleans* v. *Dukes,* 96 S. Ct. 2513 (1976).

The position might be taken that the grandfather clause in § 2 was included by Congress because Congress did not wish to deprive existing enterprises of the goodwill attached to their names, and probably could not do so without compensation. Whether this was the reason for the inclusion of the grandfather clause in 1926 cannot be gleaned from the legislative history of the Act, but the legislative history does support the proposition that the overall intent of the Act was to prevent the exploitative use of certain words by companies as well as to prevent the public from being misled by the use of such words. *See* H.R. Rep. No. 1065, 69th Cong., 1st Sess. (1926); S. Rep. No. 514, 69th Cong., 1st Sess. (1926).

Given this overall intent, we think that several assumptions may be made concerning the grandfather clause. First, Congress, even though condemning the then current exploitation and deception associated with the use of the prohibited words, was, for whatever reason, willing to permit firms already engaged in such conduct to continue to do so. Second, Congress, by including the grandfather clause, did not implicitly approve of such continued use of the prohibited words; Congress merely tolerated the continued use of those words by firms already using them.

Thus, unlike situations in which a grandfather clause permits activity to continue that is not *malum in se* or *malum prohibitum,* the activity permitted to continue by the grandfather clause here in question is, at a minimum, *malum prohibitum.*[2] Although we have been able to find no case law directly on point, we think that any grandfather clause sanctioning the continuance of activity found by the legislature to be harmful to the general public should be given the narrowest construction

---

[1]Whether a name change occurs as part of a merger or consolidation or simply because of a business decision made by a company, is irrelevant to the operation of § 2.

[2]There can be no doubt on this point. In the Senate and House reports on the 1926 Act, *supra,* there appear in detail examples of the abusive and deceptive practices that made the legislation necessary. Yet, under the grandfather clause the very situations documented in support of the legislation were permitted to continue unabated.

possible consistent with the overall purposes of the Act in which it appears. We therefore conclude that the words "such name or title" should be read to include only those full names or titles that were in existence in 1926 when that provision was adopted.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

April 11, 1977

77-20 MEMORANDUM OPINION FOR THE COMMISSIONER OF IMMIGRATION AND NATURALIZATION

Section 212(a)(27) of the Immigration and Nationality Act—Exclusion of Certain Aliens—Rhodesia

This is in response to your request for our opinion concerning the scope of Section 212(a)(27) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(27). That provision makes ineligible for visas and excludes from admission into the United States:

> Aliens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States.

In the fall of 1975, six Southern Rhodesian aliens sought to enter the United States to attend a conference of the International Federation of Agricultural Producers in Washington, D.C. The six apparently would have been traveling on British passports. The Department of State identified the six aliens as officials of the National Farmers' Union of Southern Rhodesia, an organization of private farmers that seeks to promote export sales of agricultural commodities grown in Southern Rhodesia and cooperates closely with the existing government of that country. The Department of State determined that, in attending the meeting of the International Federation of Agricultural Producers, the aliens would have sought to promote the foreign sale of agricultural commodities grown in Southern Rhodesia. We understand that the six Rhodesian aliens were excluded from the United States under Section 212(a)(27) on the basis of the State Department's determination.

The legal validity of the exclusion was subsequently questioned by a Member of Congress, who took the position that Section 212(a)(27) applies only to subversives. Because of renewed interest in the scope of Section 212(a)(27) and the continuing existence of United Nations sanc-

tions against Southern Rhodesia, we believe it is useful to convey our opinion on the subject at this time and to do so with some reference to the Rhodesian situation.

It is our opinion that potentially serious adverse foreign policy consequences may properly be taken into account in determining whether an alien is ineligible for a visa and hence inadmissible into the United States. We therefore agree that given the findings of the Department of State, the aliens who sought to attend the conference in 1975 were inadmissible under Section 212(a)(27). We also are of the opinion that otherwise innocuous activities in the United States may give rise to inadmissibility under that provision in certain circumstances.

I

As we understand the policies and practices of the National Farmers' Union, the entry of officials of that organization into the United States to attend the conference and their activities at the conference would have violated sections 3(b) and 5(b) of the United Nations Security Council Resolution 253 of May 29, 1968. Section 3(b) thereof provides that Member States "shall prevent . . . [a]ny activities by their nationals or in their territories which would promote or are calculated to promote the export of any commodities or products from Southern Rhodesia . . . ." Section 5(b) directs Member States to "[t]ake all possible measures to prevent the entry into their territories of persons whom they have reason to believe to be ordinarily resident in Southern Rhodesia and whom they have reason to believe to have furthered or encouraged, or to be likely to further or encourage, the unlawful actions of the illegal regime in Southern Rhodesia . . . ."[1]

Congress has authorized the President to issue orders, rules, and regulations to provide for the domestic enforcement of United Nations sanctions, and has established criminal penalties for persons subject to the jurisdiction of the United States who violate such orders, rules, and regulations. *See* 22 U.S.C. § 287c. Section 1(b) of Executive Order No. 11419, 3 CFR 737 (1966–1970 Compilation), which was issued to implement Security Council Resolution 253, prohibits any person subject to the jurisdiction of the United States from engaging in activities that would promote the export of any commodities or products originating in Southern Rhodesia. Thus, the representatives of the National Farmers' Union would have committed a criminal offense if, as the Depart-

[1] Section 5(a) of Resolution 253 directs all Member States to prevent the entry into their territories, save on exceptional humanitarian grounds, of any person traveling on a Southern Rhodesian passport. Section 5(a) is not implicated in the present situation because the Rhodesian nationals were traveling on British passports. We have been informed that it has been the policy of the Department of State from the beginning that the regime does not constitute "competent authority" for the issuance of passports within the meaning of § 101(a)(30) of the Immigration and Nationality Act, and that travel documents issued by the regime therefore do not meet the requirements for entry contained in § 101(a)(26). As a result, there is no need to rely on § 212(a)(27) in excluding aliens traveling on Rhodesian passports.

ment of State predicted, they had sought to promote the export of Rhodesian agricultural products while they were attending the conference. It would seem that activities that are prohibited by a Security Council Resolution, an Executive order issued to conform this Nation's foreign policy to that Resolution, and a criminal statute designed to enforce such Executive orders, must surely be regarded as "activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States" within the meaning of Section 212(a)(27). But we do not believe that the Resolution, the Executive order, and the attendant criminal sanctions are essential to our conclusion that the Rhodesian nationals were properly excluded under Section 212(a)(27).

Executive Order No. 11419 does not speak directly to the requirement in Security Council Resolution 253 that Member States prevent the entry of Rhodesian residents who there is reason to believe have furthered or encouraged or would be likely to further or encourage "the unlawful actions" of the present regime in Southern Rhodesia. This omission from the Executive order was deliberate. The Department of State and this Department took the position that no additional authorization was needed in order to implement this aspect of the Security Council Resolution because the Rhodesian aliens in question would be excluded from entry under the Immigration and Nationality Act. A memorandum prepared by this Office in 1968 and forwarded to the White House with the proposed order stated:

> Certain other requirements of the Security Council Resolution have been omitted from the proposed order on the basis that they can be put into effect on the part of the United States by the responsible agencies under existing authority. Thus, the requirements to exclude from Member States persons traveling on Rhodesian passports[2] and to "take all possible measures" to exclude certain persons ordinarily residing in Southern Rhodesia are to be implemented by the Departments of State and Justice in accordance with the Immigration and Nationality Act.

The letter of transmittal from the Justice Department's Office of Legal Counsel to the President was to the same effect.[3] Therefore, this Department, the Department of State, and the President fully expected that the Immigration and Nationality Act would, of its own force, prevent the entry of Rhodesian aliens who might engage in activities in this country that would further and encourage the unlawful actions of the regime in Southern Rhodesia and thereby adversely affect the

[2] *See* footnote 1.

[3] The function of reviewing Executive orders as to form and legality has been delegated by the Attorney General to the Office of Legal Counsel. 28 CFR § 0.25(b).

Nation's foreign relations.[4] Section 212(a)(27) was not specifically mentioned in the various letters and memorandums written in 1968, but its grounds for exclusion are the only ones contained in Section 212(a)(27) that could have been thought to be applicable to the Rhodesian situation.

The conclusion reached by the Administration in 1968 finds support in the text of Section 212(a)(27), its legislative history, and administrative interpretation. Its language is clearly not limited in its application to aliens posing a threat to internal security, as has been suggested. Activities by aliens that could have potentially serious adverse effects on the Nation's foreign policy can quite reasonably be characterized either as "prejudicial to the public interest" or likely to "endanger the . . . security of the United States" within the meaning of the provision.[5]

It is true that the elements of legislative history relating directly to the passage of the Immigration and Nationality Act in 1952 can be read as limiting application of Section 212(a)(27) to internal security cases. For example, the House and Senate reports describe the provision in identical language, indicating that it and subparagraphs (28) and (29) merely "incorporate the provisions of Section 1 of the Act of October 16, 1918, as amended by Section 22 of the Subversive Activities Control Act of 1950, 64 Stat. 987, relating to the exclusion of subversives." S. Rep. No. 1137, 82d Cong., 2d Sess. 10 (1952); H. Rep. No. 1365, 82d Cong., 2d Sess. 49 (1952). However, because the language of Section 212(a)(27) was taken almost verbatim from § 22 of the Subversive Activities Control Act of 1950, 64 Stat. 987, 1006,[6] it is necessary to consult as well the legislative history of that earlier Act, which clearly sustains the current position of the Service and the State Department.

While Congress' immediate focus in creating additional categories of excludable aliens in 1950 was also directed to persons who could be characterized as "subversives," *see, e.g.,* S. Rep. No. 2230, 81st Cong.,

---

[4] It would seem from the account in the text that in 1968 the Administration was also of the view that § 212(a)(27) would operate to bar the admission of aliens who had in the past furthered or encouraged the actions of the illegal regime in Southern Rhodesia, regardless of the nature of the specific activities in which they proposed to engage while in the country. We believe that there is considerable support for this view, *see* Part II, *infra,* but there was no need to rely upon it in excluding the aliens in view of the specific activities in which they intended to engage after entering the country.

[5] The term "national security" is often used to include considerations of both national defense and foreign policy. *See, e.g.,* Executive Order No. 11652, § 1, 3 CFR §§ 678, 679 (1971–1975 Compilation). The phrase "security of the United States" may be construed in a similar fashion.

[6] The only difference between the two provisions is that the relevant portion of § 22 of the 1950 Act did not contain the reference in Section 212(a)(27) to the "security" of the United States.

2d Sess. 16–28 (1950),[7] § 22 of the Subversive Activities Control Act of 1950 as passed swept much more broadly. Congress' choice of language is instructive, particularly its use of the phrase "prejudicial to the public interest." That phrase had a well-settled administrative interpretation in 1950. Under the Act of May 22, 1918, 40 Stat. 559, as amended by the Act of June 21, 1941, 55 Stat. 252, the President was authorized to impose additional restrictions on the entry of persons into the United States during times of war or national emergency. In Proclamation 2523, 3 CFR 270 (1938-1943 Compilation), issued November 14, 1941, the President found such additional restrictions to be necessary and declared that an alien would not be permitted to enter if his entry would be "prejudicial to the interests of the United States," as provided in regulations to be promulgated by the Secretary of State in consultation with the Attorney General. Under the regulations that were promulgated, no entry permit could be issued to any alien "if the permit-issuing authority [had] reason to believe that the entry of the alien would be prejudicial to the interests of the United States." 8 CFR § 175.52(a) (1949 ed.) *See, generally, Knauff* v. *Shaughnessy,* 338 U.S. 537, 540–41 (1950); *Shaughnessy* v. *Mezei,* 345 U.S. 206, 210–11, and n. 7 (1953). The 1949 Aliens and Nationality regulations then listed 11 categories of inadmissible aliens, one of which categories is highly relevant here:

> § 175.53 *Classes of aliens whose entry is deemed to be prejudicial to the public interest.* The entry of an alien who is within one of the following categories shall be deemed to be prejudicial to the interests of the United States . . .
>
> * * * * * * *
>
> (b) Any alien who is a member of, affiliated with, or may be active in the United States in connection with or on behalf of, a political organization associated with or carrying out policies of any foreign government opposed to the measures adopted by the Government of the United States in the public interest, or in the interest of national defense, or in the interest of the common defense of the countries of the Western Hemisphere, or in the prosecution of the war.

The proclamation and regulations were still in effect in 1950. *Knauff* v. *Shaughnessy, supra,* 338 U.S. at 546. Thus, when the predecessor to Section 212(a)(27) was adopted, aliens who were expected to be active in the United States on behalf of organizations that supported countries having foreign policy conflicts with the United States, were included among those who were inadmissible on the ground that their entry

[7] That report recommended passage of S. 1832, which was limited in purpose to amending the Act of October 16, 1918, to provide, *inter alia,* for the exclusion of those connected with Communist organizations. The substance of S. 1832 was added by the Senate to the House-passed version of the Subversive Activities Control Act of 1950, and the House later agreed to the addition. *See* H. Rep. No. 3112, 81st Cong., 2d Sess., at 54 (1950).

would be "prejudicial to the public interest" or "prejudicial to the interests of the United States."

The prohibition in Section 212(a)(27) against the entry of aliens who there is reason to believe would engage in activities that would be "prejudicial to the public interest" appears to be a direct descendant of the Presidential proclamation and regulations. "The chief difference . . . is that the operation of this new legislation is not limited to time of war or national emergency. Its inhibitions must be enforced at all times as part of our permanent legislative pattern." C. Gordon, "The Immigration Process and National Security," 24 Temp. L.Q. 302, 306 (1951).

The Senate Report that first proposed what later became § 22 of the Subversive Activities Control Act of 1950 (the predecessor of Section 212(a)(27)), discussed Proclamation 2523 and 8 CFR § 175.53 as part of the body of immigration law on which Congress was building. S. Rep. No. 2230, 81st Cong., 2d Sess. 22 (1950). The report did not expressly refer to subsection (b), quoted above, or any other subsection of 8 CFR 175.53. But neither did it express disapproval of the broad sweep of immigration law then in effect, of which the regulations were a part, or indicate an intention to narrow them. The tenor of the legislative history is precisely to the contrary.[8]

Against this background, it is entirely reasonable to infer that, in enacting Section 212(a)(27), Congress contemplated that foreign policy considerations could play a role in determining whether an alien's activities in the United States would be "prejudicial to the public interest."[9]

---

[8] For example, two Senate reports recommending the amendment finally enacted in § 22 of the Subversive Activities Control Act of 1950 described the provision as follows:

> Section 1(1) of the Act of October 16, 1918, as amended by the bill, is an admixture of existing law and the new provisions of the bill. Under existing law, among the excludable aliens are certain aliens who seek to enter the United States whose entry would be prejudicial to the public interest or would endanger the safety of the United States. The committee has broadened this class of excludable aliens to include those aliens who seek to enter the United States to engage in activities which would endanger the welfare of the Unites States.

S. Rep. No. 2230, 81st Cong., 2d Sess. 5 (1950); S. Rep. No. 2369, 81st Cong., 2d Sess. 10 (1950).

Then-existing *statutory* law only prohibited the entry of aliens who there was reason to believe would engage in activities that would endanger the safety of the United States. *See* S. Rep. No. 2230, *supra*, at 28. The reference in the Senate report to the prohibition "[u]nder existing law" against entries that would be "prejudicial to the public interest" must therefore have been to Proclamation 2523 and 8 CFR § 175.53. The passages from the Senate reports express a purpose to retain and codify the substance of these nonstatutory restrictions.

[9] The Immigration and Naturalization Service analysis of § 212(a)(27), when the Immigration and Nationality Act of 1952 was still in its draft stage, informed the Congress that provisions similar to § 212(a)(27) already appeared in the Act of May 22, 1918 as amended, and Proclamation 2523. U.S. Immigration and Naturalization Service, Report on S. 716, A Bill to Revise the Laws Relating to Immigration, Naturalization and Nationality, at p. 212-24. The Service did not mention the regulations in its analysis, but the reference to the proclamation supports the conclusion that § 212(a)(27) may be interpreted in light of the grounds for exclusion specified in the regulations implementing the proclamation.

The administrative interpretation by the Departments of State and Justice has been consistent with this reading of the legislative history. We are informed that over a number of years, the Department of State has applied Section 212(a)(27) in two different types of cases: Cases involving a security threat in the narrow sense, such as the entry of saboteurs or persons involved in intelligence missions against the United States, and cases involving potentially far-reaching adverse effects on United States foreign policy. Exclusion of the Rhodesian aliens was therefore in keeping with the latter aspect of the State Department's previous application of the section.

The interpretation by the Board of Immigration Appeals is not to the contrary. For example, in *Matter of M–*, 5 I&N Dec. 248, 252 (1953), the Board stated:

> The Senate and House Committees which recommended the passage of the bill . . . considered the section as one relating to subversives (p. 10, S. Rept. No. 1137, 82d Cong., 2d Sess.; p. 49, H. Rep. No. 1365, 82d Cong., 2d Sess.). *However it is clear that the language of the section is broad enough to include others than subversives.* [Emphasis added.]

See also, Matter of McDonald and Brewster, Int. Dec. #2353 (March 13, 1975), at pp. 3–4. No doubt it was with such an interpretation of Section 212(a)(27) in mind that the Departments of State and Justice concluded in 1968 that Rhodesian aliens who would be likely to further or encourage the unlawful regime in Southern Rhodesia, could be excluded under the Immigration and Nationality Act without additional authorization in Executive Order No. 11419.

It is our opinion that the language of Section 212(a)(27), its legislative history, and administrative interpretation all support your conclusion that the six aliens who sought to attend an agricultural conference in the United States were inadmissible under that section.

II

A question has arisen in the course of our review of Section 212(a)(27) as to whether that provision would operate to exclude an alien whose mere entry into or presence in the United States would be "prejudicial to the public interest" or "endanger the . . . security of the United States," perhaps for foreign policy reasons. As mentioned in footnote 4, the Administration in 1968 apparently assumed that to be the case in choosing to rely on Section 212(a)(27) to prevent the entry of Rhodesian aliens who had in the past furthered or encouraged the unlawful actions of the illegal regime in Southern Rhodesia. *See* Security Council Resolution 253, § 5(b). The exclusion of such aliens presumably was intended to be predicated not on the nature of any specific activities in which they would engage while here, but on the serious adverse foreign policy consequences of allowing them to be present in violation of Security Council Resolution 253. We believe that the

conclusion reached in 1968 was based on a reasonable administrative interpretation of Section 212(a)(27).

It is true that Section 212(a)(27) does not expressly provide that an alien whose *entry* would be prejudicial to the public interest or endanger national security is inadmissible; it speaks instead of the nature of the activities in which the alien seeks to engage after entering the United States. Nevertheless, we believe that the circumstances surrounding the alien's entry are in some cases quite relevant to the assessment of the foreign relations impact of the alien's subsequent activities in this country.

Whether or not an alien is inadmissible under Section 212(a)(27) depends on all the facts and circumstances, including foreign policy factors over which the individual alien may have no control. Thus, activities that might be wholly innocuous if engaged in by one alien, might fairly be regarded as "prejudicial to the public interest" if engaged in by another, even if the individual alien did not have a specific intent to cause any harm or disturbance while in the United States.

Section 5(b) of Security Council Resolution 253, to which this country is committed, imposes a duty on Member States to prohibit the entry *for any purpose* of all Rhodesian aliens who have furthered or encouraged the unlawful actions of the Rhodesian regime. As a result, *all* of the activities of such persons in the United States, however harmless they would be if engaged in by other aliens, might have serious foreign policy consequences simply because the Rhodesians would have entered the country in violation of the resolution.[10] As a practical matter, then, Rhodesian aliens covered by the Security Council Resolution are inadmissible because their entry or presence in the United States would be prejudicial to the public interest or endanger national security, even though the language of the statute speaks in terms of activities of aliens in the United States.[11]

The legislative history supports this interpretation of the statute. For example, the Presidential proclamation and regulations on which Section 212(a)(27) was based were written in terms of an alien whose *entry* would be prejudicial to the United States or to the public interest, *see,* Proclamation 2523, *supra;* 8 CFR § 175.52(a) and 175.53 (1949), *supra,* as did the two Senate Reports that first proposed the provision in 1950.

---

[10] Alternatively, Rhodesian aliens required to be excluded under the Security Council Resolution could be considered to be inadmissible under § 212(a)(27) on the ground that their *presence* in the United States would be an "activity" that would be prejudicial to the public interest or endanger the national security.

[11] An argument against the interpretation we have advanced in the text has been suggested, based on the hypothetical example of a military dictator, a presumed *persona non grata* in this country, who might wish to enter the United States to visit his dying mother or to receive medical attention. We agree that § 212(a)(27) would ordinarily not prevent such an entry. But we reach that conclusion on the ground that such otherwise harmless activities in this country would not usually cause a foreign policy embarrassment of sufficient magnitude to be regarded as prejudicial to the public interest simply because a military dictator was involved, not because § 212(a)(27) is wholly inapplicable in such a setting

See footnote 8. In fact, 8 CFR § 175.53(b), quoted earlier, provided that an entry would be regarded as prejudicial to the public interest if the alien "is a member of, affiliated with, *or* may be active in the United States in connection with or on behalf of, a political organization associated with or carrying out policies of any foreign government opposed to the measures adopted by the Government of the United States in the public interest . . .". [Emphasis added.] This phrase would have barred the members of the National Farmers' Union of Southern Rhodesia, as the Department of State has described that organization, regardless of the nature of their intended activities in the United States.

The Department of State has suggested that some memorandums and correspondence from 1959 to 1962 relating to the efforts of a certain alien to enter the United States may demonstrate an administrative interpretation that an alien could not be excluded solely on the ground that the circumstances surrounding his or her entry render all subsequent activities "prejudicial to the public interest" or a danger to the security of the United States. We do not believe that memorandums and correspondence in question furnish a sound basis for rejecting our interpretation of the statute.

Some of the materials do indicate that an alien may not be excluded under Section 212(a)(27) solely on the ground that his native country has stated that it would regard his admission as an unfriendly act. Several letters also state that the foreign reaction to an alien's entry is not "directly pertinent" to his eligibility for a visa. But despite these statements, both factors appear to have played a decisive role in the State Department's handling of cases over the years. Moreover, while the emphasis was on the particular alien's intended activities in the United States, a number of the memorandums and letters state that it was the State Department's view that the individual's "entry," "admission," or "coming" to the United States would be prejudicial to the public interest, thereby suggesting that it is permissible to consider the ramifications of the entry itself. Because of these inconsistencies, we decline to rely on the materials made available to us by the Department of State as establishing an administrative interpretation that an alien cannot be excluded on the ground that his entry or mere presence would be prejudicial to the public interest or endanger the security of the United States.

The Service has informed us that it has nothing in its files, other than published opinions of the Board of Immigration Appeals, that might shed light on whether an alien may be excluded under Section 212(a)(27) on the ground that his entry or presence in the United States would be prejudicial to the public interest. We have reviewed the published opinions that discuss Section 212(a)(27), including those already cited, but we do not find them to be expecially illuminating on the precise question presented here. All involved charges that the alien would engage in specific activities after entering the United States that

would be prejudicial to the public interest; there was thus no need to discuss the foreign policy consequences of the alien's mere entry or presence.[12]

We agree with what we understand to be the position of the Department of State that under our analysis, only circumstances of an unusual nature could permit a determination that the entry of an alien into the United States would have such serious adverse foreign policy consequences that his mere presence and otherwise innocuous activities in this country would be prejudicial to the public interest or endanger national security.[13] But in our view, the entry of Rhodesian aliens who have furthered or encouraged the "unlawful activities" of the Rhodesian government presents such a case. It is our opinion now, as it was in 1968, that Section 212(a)(27) bars their entry.

We also agree with your conclusion that whether an alien is barred by Section 212(a)(27) should be determined on a case-by-case basis. When a Southern Rhodesian alien is involved, it will be necessary to examine the nature of his intended activities in the United States—as in the case of the six members of the National Farmers' Union who were expected to promote export sales of agricultural commodities grown in

---

[12] For example, in *Matter of M–*, 8 I&N Dec 24 (1958), the Board held that a 73-year-old former Rumanian industrialist, who had previously lived in the United States for 11 years without incident but who was alleged to have been a Nazi sympathizer and Communist sympathizer in Rumania before coming to the United States, was not inadmissible under § 212(a)(27). There was no suggestion, as there has been here, that the alien's mere entry or presence in the United States might have had serious adverse foreign policy consequences. The Board did appear to be of the view that his expected activities after reentering the United States would be determinative, *id.* at 29–30, but it nevertheless undertook an exhaustive review of the alien's past affiliations and activities before concluding that he was admissible. And the Board was especially influenced by a determination in a prior proceeding in 1951 that the alien "was not within the classes of aliens specified in former 8 CFR § 175 53, that is, aliens whose *entry* would be deemed to be prejudicial to the interests of the United States." *Id.* at 30. [Emphasis added.]

[13] See the following portion of a letter dated January 14, 1977, from the Administrator of the Bureau of Security and Consular Affairs, to this Office:

> When an alien's activities are in and of themselves entirely innocuous—for example, spending a few days or weeks of private relaxation at a resort area—it would then be necessary to demonstrate that the alien's background, notoriety, our government's policies, attitudes and commitments, and other factors were such that the spectacle of the alien's being given permission by the United States Government to engage in such otherwise innocuous activities would or reasonably could be considered to be prejudicial to the public interest or to endanger the safety or security of the United States. It would be the Department's view that such a situation would necessarily involve circumstances of an unusual nature.

Southern Rhodesia when they attended a conference in the United States—or to determine whether the particular individual had in the past furthered and encouraged the "unlawful actions" of the regime to some significant degree.[14]

JOHN M. HARMON
Acting Assistant Attorney General
Office of Legal Counsel

---

[14] Not all Southern Rhodesians covered by Security Council Resolution 253 are inadmissible under § 212(a)(27) on the ground that their mere presence in the United States is an activity prejudicial to the public interest. Aliens traveling on Rhodesian passports, *see* Resolution § 5(a), are inadmissible under § 212(a)(27) of the Act. *See* note 1, *supra.*

April 11, 1977

77-21 MEMORANDUM OPINION FOR THE PRESIDENT

Proposals Regarding an Independent Attorney General[1]

This is in response to your request that legislation be prepared that would provide that the Attorney General should be appointed for a definite term and should be removed from office only for cause of malfeasance. For the reasons discussed below, there is serious doubt as to the constitutionality of such legislation. However, within the limits set by the Constitution, there are steps which can be take further to remove the Attorney General and the Department of Justice from political influence.

The Constitution establishes the framework within which the proposed limitation on the removal of the Attorney General must be examined. The first sentence of Article II vests the executive power of the Government in the President and charges him with the general administrative responsibility for executing the laws of the United States. Article II, § 2, provides that, with the advice and consent of the Senate, the President shall select those persons who are to act for him in executing the laws. The closing statement of Article II, § 3, the last section of the Constitution dealing with the President's powers and duties, emphasizes the President's responsibility: "He shall take Care that the Laws be faithfully executed." Thus, the President is given not only the power, but also the constitutional obligation to execute the laws.

In *Myers* v. *United States*, 272 U.S. 52 (1926), the Supreme Court held that the President had exclusive authority under the Constitution to remove a postmaster, an executive official, notwithstanding statutory attempts to restrict this power. The Court viewed the effort by Congress to restrict the discretionary right of the President to remove an officer he had appointed and for whose action he was responsible as inconsistent with basic mandates of the Constitution. Significantly, the

[1] This memorandum was prepared by the Office of Legal Counsel and approved by the Attorney General

Court reasoned that "to hold otherwise would make it impossible for the President, in case of political or other differences with the Senate or Congress, to take care that the laws be faithfully executed." The constitutional underpinnings of this decision stand for the proposition that the President's freedom to remove executive officials cannot be altered by legislation.

The Attorney General is the chief law enforcement officer of the United States. He acts for the President to ensure that the President's constitutional responsibility to enforce the laws is fulfilled. To limit a President in his choice of the officer to carry out this function or to restrict the President's power to remove him would impair the President's ability to execute the laws.

Indeed, the President must be held accountable for the actions of the executive branch; to accomplish this he must be free to establish policy and define priorities. Because laws are not self-executing, their enforcement obviously cannot be separated from policy considerations. The Constitution contemplates that the Attorney General should be subject to policy direction from the President. As stated by the Supreme Court: "The Attorney General is . . . the hand of the President in taking care that the laws of the United States . . . be faithfully executed." *Ponzi* v. *Fessenden,* 258 U.S. 254, 262 (1921). Removing the Attorney General from the President's control would make him unaccountable to the President, who is constitutionally responsible for his actions.

It is our conclusion that the framers of the Constitution intended for the functioning of the executive branch to rest squarely on the integrity of the President. He alone is elected by, and thus represents, all the people. For this fundamental reason it is his policy decisions that are to control as he undertakes to execute the laws.[2] Two of the Supreme Court's many relevant statements in the *Myers* case are particularly in point:

> The degree of guidance in the discharge of their duties that the President may exercise over executive officers varies with the character of their service as prescribed in the law under which they act. The highest and most important duties which his subordinates perform are those in which they act for him. In such cases they are exercising not their own but his discretion. . . . Each head of a department is and must be the President's *alter ego* in the

[2] The following was said by you at Attorney General Griffin Bell's swearing-in on January 26, 1977: "To the maximum degree possible, the Attorney General should personify what the President of the United States is—attitudes, philosophies, commitments—because here is an extension of the President's attempt to provide equality of opportunity and a sense of trust in the core of our American governmental institutions. . . ." This statement concisely summarizes the rationale underlying the constitutionally based prohibition on legislative restrictions of the President's power to remove such an official.

> matters of that department where the President is required by law to exercise authority. 272 U.S. at 132–133. [Emphasis in original.]
>
> * * * * * * *
>
> Then there may be duties of a quasi-judicial character imposed on executive officers . . . , the discharge of which the President cannot in a particular case properly influence or control. But even in such a case he may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised. Otherwise he does not discharge his own constitutional duty of seeing that the laws be faithfully executed. 272 U.S. at 139.

Even though we have concluded that legislation establishing a definite term of office for the Attorney General and restricting the President's power to remove him only for cause probably would be held unconstitutional, it might be argued that these proposals could be implemented by some method other than legislation, *i.e.,* by Executive order. Because the restrictions would be imposed not by Congress but by the President himself, and because he legally could revoke or supersede the Executive order at will, it could be argued that the Executive order would simply constitute a voluntary waiver by the President of his constitutional power to remove the Attorney General. However, by restricting his power to remove the Attorney General, the President would necessarily be restricting his influence over that Cabinet officer. Indeed, that would be the declared purpose of the restriction. And by restricting his influence, he would be restricting his ability to fulfill his constitutional responsibility to ensure that the laws be faithfully executed. That constitutional responsibility for the execution of the laws cannot be waived. Therefore, it is our view that an Executive order, as well as legislation, restricting the President's right to remove the Attorney General would be constitutionally suspect.

We have not addressed specifically the question whether the Attorney General could be placed in some sort of separate, non-Cabinet status with a fixed term and subject to removal only with consent of the Congress. This would amount to an attempt, in effect, to remove the Attorney General from the executive branch. The foregoing discussion establishes that the President must have control over the country's chief law enforcement official because of the President's constitutional duty faithfully to execute the Nation's laws. Having reached this conclusion, it follows that there is no method, short of a constitutional amendment, to separate the Attorney General from Presidential control. One illustration of the constitutional problem raised by such a proposal is that if the Attorney General is removed from the executive branch he may become overly responsive to Congress, by virtue of the appropriation process, to cite only one example, and this would clearly

affect the separation of powers among the three branches that is established by the Constitution. Analogous problems are easy to imagine.

There is a legal maxim that hard cases make bad law. We believe that implementing the specific proposal mentioned above would be permitting a hard case, Watergate and its aftermath, to produce bad law. It is the responsibility of the Chief Executive to make certain that the system, particularly including the Justice Department, is not subject to abuse for political purposes. That involves trust and integrity—two things no law can provide or guarantee. The relationship between the President and the Attorney General is governed by the Constitution. The fundamental aspects of this relationship, that is, the President's power to appoint and remove Executive officers in his discretion, cannot be altered without impairing the President's constitutional obligations to control the executive branch and faithfully execute the Nation's laws.

GRIFFIN B. BELL
Attorney General

April 22, 1977

77-22 MEMORANDUM OPINION FOR THE ACTING ASSISTANT ATTORNEY GENERAL, TAX DIVISION

Proposed Tax Assessment Against the United States Postal Service

This is in response to your request for our opinion as to the available remedies to resolve a dispute between the Internal Revenue Service (IRS) and the Postal Service. In our opinion, the question for consideration is the justiciability of a dispute between the IRS and another executive branch entity regarding Federal taxes to be paid by the latter. We conclude that there is no reasonable basis to believe that such a dispute over the allocation of funds between two executive agencies, a matter that does not concern any adverse private person as a "real party in interest," is justiciable. If formally asked this question by the Postal Service and IRS, we would so respond. Having so concluded, we see no need for us to consider the question of what administrative steps must be taken to bring the matter into a litigating posture.

The dispute involves the Airport and Airway Revenue Act of 1970, which imposes a 5 percent tax on the amount paid for the transportation of property by air. 26 U.S.C. § 4271.[1] The tax is imposed upon the person making the transportation payment subject to the tax. The legislative history of the statute clearly indicates that the Postal Service

---

[1] The provision reads in pertinent part as follows:

§ 4271. *Imposition of tax*

(a) In general.—There is hereby imposed upon the amount paid within or without the United States for the taxable transportation . . . of property a tax equal to 5 percent of the amount so paid for such transportation. The tax imposed by this subsection shall apply only to amounts paid to a person engaged in the business of transporting property by air for hire.

(b) By whom paid.—

(1) In general.—. . . the tax imposed by subsection (a) shall be paid by the person making the payment subject to tax.

is subject to the transportation tax,[2] and, so far as we are aware, the Postal Service has not disputed this. The particular issue concerns the proper computation of the tax. The IRS in Revenue Ruling 74-512 required the Postal Service to pay the 5 percent tax not only on the line haul charge it pays to air carriers for transportation of mail, etc., but also on terminal handling charges, including receipt of mail, loading, unloading, and transfer of mail between planes. The Postal Service disagrees with this interpretation of § 4271 and has refused payment of the tax on the terminal handling charges, although it has apparently paid the line haul charges.

Section 4291 of Title 26 provides, with certain exceptions, that persons receiving payments for services or facilities subject to tax [3] shall collect the tax from the person making the payment; but an administrative regulation, Treas. Reg. § 154.2-1(f)(1), provides that in the case of amounts subject to tax that are paid by the Postal Service, the tax shall be paid directly to the IRS by the Postal Service as if it were a collecting agent.[4]

We understand that the IRS is presently holding in abeyance a proposed tax assessment of some $10 million against the Postal Service. The IRS has raised the question whether it may follow its regular assessment procedure, under which the Postal Service would be required to pay the tax, claim a refund, and bring suit against the United States for the refund in order to contest the IRS' interpretation of § 4271.

The leading case on the issue of justiciability in this context is *United States* v. *I.C.C.*, 337 U.S. 426 (1949). The question there was whether the United States as a shipper was barred from challenging in the Federal courts an Interstate Commerce Commission order denying the Government a recovery in damages for the exaction of an allegedly unlawful railroad rate. Both the Commission and the United States were made defendants, the latter because of the statutory requirement that any action to set aside an order of the Commission had to be

---

[2] The House Committee report states:

> The exemptions for transportation furnished to State and local governments, the United States, and nonprofit educational organizations are terminated. Removing the exemption for transportation furnished to the United States subjects the Post Office to the 5 percent property tax on amounts it pays for the transportation of mail by air. It did not seem appropriate to continue special exemptions for these governmental and educational organizations since this tax is now generally viewed as a user charge. In this situation there would appear to be no reason why these governmental and educational organizations should not pay for their share of the use of the airway facilities. H. Rep. No. 601, 91st Cong., 1st Sess., at 46 (1969). Accord, S. Rep. No. 706, 91st Cong., 2d Sess., at 18 n. 5 (1970).

[3] According to Rev. Rul. 74-512, in most cases the Postal Service pays an air carrier to perform these services.

[4] The IRS has informed us that although Treas. Reg. § 154.2-1(f)(1) arguably is contrary to § 4291, in its view, if the Postal Service paid the claimed tax pursuant to this regulation, the Postal Service would not be barred from bringing suit for a refund by the rule that a mere volunteer who pays a tax may not sue for a refund. The refund statutes and regulations do not expressly cover this situation. *See* 26 U.S.C. § 6415.

brought against the United States. A three-judge district court dismissed the case on the ground that the Government could not sue itself. The Supreme Court reversed in a unanimous opinion, holding that "courts must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented," at 430. It viewed the case as one involving controversies of a type that were traditionally justiciable, stating at 430–431:

> The basic question is whether railroads have illegally exacted sums of money from the United States. Unless barred by statute, the Government is not less entitled than any other shipper to invoke administrative and judicial protection. To collect the alleged illegal exactions from the railroads the United States instituted proceedings before the Interstate Commerce Commission. In pursuit of the same objective the Government challenged the legality of the Commission's action. This suit therefore is a step in proceedings to settle who is legally entitled to sums of money, the Government or the railroads. The order if valid would defeat the Government's claim to that money. But the Government charged that the order was issued arbitrarily and without substantial evidence. . . . Consequently, the established principle that a person cannot create a justiciable controversy against himself has no application here.

In our opinion, the Court's analysis does not support the position that the Postal Service and IRS are entitled to judicial resolution of their dispute. The only significant similarity is that the dispute involves large sums of money; otherwise, the situations are markedly dissimilar. In *United States* v. *I.C.C.*, as the Court noted, "the basic question [was] whether railroads have illegally exacted sums of money from the United States"; here the basic question is which of two governmental entities is entitled to money appropriated by Congress. It is in essence an interagency dispute. The question of which agency should have the money is peculiarly inappropriate for judicial determination; we do not believe that a question of this kind is one that, in the words of the Court, "involves controversies of a type which are traditionally justiciable." 337 U.S. at 430.

Subsequent judicial holdings confirm our view. The lower court decisions following *United States* v. *I.C.C.* have interpreted it as upholding Federal jurisdiction over a suit by the Government against itself only if one of the real parties in interest is a truly adverse private party. *United States* v. *Easement and Right of Way*, 204 F. Supp. 837 (D. Tenn. 1962), was a condemnation suit brought by the Tennessee Valley Authority (TVA) in which it sought to join as a defendant the Farmers Home Administration (FHA), Department of Agriculture, which held a mortgage security interest in the land involved. The court held that this could not be done, stating that "there could not be any issue between the TVA and the FHA, both being the United States, which this Court could litigate or adjudicate. Any differences between

these agencies would at most be interagency disputes which are not subject to settlement by adjudication." 204 F. Supp. at 839. A similar analysis was applied in *Ishverlal Madanlal & Co.* v. *SS Vishva Mangal,* 358 F. Supp. 386 (D. N.Y. 1973), a suit brought by the Indian Supply Mission on behalf of the Indian government against a vessel and its owner (a corporation formed by the merger of a private corporation and a second corporation wholly owned by the Indian government) for damage to the cargo. Although the plaintiff was the Supply Mission, the real party in interest was the cargo insurer. The court held that the suit was justiciable. It interpreted *United States* v. *I.C.C.* as holding that the courts should "look to the real parties in interest and to the nature of the underlying controversy in order to ascertain whether or not there is a real controversy and jurisdiction exists." 358 F. Supp. at 390. The court noted that in *U.S. ex rel. Chapman* v. *F.P.C.,* 345 U.S. 153 (1953), a proceeding by the Secretary of the Interior for judicial review of an order by the Federal Power Commission, the real party in interest adverse to the Secretary was a private power company licensed by the Commission.

In *Chapman,* the Supreme Court did not discuss the justiciability issue.[5] The only Supreme Court opinion to address this question since *United States* v. *I.C.C.* is *United States* v. *Nixon,* 418 U.S. 683 (1974), which involved quite unusual facts. In *Nixon,* the Court upheld the jurisdiction of a Federal district court over the Special Prosecutor's attempt to enforce a documentary subpoena directed to President Nixon, who claimed executive privilege. The President argued that there was no case or controversy because the dispute was solely an intrabranch dispute between members of the executive branch. The Supreme Court rejected this argument, citing *United States* v. *I.C.C.,* and other decisions of the Court.[6] It noted that the material was sought for use in a Federal grand jury proceeding, and that the enforceability of a subpoena and the claim of a privilege were traditionally justiciable issues (at 696–697). Moreover, the concrete adverseness necessary to sharpen the issues was present. *See,* 418 U.S. at 697. Although the Special Prosecutor was an agent of the executive branch, he had been delegated the authority by the Attorney General to challenge the President's refusal to produce evidence.

Although a number of the cases cited by the Court involved intrabranch disputes, they provide little guidance, because the Court did not discuss the issue. *See, United States* v. *Marine Bancorporation,* 418 U.S.

---

[5] The Court observed that the Secretary had standing, but it stated that the difference in views between the members of the Court precluded a single opinion on this issue, and that setting out the divergent views would "not further clarification of this complicated specialty of federal jurisdiction, the solution of whose problems is in any event more or less determined by the specific circumstances of individual situations . . . ." 345 U.S. at 156.

[6] The Court stated (p. 693): "The mere assertion of a claim of an 'intra-branch dispute,' without more, has never operated to defeat federal jurisdiction; justiciability does not depend on such a surface inquiry."

602 (1974); *United States* v. *Connecticut National Bank,* 418 U.S. 656 (1974); *Powell* v. *McCormack,* 395 U.S. 486 (1969); [7] *Federal Marine Board* v. *Isbrandtsen,* 356 U.S. 481, 483 n. 2 (1958); *Secretary of Agriculture* v. *United States,* 347 U.S. 645 (1954); *United States ex rel. Chapman, supra; I.C.C.* v. *Jersey City* 322 U.S. 503 (1944).

Thus the few cases dealing explicitly with this problem require at a minimum that there be an issue of the kind traditionally viewed as justiciable, and also that there be sufficient adverseness to sharpen the issues. With regard to the adverseness of the parties, the Postal Service, like the Special Prosecutor in *Nixon* and the regulatory agencies involved in *United States* v. *I.C.C.* and *U.S. ex rel. Chapman* v. *F.P.C.*, has a degree of independence from the executive branch. It is an "*independent* establishment of the executive branch of the Government of the United States." 39 U.S.C. § 201. [Emphasis added.] It was removed from direct political control,[8] and given considerable independence in managing its finances.[9] It has the authority to sue and be sued in its official name, 39 U.S.C. § 401(1), and, with the prior consent of the Attorney General, it may employ its own attorneys to conduct its litigation. 39 U.S.C. § 409(d).

But we do not believe that there is a nongovernmental "real party in interest" here. Congress intended to apply the tax in § 4271 to the transportation of the mails and other transportation "*furnished to the United States.*" [Emphasis added.] [10] We recognize that the individual users of the mails and of the airports and airways have an interest in the outcome of this dispute; the mail rates may increase if the Postal Service's costs increase, and a decrease in revenues collected under § 4271 might ultimately result in the imposition of a higher rate of tax on those who use the airports and airways. However, these broad interest groups are not identifiable individuals or entities like the railroads and private power companies in *United States* v. *I.C.C.* and *U.S. ex rel. Chapman,* respectively, who were active parties in the agency

[7] The Court did reject the argument that the case was nonjusticiable because judicial review would improperly interfere with the functioning of the coordinate legislative branch. 395 U.S. at 548–49.

[8] A Board of Governors is appointed by the President for a fixed term. 39 U.S.C. § 202. These Governors, not the President, "shall appoint and shall have the power to remove the Postmaster General . . [and to fix his] pay and term of service . . . ." 39 U.S.C. § 202(c). The Governors and the Postmaster General then appoint his Deputy and fix his term. 39 U.S.C. § 202(d). *See* H.R. Rep. No. 1104, 91st Cong., 2d Sess. at 11–13 (1970); H.R Doc. No. 313, 91st Cong., 2d Sess. at 52.

[9] In enacting the Postal Reorganization Act, Congress' purpose was to authorize the operation of the Postal Service in "a business-like way." H.R. Rep. No. 1104, 91st Cong., 2d Sess. 11 (1970). The Postal Service Fund is available to the Service without fiscal year limitation. 39 U.S.C. § 2003. It is required to submit a yearly budget, including a statement of the amounts it requests to be appropriated, and the President is required to include these amounts "with his recommendations but without revision, in the budget transmitted to Congress." 39 U.S.C. § 2009. It is authorized to "determine the character of, and necessity for, its expenses," to "determine and keep its own system of accounts," to "settle and compromise claims by or against it," and "sue and be sued in its official name." 39 U.S.C. § 401.

[10] H.R. Rep. No. 601, *supra,* n. 2.

and judicial proceedings, vigorously defending their private interests. In contrast, nearly all citizens use the mails, and of course many individuals and businesses use both the mails and the airports and airways. The interests represented by both the Postal Service and the IRS are facets of the public interest, not truly private interests adverse to those of the Federal Government as a whole.

For the foregoing reasons, it is our opinion that the question here involved in not susceptible of resolution by the courts.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

May 2, 1977

77-23 MEMORANDUM OPINION FOR THE ACTING COMMISSIONER OF THE INTERNAL REVENUE SERVICE

Congressional Access to Tax Returns—26 U.S.C. § 6103(f)

This is in response to your Agency's request for our interpretation of § 6103(f) of the Internal Revenue Code of 1954, as amended, 26 U.S.C. § 6103(f). This section, by reason of § 1202(a) of the Tax Reform Act of 1976, now deals with the question of congressional access to Federal tax returns and tax return information. We believe that we can best respond to this inquiry by addressing the three major issues presented by the request. These issues are: (1) whether, and under what authority, a subcommittee might inspect returns and return information; (2) whether a subcommittee, acting pursuant to a delegation of authority from the committee chairman, might request returns or return information directly from the Internal Revenue Service (IRS); and (3) whether a subcommittee, acting pursuant to a request from the committee chairman to the IRS, might obtain returns or return information directly from the IRS. For the reasons that follow, it is our conclusion that subcommittees may inspect Federal tax returns and return information, but only upon a request to the IRS by the chairman of the pertinent committee, which request specifies at least the particular line of inquiry to which the information must relate.

I. Inspection by Subcommittees

We shall first discuss the issue of a subcommittee's inspection of Federal tax returns and return information. The two provisions of § 6103(f) pertinent to this issue provide:

> Upon written request from the chairman of the Committee on Ways and Means of the House of Representatives, the chairman of the Committee on Finance of the Senate, or the chairman of the Joint Committee on Taxation, the Secretary shall furnish such

> committee with any return or return information specified in such request . . . 26 U.S.C. § 6103(f)(1).
>
> Any committee described in paragraph (1) or the Chief of Staff of the Joint Committee on Taxation shall have the authority, acting directly, or by or through such examiners or agents as the chairman of such committee or such chief of staff may designate or appoint, to inspect returns and return information at such time and in such manner as may be determined by such chairman or chief of staff. 26 U.S.C. § 6103(f)(4)(A).

It is apparent at once that subcommittees are not explicitly authorized in either of these provisions to inspect tax returns or return information. Because disclosure of tax records is prohibited "except as authorized by this title," 26 U.S.C. § 6103(a), it might be thought that there is no basis in the statute for allowing subcommittees access to such records.

Even though we are mindful that the application penalties warrant a cautious interpretation of the statute, *see* 18 U.S.C. § 1905, 26 U.S.C. §§ 7213, 7217, we think that the statute, considered as a whole, shows that Congress meant for subcommittees to be able to inspect tax returns and return information. We cannot imagine that Congress intended to prohibit disclosure to the subcommittees, and yet at the same time allow inspection by both the members of the subcommittees as members of the committee and by members of the subcommittees' staffs—or even to those further removed from the daily work of Congress—as "agents." The purposes underlying § 6103 do not require, and would even refute, such a proposition. While Congress was concerned about the citizens' right to privacy, it was also concerned about the Government's need for the tax information, *see* S. Rep. No. 938 (Part I), 94th Cong., 2d Sess. 318 (1976), and was very much aware of its own needs in this regard. *Id.* at 319–320. In this light, we do not think it a reasonable assessment of Congress' intent to say that the subcommittees—which do much of the Congress' work—cannot inspect the materials necessary to their functions.

Although the statutory text does not mention subcommittees, it nonetheless offers strong support for our conclusion here. Under the prior law, the subcommittees of the House Ways and Means Committee and the Senate Finance Committee had requested, and received, access to returns and return information held by the IRS. The language of the prior law under which such access was authorized—*i.e.,* "the Secretary . . . shall furnish such committee" and "any such committee shall have the right, acting directly as a committee, or by or through . . . examiners or agents . . . to inspect any or all of the return"—has been largely retained in the new provisions. *See* 26 U.S.C. § 6103(f)(1) and (4)(A). This reenactment of the prior provisions would suggest that the law was to remain the same and that the interpretation thereof—displayed by those subcommittees most closely associated with the tax laws—should continue.

We thus come to the question of how subcommittees are to fit within the statutory structure—*i.e.*, whether they should be regarded as "committees" or as "agents" of the committees. We would note at the outset that, under the provisions relevant here, it does not appear to be a matter of great importance whether a subcommittee is found to satisfy one term or the other; both a committee and its agents are to proceed "at such time and in such manner as may be determined by such chairman . . ." 26 U.S.C. § 6103(f)(4)(A). Nevertheless, it is our view that subcommittees are best regarded as "agents" within the meaning of the statute. Although neither the statute nor its legislative history offer much guidance on this issue, we think this result most naturally follows from the statutory language. While the term "committee' may be given a broad reading if the congressional purpose warrants it, *see, e.g., Barenblatt* v. *United States,* 240 F. 2d 875, 878 (D.C. Cir. 1957), *vacated on other grounds,* 354 U.S. 930 (1957), *aff'd on rehearing,* 252 F. 2d 129 (1958), *aff'd,* 360 U.S. 109 (1959), its usage here is with reference to specifically named full committees. Rather than contort the statutory language so that it would encompass an entity normally thought to be apart from the full committee, we prefer to view the subcommittee as coming within the term "agents." While this terminology was most probably designed with staff personnel in mind, it is certainly broad enough to encompass subcommittees whose function is to act on behalf of the full committee.

The final question that remains to be considered is whether the subcommittee may inspect tax returns and return information directly, or whether such materials must be first handed over to the full committee. Although the statute refers to the Secretary's furnishing such information to the committee, 26 U.S.C. § 6103(f)(1), we believe that direct access is permissible here. The subcommittees are themselves permitted to inspect this information, and it seems wasteful to interject a requirement that such access is allowed only after it goes to the full committee. Moreover, the provision providing for inspection of returns by agents "at such time and in such manner as may be determined by such chairman," 26 U.S.C. § 6103(f)(4)(A), seems broad enough to permit the chairman to decide to allow an immediate inspection by the subcommittee.

II. Disclosure by Way of Delegated Authority

The second issue to be addressed is whether delegated authority under the rules of the pertinent committees is sufficient to permit a subcommittee to initiate a request for returns or return information. As we understand it, both from your letter and our conversations with members of the congressional staffs, the old law had been interpreted to allow subcommittees acting under a delegation of authority to request such material directly from the IRS. We do not believe, however, that this practice can continue under the present law. Section 6103(f)(1)

provides that the Secretary shall furnish the tax information "upon written request from the chairman of the Committee on Ways and Means of the House of Representatives [or] the chairman of the Committee on Finance of the Senate . . . ." The lack of grant of authority to the chairmen of the subcommittees, when considered in light of the general approach that "returns and return information shall be confidential" and should not be disclosed "except as authorized by this title," 26 U.S.C. § 6103(a), would indicate that they are not authorized to make requests for tax records.

Of course, as with the problem of subcommittee inspection, the lack of a specific grant of authority to the subcommittee chairmen need not be determinative. Other factors relevant here—*e.g.*, legislative history, indications in other parts of the statute, or even other provisions of law—could give rise to a conclusion that Congress intended to permit a delegation of authority. However, we do not believe that such factors lead to such a result here; rather, it is our conclusion that all such indicia are to the contrary.

Nothing in the provisions authorizing disclosure of tax information to Congress would appear to impliedly authorize a delegation of authority here. The other provisions that authorize congressional access to tax information do so only upon the written request of a specifically designated person—*i.e.*, the Chief of Staff of the Joint Committee on Taxation, or the chairman of a nontaxwriting committee that is authorized by the Senate or House to inspect tax information. *See* 26 U.S.C. § 6103(f) (2) and (3). The designation of a specific high-ranking person in each instance would suggest an intent on the part of Congress that, even among those in Congress who were authorized to inspect such material upon disclosure, only a few—those in overall charge of a particular committee's operations—could actually initiate a request for disclosure.

Other parts of § 6103 reinforce this conclusion. The statute in many instances requires that disclosure to other parts of the Government be made upon the written request of the highest-ranking official in the particular office making the request. For example, the President himself must sign a request for a tax return to be made available to the White

House, 26 U.S.C. § 6103(g)(1); [1] similarly, the heads of various State or Federal agencies appear to be required to sign requests before disclosure can be made to those agencies. *See, e.g.*, 26 U.S.C. §§ 6103(j)(1) and (2), 6103(k)(5), 6103(1)(5).[2] The apparent purpose underlying such requirements would be that, in order to ensure that disclosure is warranted, the highest-ranking official of a particular governmental unit would have to pass upon and approve any request for disclosure. This purpose would be no less forceful with respect to Congress, and the fact that the provisions applicable to Congress adhere to the approach of specifically designating a high-level official would suggest an intent to adopt the same means—*i.e.*, personal authorization—in achieving the overall goal.

This point is highlighted by the fact that, when Congress deemed it necessary to allow for a subordinate official's authorization, it did so explicitly. For example, various provisions allow subordinate Department of Justice officials to request disclosure, *see* 26 U.S.C. §§ 6103(h)(3)(B), 6103(i)(1)(B); the same is true with regard to other departments. *See, e.g.*, 26 U.S.C. § 6103(j)(3) (relating to subordinate officials of the Department of the Treasury). The existence of such provisions demonstrates that the need for allowing subordinates' authorization of disclosure was considered, and passed upon by Congress; the fact that no such authorization was provided the chairmen of subcommittees must indicate that it was not intended that they have such authority. *Cf., Cudahy Packing Co.* v. *Holland,* 315 U.S. 357, 365–66 (1942).

The legislative history is not very informative on this question. The legislative reports, in addressing this issue, simply state that the committees will have access to tax information "upon written request of their

---

[1] The fact that the statute requires the President to "personally" sign such requests does not, in our view, imply that such authority can be delegated in the absence of such a requirement. This requirement was first adopted in Executive Order No. 11805, 3 CFR 896 (1971-75 compilation); the legislative history of the statute makes clear that the statute was largely designed to codify the provisions of the Executive order. *See* S. Rep. No. 938 (Part I), *supra* at 322 Moreover, in view of the broad powers of delegation conferred on the President by other provisions of law, *see* 3 U.S.C. §§ 301-302, such terminology was necessary to ensure that the President himself sign the pertinent requests. In light of these considerations, we do not believe the absence of such an explicit requirement with respect to the committee chairmen can be taken as an indication that Congress did not intended to require them to sign requests for disclosure. Indeed, the fact that the President himself must sign such requests would suggest that a similar requirement would attach to all officials who were specifically designated to sign written requests.

[2] It seems clear that agency heads are required by the statute personally to sign requests for disclosure. Previously, Treasury regulations had allowed for disclosure upon the written request or notice by the heads of various agencies, *see, e.g.*, 26 CFR § 301.6103(a)—102, 103, and 104 (1975). This requirement had been interpreted to require that the head of the department actually sign the request, *see* Hearings on Federal Tax Return Privacy before the Subcommittee on Administration of the Internal Revenue Code of the Senate Committee on Finance, 47–48 (1975). The present law, by enacting in many instances language similar to that used in the regulations, presumably did so in light of this interpretation—particularly in view of the fact that the underlying purpose was to tighten up on the disclosure of tax records.

respective chairmen." H.R. Rep. No. 1515, 94th Cong., 2d Sess. 476 (1976); *see also* S. Rep. No. 938 (Part I), *supra* at 320. This statement, by itself, is not particularly helpful, since it merely restates the language that is at issue here. It does serve, however, to rebut the proposition that Congress meant to allow for more persons to authorize disclosure than it provided for in the statute itself. The absence of any other references to the question of delegation in the legislative materials is even more telling. It seems to us most unreasonable to assess congressional intent as allowing for delegation where, in a statute meant to restrict even congressional access, *see* S. Rep. No. 938 (Part I), *supra* at 319–20, Congress clearly did not provide for delegation in the statute and said nothing on the matter in the legislative record.

Of course, if there had previously existed a provision explicitly allowing for a broad delegation of the chairmen's authority, it could perhaps be said that the present legislation contemplated that such a provision would be applicable here. However, our research has uncovered no such general authority. To the contrary, it appears that, in matters akin to the one at issue, Congress' practice is to provide specifically for a delegation where it wishes to allow for one. For example, in legislation providing for congressional subpoenas, the statutes often provide explicitly that the subpoenas may be signed by either the chairman or another member designated by him or the pertinent committee, *see, e.g.*, 2 U.S.C. §§ 413, 473(d). In contrast, other provisions lack such an authorization of delegation and allow only specifically named persons to sign subpoenas. *See, e.g.*, 26 U.S.C. § 8021(b)(2). It is evident that Congress chose to adopt this latter approach with respect to committee access to tax records; we thus do not believe it appropriate here to allow for a delegation where Congress itself, in contrast to the pattern adopted in other instances, has not seen fit to provide one.

The fact that it was the past practice of the committees involved to delegate authority to subcommittees to request information directly from the IRS is not enough, in and of itself, to justify continuing such a practice under the new law. The statute here was designed to tighten the rules for disclosure, and a reference to past practice therefore provides little in the way of guidance under the new law. While we have relied on past practices in determining that subcommittees were to continue to have access to tax returns and return information, our rationale for doing so was that such practices reflected Congress' interpretation of language carried over into the present statute. In contrast, the language relating to requests by Congress for tax information has been changed, and thus past practice is of little help in determining Congress' view of the present wording.

It has been suggested by members of congressional staffs that the statutory language allowing examiners and agents "to inspect returns and return information at such time and in such manner as may be

determined by such chairman" might allow delegation of authority here. It seems to us, however, that this provision relates to the persons to whom tax information might be disclosed, and does not address the question of which persons might request disclosure from the IRS. This latter issue is specifically dealt with by other language in the statute, and to give the above-quoted language its suggested broad sweep would simply disregard that more specific language.

We recognize that subcommittees of the Senate Finance Committee and the House Ways and Means Committee are authorized to "require by subpoena or otherwise . . . the production of such correspondence, books, papers, and documents . . . as it deems advisable." 2 U.S.C. § 190b(a). *See also* House Rule XI(m)(1)(B). While this provision could obviously be read to encompass tax records, we believe that Section 6103, both in its terminology—"upon written request from the chairman"—and in its evident purpose to restrict even congressional access to tax information, necessarily delimits the grant of authority specified in these provisions insofar as tax records are concerned.

III. Disclosure by Way of a Chairman's Request to the IRS

Your letter further inquires whether the chairman of a committee might request the IRS to furnish the subcommittee such returns or return information as the subcommittee might request. There are two different situations where this problem might develop; the first is where a chairman would make one "blanket" request that the IRS thereafter comply with any request on any matter made by the subcommittee. We do not believe that either the language of the statute, or the purpose underlying it, would allow for such an approach. Section 6103(f)(1) provides for the disclosure of "any return or return information *specified* in such request." [Emphasis added.] This would appear to require that the request of the chairman mention or name in a specific or explicit manner the information sought. A request by a chairman that the IRS comply with a certain subcommittee's subsequent requests would not, in our view, meet this requirement; while the chairman could perhaps be said to have "specified" that certain information—*i.e.*, that requested by the subcommittee—be furnished, he has hardly identified that information precisely or in detail. A more important factor here, however, is that such a request by the chairman would depart from Congress' apparent purpose of having the chairman pass upon each request and, in effect, would amount to a delegation of authority to the subcommittee to proceed on its own. We have in the discussion set forth above concluded that this is not within Congress' intent, and as such do not believe that it can be accomplished under the form of such a "request" to the IRS.

The chairman could, however, at times make a more limited request that the IRS furnish a subcommittee with materials pertinent to a particularized inquiry; we believe that this would be permissible under

the statute. A request for materials relating to a particular line of inquiry seems to us to comport sufficiently with the statutory requirement that requested information be "specified." While the chairman may not know at the time of the request the exact information sought, he will be informed of the general nature of the information to be requested and the reasons for doing so—thereby fulfilling, in our view, the purposes served by the requirement of personal approval.

The purposes of the statute also support this approach in a broader sense. As a practical matter, it is necessary to proceed in this manner if subcommittees are to function effectively; the need for certain information may not become apparent until a subcommittee's hearings have already begun, and it is simply not practical to have the chairman sign a request for information each time this occurs. As we discussed above, the general thrust of the statute is to reconcile the need for confidentiality of tax returns with the need for disclosure to further the Government's work. A determination here that would effectively curtail the subcommittee's work would not comport with this overall goal; rather, we think the underlying aim of a balance is achieved by requiring the chairman to pass upon the subcommittee's requests, and yet allowing those requests to specify information relating to a particular line of inquiry rather than setting forth exactly the returns and return information sought.

Conclusion

We conclude that subcommittees are entitled to inspection of tax returns and return information directly, provided that the committee chairman's request for such information specifies at least what line of inquiry the information is to relate to. A delegation of authority from the chairman to the subcommittee, or a "blanket" request from the chairman to the IRS, is not sufficient under the statute to allow the subcommittees access to the relevant materials.

JOHN M. HARMON
Acting Assistant Attorney General
Office of Legal Counsel

May 9, 1977

77-24 MEMORANDUM OPINION FOR THE ADMINISTRATOR OF THE DRUG ENFORCEMENT ADMINISTRATION

Control of *Papaver bracteatum*—Drug Enforcement Administration

This is in response to your request for our opinion whether the Drug Enforcement Administration (DEA) [1] has the authority to control the production of the plant *Papaver bracteatum,* and, if so, whether its production may be prohibited. In general, we support the Administrator's authority on both these questions because we believe that there exists a reasonable basis for that authority. But we also recognize that reasonable contrary arguments can be advanced, so that it is uncertain whether the Administrator's authority, if challenged, would be sustained in court.

Papaver bracteatum is the great scarlet poppy. *Bracteatum* contains and produces thebaine, which is chemically identical to the thebaine produced by the opium poppy, *Papaver somniferum L.* Thebaine may be converted into other drugs, including codeine. Both thebaine and codeine are currently subject to control pursuant to the Comprehensive Drug Abuse Prevention and Control Act of 1970, as amended, 21 U.S.C. § 801 *et seq.* (hereafter referred to as the Controlled Substances Act or CSA). *Bracteatum,* itself, however, is not presently a controlled substance because it is not listed in any of the schedules of 21 U.S.C. § 812, or 21 CFR § 1308. Although *bracteatum* contains thebaine, there will be no effect "in the traditional sense of having an abuse potential" upon an individual who chews, smokes, or ingests *bracteatum.*

I. Control

It is our opinion that the Administrator may control the production of *bracteatum,* either (1) pursuant to delegation of the Attorney General's authority to regulate the manufacture of thebaine under the Con-

[1] The Attorney General has delegated the functions vested in him under the Comprehensive Drug Abuse Prevention and Control Act to DEA. 28 CFR 0.100(b).

trolled Substances Act or (2) pursuant to United States obligations under the Single Convention on Narcotic Drugs, 18 U.S.T. 1407, 30 T.I.A.S. No. 6298. But in the case of control pursuant to treaty obligation, such control must be predicated upon certain findings by the appropriate United States officials, and we have some doubt whether the requisite findings can be made.

A. Regulation of the Manufacture of Thebaine

The first ground on which the Administrator may rely to control the production of *bracteatum* derives from authority under the Controlled Substances Act providing for the registration of and control of the manufacture of the drug thebaine.

The term "manufacture" is defined expansively in 21 U.S.C. § 802(14) to mean:

> *the production, preparation, propagation,* compounding or processing *of a drug or other substance,* either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of such substance or labeling or relabeling of its container; except that such term does not include the preparation, compounding, packaging, or labeling of a drug or other substance in conformity with applicable State or local law by a practitioner as an incident to his administration or dispensing of such drug or substance in the course of his professional practice. [Emphasis added.] [2]

A "manufacturer" is defined in the same section as "a person who manufactures a drug or other substance." The term "production," which, as noted above, is included in the definition of the term "manufacture," is defined in 21 U.S.C. § 802(21) to include "the manufacture, planting, cultivation, growing, or harvesting of a controlled substance." Neither of these terms has been the subject of judicial construction.

In our opinion, the growth of *bracteatum*—which contains and produces thebaine—for the purpose of extracting thebaine it produces, constitutes the "manufacture" of thebaine within the meaning of § 802(14). It would be difficult to imagine a definition of manufacture more broadly drawn than § 802(14), especially when taken in conjunction with paragraph (21) defining production. The statute appears to include each step in the development of a controlled substance prior to its distribution and dispensation—thus even packaging and labeling were included.

Applying the statutory definitions to *bracteatum,* it appears that the plant itself would first be "propagated" and then the thebaine "extract-

---

[2] This definition is much broader than that found in the Narcotic Manufacturing Act of 1960, 74 Stat. 55, § 3(f):

The term "manufacture" means the production of a narcotic drug, either directly or indirectly by extraction of substances of vegetable origin, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis.

ed." Both the "propagation" of a controlled substance [3] and its "extraction" are included within the definitions of "manufacture" and "production."

These definitions fit in with 21 U.S.C. § 822, which requires that every person who "manufactures" a controlled substance or who "proposes to engage in the manufacture" of a controlled substance obtain an annual registration issued by the Attorney General. And 21 U.S.C. § 821 authorizes the Attorney General to promulgate rules and regulations "relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances."

Accordingly, we believe that these provisions permit the Administrator, in the exercise of his delegated authority, to require persons who propose to grow *bracteatum* for the purpose of extracting thebaine to register as manufacturers of thebaine. [4]

B. The Single Convention on Narcotic Drugs

It is also our opinion that the Administrator, acting pursuant to the Attorney General's delegated authority, has the power to control the production of *bracteatum* pursuant to the obligations imposed on the United States by the Single Convention if he can make certain findings. He must determine, first, that *bracteatum* may be "used in the illicit manufacture" of thebaine, and, second, that *bracteatum* is *not* "easily convertible" to thebaine or other controlled drugs, although sufficient support may exist to justify a finding that *bracteatum* may also be found to be readily convertible to thebaine.

The following discussion explains the reasons for our opinion.

The United States ratified the Single Convention on Narcotic Drugs in 1967, three years before the enactment of the Controlled Substances Act, and a number of the provisions of that Act reflect Congress' intent to comply with the obligations imposed by the Single Convention. *See* 21 U.S.C. §§ 801(7), 811(d), 812(b), 953(a)(1), 958(a). Moreover, both the House and Senate reports on the Act mention the need to comply with the international obligations as one reason for Federal legislation on this subject. S. Rep. No. 613, 91st Cong., 1st Sess. at 4 (1969); H. Rep. No. 1444, Pt. 1, 91st Cong., 2d Sess. at 29 (1970).

Accordingly, the Controlled Substances Act authorizes the Attorney General to control drugs where control is required by treaty. Section 811(d) provides:

---

[3] It might be argued that the production—including planting, cultivation, and growth—here would be that of *bracteatum* and not of the controlled substance thebaine. The portion of the definition of manufacture by cultivation, etc., could therefore be reserved for cases in which a plant itself is controlled—as is the opium poppy. However, in our opinion, because the plant *bracteatum* contains a controlled substance (thebaine), the propagation of *bracteatum* for the purpose of producing this thebaine is the cultivation or "production" of thebaine.

[4] But we do not believe that the Administrator has the authority to control the growth of *bracteatum* for other purposes.

> If control is required by United States obligations under international treaties, conventions, or protocols in effect on the effective date of this part, the Attorney General shall issue an order controlling such drug under the schedule he deems most appropriate to carry out such obligations . . . .

Bracteatum is not scheduled as a drug that must be controlled under the Single Convention,[5] although thebaine and codeine are. But we must also consider in this connection Article II, paragraph 8, of the Single Convention. That paragraph imposes an obligation upon the United States to apply measures of supervision to certain substances not listed in the schedule of the Single Convention. It states:

> The Parties shall use their best endeavors to apply to substances which do not fall under this Convention, but which may be used in the illicit manufacture of drugs, such measures of supervision as may be practicable.

It could be argued that the requirement that each Party use its "best endeavors" to apply "practicable" means of supervision allows such a broad scope of discretion that it cannot be said to create any "obligation" in any meaningful sense of the word. The official commentary on the Convention concludes that "[t]he vagueness of the wording of paragraph 8 leaves it practically to the discretion of each Party to decide to what substances it should apply the control provided in this paragraph, and what measures it would be practicable to take." Commentary on the Single Convention on Narcotic Drugs, 1961 (prepared by the Secretary-General of the United Nations), at 71.

But we conclude, as did the U.S. Court of Appeals for the District of Columbia in *National Organization for the Reform Of Marijuana Laws (NORMAL)* v. *DEA*, No. 75-2025 (April 26, 1977), that DEA may properly rely upon paragraph 8 as creating a treaty "obligation" for purposes of 21 U.S.C. § 811(d). In that case the court upheld DEA's control of *cannabis* seeds capable of germination on the basis of paragraph 8 of the Single Convention and 21 U.S.C. § 811(d). It observed that the official commentary "assigns a specific purpose to the open-endedness of the provision." It concluded that discretion had to be allowed in determining both the substances subject to paragraph 8 because it was impossible to foresee either all the substances that might in the future be used for illicit manufacture, or the controls to be applied, because measures practicable in one country might be impracticable in another where the substance in question is used for legitimate purposes. Slip opinion, at 43–44. Accordingly, the paragraph 8 require-

[5] The Commentary on the Single Convention on Narcotic Drugs, 1961 (prepared by the Secretary General of the United Nations), at 25, expressly notes that *bracteatum* is a species separate from *Papaver somniferum*, which is controlled, and states that the extraction of thebaine from *bracteatum* would be controlled by the provisions of the Convention governing manufacture.

ment is sufficient to create a treaty "obligation" within the meaning of 21 U.S.C. § 811(d).

Therefore, the Single Convention obligates the United States to apply measures of supervision to *bracteatum* if it falls within the scope of paragraph 8. That paragraph calls for control if a substance "may be used in the illicit manufacture of drugs." [6] "Drugs" are defined by Art. I, ¶(j) of the Single Convention as substances on schedule I or II of the Convention; both thebaine and codeine are such scheduled drugs.

But there is a further problem in determining whether *bracteatum* falls within paragraph 8. Both the records of the Convention drafters and the official commentary support the view that paragraph 8 was not intended to apply to substances readily "convertible" into narcotic drugs by traffickers. Commentary at 70, Official Records, United Nations Conference for the Adoption of a Single Convention on Narcotic Drugs, Vol. II at 77–79.[7] Known substances of this nature were included in the Single Convention schedules, and Art. III, ¶3 (iii) provides a procedure whereby additional convertible substances may be added to these schedules and thereby made subject to the specific measures of control required for scheduled substances.

---

[6] A narrow interpretation of the term "obligation" would conflict with the legislative intent expressed in the Senate report, which stated that "[t]*he Attorney General must* give appropriate consideration to the findings and declarations of certain international bodies and *generally abide by both the letter and the spirit of our treaty agreements* regarding the control of drugs" S Rep No. 613, 91st Cong., 1st Sess. 16 (1969) [Emphasis added.]

[7] The official records of the drafters reflect that the Netherlands representative raised the question whether the substances were covered by the more general obligations of this section, stating that his delegation believed such substances should themselves be scheduled. The Yugoslavian representative stated that the authors of this draft paragraph "had not been thinking of convertible substances . . . . The reference was a general one to raw materials which could be used in manufacturing synthetic drugs . . ." He agreed that convertible substances should be scheduled. The Hungarian representative stated that this paragraph was intended to cover substances not covered elsewhere, and agreed that convertible substances should be scheduled. At this point the Deputy Executive Secretary stated that:

> [d]rugs were placed under international control either because they were addiction-producing or because they were convertible into addiction-producing substances. Drugs of the second type were not grouped separately, but some were included in schedule I and some in schedule II; that was in accordance with existing treaties. The suggestion that there should be a separate schedule for convertible substances would involve a fundamental change in the way the draft Convention and the existing treaties were set out. *It should be made clear that the word "convertible" was used to describe substances that could easily be converted into narcotic drugs by a trafficker; paragraph 3 [now Art. 2 ¶8] was not intended to refer to convertible substances in that sense. If it were felt that the Convention as worded did not make it clear that the substances under control included not only dangerous drugs but also substances which were convertible into dangerous drugs, an explicit statement to that effect could be made either in the definition of the word "drug" or in a paragraph in Article 3 laying down the criteria for deciding that new drugs were to be brought under control.* [Emphasis added.]

The records indicate that after some further discussion it was agreed that a reference to convertibility should be inserted, and consideration of this reference was deferred. As stated in the text, such a provision expressly noting that convertible substances could be added to the various schedules was inserted in Art. III, ¶3 (iii). This appears to comply with the Deputy Executive Secretary's suggestion.

On that basis, it is our view that the Administrator may control *bracteatum* pursuant to paragraph 8 only if he determines that *bracteatum:* (1) may be used in the illicit manufacture of drugs, including thebaine; and (2) is *not* a substance readily "convertible" to thebaine or other controlled drugs by narcotics traffickers.[8] However, if *bracteatum* is a convertible substance, and the Administrator believes that international control is apppropriate, he must follow the procedures in Art. III to have *bracteatum* added to an appropriate schedule of the Single Convention.

C. Other Bases of Control.

In our opinion, neither of the two above theories would authorize the Administrator to control *bracteatum.*

One possible theory is that *bracteatum* might be controlled as an "immediate precursor" of thebaine. Section 811(e) permits the Attorney General to control the "immediate precursor" of a controlled substance, and 21 U.S.C. § 802(22) defines an "immediate precursor" as a substance designated by the Attorney General as "the principal *compound* used, or produced primarily for use, in the manufacture of a controlled substance; . . . *an immediate chemical intermediary* used or likely to be used in the manufacture of such controlled substance. . . ." [Emphasis added.] It is our belief that §§ 802(22) and 811(e) were intended to apply to chemicals, and are not applicable to the plant *bracteatum.*

A second theory is that *bracteatum* might itself fulfill the requirements to be listed independently on one of the schedules detailed in 21 U.S.C. § 812. Inclusion in any of the five schedules set out in this section requires a finding of a degree of potential for abuse of that substance, ranging from a "high potential for abuse" in schedules I and II, to schedule IV, which is characterized by (A) "low potential for abuse relative to the drugs or other substances in schedule III," or (C) "abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule III." Because, despite the presence of thebaine, *bracteatum*—whether smoked, chewed, or ingested—has no effect "in the traditional sense of having an abuse potential," it appears that *bracteatum* could not fall within any of the schedules of the CSA.

II. Prohibiting the Production of *Bracteatum*

In view of our conclusion that the production of *bracteatum* may be controlled as the manufacture of thebaine, or possibly pursuant to U.S. treaty obligations under the Single Convention, we reach the question whether all domestic production may be prohibited.

Potentially, there are two grounds upon which production may be prohibited: (1) if production would violate U.S. treaty obligations; or

---

[8] In this connection it may be useful to compare the concept of a convertible substance with the concept of an "immediate precursor" under the CSA. In our opinion, *bracteatum* is not an "immediate precursor" of thebaine. *See* discussion, p. 10, *infra.*

(2) if production would be inconsistent with the public interest. It is our opinion that a prohibition of all domestic production is not required by the Single Convention. On the other hand, we believe that if the Administrator finds that controlled domestic production would result in a substantial increase in the supply of illicit controlled substances in the United States, then he may determine that any production at all would be inconsistent with the public interest.

A. Treaty Obligations

Section 823 of Title 18 provides that the Attorney General shall not register an applicant to manufacture a substance on schedule I or II of the CSA, unless the registration is consistent with United States obligations under international treaties. It could be argued that domestic production of *bracteatum* as a source of licit narcotic drugs is "in derogation of the spirit of the Single Convention."

The Preamble to the Single Convention states that the Parties recognize that addiction to narcotic drugs is "fraught with social and economic danger to mankind" and that they are "conscious of their duty to prevent and combat this evil" through international coopertion. We do not think that these general statements in and of themselves create a treaty "obligation" not to permit the domestic production of *bracteatum* as a source of thebaine and other drugs, even if this would disturb the international balance of supply and demand for these drugs. The preamble states the general considerations that motivated the Parties to agree to the stringent controls stated in the body of the treaty. The Convention includes controls on the manufacture of scheduled substances, such as thebaine and codeine: Article XXI limits the total that may be manufactured and imported by one country to the sum of the quantity consumed for medical and scientific purposes, the quantity used for the manufacture of other drugs, the quantity exported, the quantity added to stocks to bring them up to standard, and the quantity acquired for special purposes. The Single Convention therefore requires that the United States place an appropriate quota on the production of controlled narcotics derived from *bracteatum,* but does not wholly prohibit the growth of *bracteatum* to produce controlled drugs.[9]

B. Public Interest

The Administrator may refuse to register an applicant to manufacture a schedule I or II drug, such as thebaine, if he determines that registration would not be consistent with the public interest. Section 823(a) of Title 18 provides:

(a) The Attorney General *shall register an applicant to manufacture controlled substances in schedule I or II if he determines that such registra-*

[9] In contrast, Art. XXII requires a Party to prohibit the cultivation of the opium poppy (*somniferum*), the coca bush, and the *cannabis* plant in certain circumstances. The official commentary also notes that it would be hypothetically possible that a party would be required to prohibit the cultivation of the *cannabis* plant to satisfy its obligation in Art. XXVIII, ¶3, to prevent illicit traffic.

tion is consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on the effective date of this part. *In determining the public interest, the following factors shall be considered:*

(1) maintenance of effective controls against diversion of particular controlled substances and any controlled substance in schedule I or II compounded therefrom into other than legitimate medical, scientific, research, or industrial channels, by limiting the importation and bulk manufacture of such controlled substances to a number of establishments which can produce an adequate and uninterrupted supply of these substances under adequately competitive conditions for legitimate medical, scientific, research, and industrial purposes;

(2) compliance with applicable State and local law;

(3) promotion of technical advances in the art of manufacturing these substances and the development of new substances;

(4) prior conviction record of applicant under Federal and State laws relating to the manufacture, distribution, or dispensing of such substances;

(5) past experience in the manufacture of controlled substances, and the existence in the establishment of effective control against diversion; and

(6) *such other factors as may be relevant to and consistent with the public health and safety.* [Emphasis added.]

As your memorandum suggests, because registration of *bracteatum* producers is consistent with U.S. treaty obligations, the only other ground upon which registration could be refused would be § 623(a)(6), namely, the "public health and safety" factor.

This factor should be interpreted, in our judgment, to include consideration of a predictable increase in the domestic supply of illicit controlled substances from foreign sources. The congressional findings in 21 U.S.C. § 801 state that the "illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people." There can be no question that the Controlled Substances Act reflects not only Congress' understanding that the availability of illicit drugs has a serious impact on public health, but also that illicit drugs are frequently imported rather than domestically produced. The emphasis throughout the Act on the control of importation and the recognition of U.S. treaty obligations intended to impose international controls bears out this conclusion.

The materials submitted with your memorandum indicate that the Department of State has expressed the view that domestic production of *bracteatum* would weaken the existing constraints on illicit foreign narcotics production, and discourage producing countries from attempting to maintain effective controls. It urges that this will result in the

availability of greater narcotic supplies for traffickers, which supplies will be transported into the United States. This argument is detailed in the Department of State's submission for the hearings held by DEA on this subject.

Accordingly, in our opinion, if the Administrator finds that a substantial increase in the availability of illicit drugs will result from the domestic production of *bracteatum* because of a breakdown in informal international understandings and because of the loss of licit U.S. markets, he could then determine that registration of applicants to grow *bracteatum* would not be consistent with the public interest, and deny registration pursuant to 21 U.S.C. § 823(a)(6).[10] Of course, before making his final determination of the public interest, the Administrator would also have to weigh all other comments received and evidence available in light of the six factors listed in § 823.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

---

[10] We recognize, however, that the language of § 823(a)(6) is extremely broad or "imprecise." and thus might support many interpretations, some contrary to the one discussed here. We have found nothing in the legislative history to provide specific guidance as to its interpretation in this circumstance.

May 9, 1977

77-25 MEMORANDUM OPINION FOR THE GENERAL COUNSEL, DEPARTMENT OF DEFENSE

Status of Baggers as Federal Employees—Fair Labor Standards Act

This is in response to the request of the General Counsel concerning a disagreement between the Department of Defense (DOD) and the Civil Service Commission (CSC) regarding the interpretation of the Fair Labor Standards Act of 1938 (FLSA), as amended in 1974, 29 U.S.C. §§ 201 *et seq.* The CSC has determined that individuals who, with the permission of the commissary, bag and transport DOD commissary patrons' purchases in return for tips ("baggers") are employees within the scope of the FLSA. It is DOD's view that this interpretation "conflicts with statutory and traditional concepts of Federal employment." For the reasons that follow, we conclude that such concepts are not controlling under the FLSA and that CSC's application of the "economic realities" test[1] to determine questions of employment, even in the Federal sector, is proper.

I

DOD's main objection to CSC's determination lies in its resort to the "economic realities" test in determining whether an individual is an employee for purposes of the FLSA, and the view that the statute "expressly excepted from the general definition of 'employees'" individuals employed by the U.S. Government. This line of reasoning, it is argued, renders the "economic realities" standard inoperative as a test of Federal employment. It is further contended that the coverage of the FLSA is restricted to those who conform to the statutory criteria of Federal employment set forth in 5 U.S.C. § 2105.

---

[1] The "economic realities" test, as generally applied by the courts, simply refers to an analysis of a controverted employment situation based not on isolated factors but rather "upon the circumstances of the whole activity." *Rutherford Food Corp.* v. *McComb,* 331 U.S. 722, 730 (1947).

We cannot agree that the statutory framework here leads to such conclusion. The pertinent parts of the FLSA definition of "employee" in 29 U.S.C. § 203(e) read as follows:

> (1) Except as provided in paragraphs (2) and (3), the term "employee" means any individual employed by an employer.
>
> (2) In the case of an individual employed by a public agency, such term means—
>
> > (A) any individual employed by the Government of the United States—
> >
> > > (i) as a civilian in the military departments (as defined in section 102 of Title 5),
> > >
> > > (ii) in any executive agency (as defined in section 105 of such title),
> > >
> > > (iii) in any unit of the legislative or judicial branch of the Government which has positions in the competitive service,
> > >
> > > (iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, or
> > >
> > > (v) in the Library of Congress.

It is clear that Federal employees are not deemed employees subject to the FLSA by virtue of the "general" definition of employee set forth in § 203(a)(1). It is not at all clear, however, how this fact gives rise to a conclusion that the "economic realities" test is to be inapplicable to all individuals working in the Federal sector. The "exception" in § 203(e)(1) does not purport to exclude Federal employees from the scope of the statute or create different standards as to them, but merely refers to § 203(e)(2). This latter provision, except for the kind of employer to which it relates, adheres strictly to the structure of the "general" definition in § 203(e)(1)—that is, the provision defines "employee" as "any individual employed by" the pertinent employer. Because the "economic realities" test applies to determine whether this requirement is [fulfilled with respect to the "general" definition, it would seem equally applicable to determine whether this same requirement is] satisfied with respect to the question of the FLSA's coverage in the Federal sector.

While the "economic realities" test may have been applicable only with respect to the "general" definition prior to the 1974 amendments, it does not follow that it should remain so limited today. The "general" definition was the only one in existence prior to 1974, and as such the "economic realities" standard was applicable in every case where the question of coverage under the definition of "employee" arose. Absent some contrary indication in the amendments themselves or in their legislative history, we would expect that the same approach would hold true today in any case where the issue was whether an individual was an employee under the FLSA—whether the individual was associated with the Government or a private employer.

There is no such contrary indication here; in fact, all indications are that the "economic realities" test should be applied in the Federal sector and that formal criteria are not to be determinative. Most fundamentally, if Congress had intended that formal criteria were to prevail, it would have explicitly so stated. Instead, Congress chose a more expansive approach. An employee is defined by the FLSA as "any individual *employed* by the Government of the United States," 29 U.S.C. § 203(e)(2)(A). [Emphasis added.] In turn, the definition of "employ" "includes to suffer or permit to work." 29 U.S.C. § 203(g).[2] The use of this broadly defined term with reference to the Federal Government must thus mean that the Government could "employ" an individual even if formal statutory criteria were not met. All that need be done is that the Government "suffer or permit" that individual to work in one of the areas specified in § 203(e)(2)(A)(i)-(v).

The legislative history of the provisions at issue here bolsters this view. That history shows that Congress intended that coverage under the FLSA "should be interpreted broadly," S. Rep. No. 690, 93d Cong., 2d Sess. 56 (1974). Strict adherence to formal criteria of employment would hardly comport with this general mandate. More specifically, the legislative history is clear that the reason for extending the FLSA to Federal employees was to subject the Federal Government and private employers to the "same standards." *See* 120 Cong. Rec. 4702 (remarks of Senator Williams). While this expression of intent could be viewed as limited to the payment of similar minimum and overtime wages, we believe that Congress meant for the "same standard"—including the "economic realities" test with respect to the scope of the Act—to apply across the board. Any doubt about this point was resolved by the committee's statement:

> It is the intent of the Committee that the Commission will administer the provisions of the law in such a manner as to assure consistency with the meaning, *scope,* and *application* established by the rulings, regulations, interpretations, and opinions of the Secretary of Labor which are applicable in other sectors of the economy. S. Rep. No. 690, 93d Cong., 2d Sess. 23 (1974). [Emphasis added.] *See also* H.R. Rep. No. 913, 93d Cong., 2d Sess. 23 (1974).

The standards previously established by the Secretary of Labor with respect to the scope and application of the FLSA would, of course, include the "economic realities" approach. The above statement thus makes it quite clear that this same approach is to be applied to the

[2] Significantly, the Supreme Court had previously acknowledged the broad scope of the Act under such definitions:

> In determining who are "employees" under the Act, common law employee categories or *employer-employee classifications under other statutes* are not of controlling significance . . . . This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category. *Walling* v. *Portland Terminal Co.*, 330 U.S. 148, 150-51 (1947). [Emphasis added.]

question whether an individual working for the Federal Government is an employee under the FLSA.

Moreover, the suggested approach of resorting to 5 U.S.C § 2105 seems particularly inappropriate in this case. A resort to that section would ignore completely the definitions of Government employees set forth in the FLSA itself. It seems clear that the coverage of the FLSA must be determined by reference to the definitions contained within it, and not by criteria set forth in an unrelated title. Nothing is said to indicate that the FLSA definitions are not sufficient in themselves; and, more specifically, no reference is made to the definition set forth in 5 U.S.C. § 2105. In fact, Congress indicated its awareness of the relevance of several provisions of Title 5 by referring to them in § 203 itself (*i.e.,* 5 U.S.C. §§ 102, 105). The absence of any similar reference to 5 U.S.C. § 2105 could suggest that Congress did not intend that provision to be applicable here.[3] We believe that to resort to 5 U.S.C. § 2105 would disregard the definitions that Congress carefully framed for purposes of the FLSA and made determinative a set of criteria that Congress gave no indication were to be relevant.[4]

II

The DOD also points out that, if baggers are regarded as employees within the FLSA, problems arise with respect to other statutes—for example, the conflict-of-interest laws, 18 U.S.C. §§ 201 *et seq.,* and the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.* We do not believe that CSC's conclusion here is determinative of the question whether a bagger is an employee for purposes of these other provisions. The problems adverted to, therefore, may not exist. Even if problems arise, it will not be due to CSC's determination with respect to the FLSA, but rather by reason of the language of these other provisions and Congress' purpose in enacting them.

The DOD might argue that Congress' failure to provide for baggers in some respects—such as appropriations or manpower ceilings—indicates that Congress did not intend to allow baggers to be paid out of Federal funds and, therefore, by implication, did not intend that baggers be regarded as employees within the FLSA. We think, however,

---

[3] Nor is there any indication in 5 U.S.C. § 2105 to the contrary. By its own terms, that provision exists "for the purpose of this title"; the legislative history also indicates that the section is designed only for the purposes of Title 5. *See* S. Rep. No. 1380, 89th Cong., 2d Sess. 47 (1966).

[4] In fact, if 5 U.S.C. § 2105 were to be determinative here, it would not only ignore but also completely nullify some of the provisions explicity set forth in § 203. For example, § 203 includes those employed "in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces." 29 U.S.C. § 203(e)(2)(A)(iv). A resort to the standards of 5 U.S.C. § 2105, however, would exclude from the definition of employee (for purposes of laws administered by the CSC) "an employee paid from nonappropriated funds" of military exchanges and other instrumentalities of the United States under the jurisdiction of the Armed Forces. 5 U.S.C. § 2105(c). We cannot believe that Congress meant, on the one hand, to set forth certain criteria and, on the other, intended that a mandated resort to another statutory provision would abrogate those criteria.

that this argument reads too much into Congress' silence. In view of the broad language of the FLSA and Congress' aims underlying it, it is our opinion that, in order for other provisions of law to create an exception, they must do so specifically and clearly. *Morton* v. *Mancari,* 417 U.S. 535, 551 (1974). We therefore conclude that possible inconsistency with appropriation authorization cannot be deemed to create an exception to the usual standards by which the FLSA is to be applied.[5]

III

The DOD also argues that, even if the "economic realities" test does apply, the most important factor to be considered is whether the individual involved has met the formalities required by statute. If this is meant to imply that the statutory criteria of Title 5 are to be determinative, it is merely a restatement of your primary argument and must fail for the reasons discussed above.

Moreover, we doubt whether it is even proper to regard a failure to satisfy statutory criteria as of great, rather than controlling, importance. The courts have made clear that the test of an employment relationship is not to depend on technical or isolated factors, but rather "upon the circumstances of the whole activity." *Rutherford Food Corp.* v. *McComb, supra,* at 730; *Goldberg* v. *Whitaker House Cooperative, Inc.,* 366 U.S. 28, 33 (1961); *Hodgson* v. *Griffin and Brand of McAllen, Inc.,* 471 F. 2d 235, 237 (5th Cir. 1973). Thus CSC might quite properly accord more weight to other factors more indicative of the economic realities of the situation.

We do not read your request for our opinion as asking for our views generally as to CSC's application of the "economic realities" test to the facts of this particular case. Nor do we believe that such as assessment is within our province, because such determinations are lodged by law in the Commission. 29 U.S.C. 204(f). Additionally, insofar as the application of the "economic realities" test involves an examination of all the relevant facts and circumstances, we think that the Commission is better suited than this Office to make such a determination. In fact, to

[5] The fact that Congress has directed DOD to reduce commissary personnel and the cost of commissary operations, is not so specifically or explicitly addressed to the situation here as to allow for an exception to Congress' expansive approach in the 1974 amendments. Rather, the mandate to cut costs must be viewed in light of the usual rule that congressional enactments are to be read in harmony, *see, Morton* v. *Mancari, supra,* and we thus believe that this directive must be applied within the constraints imposed by other congressional enactments.

the extent that such an evaluation is a mixed question of law and fact,[6] it is beyond the authority of this Office. 28 U.S.C. § 512. *See* 20 Op. A.G. 240, 242 (1891); 20 Op. A.G. 711 (1894); 19 Op. A.G. 676 (1890).

The decision to apply the FLSA concept of employment to the Federal sector was made by Congress, and in our opinion any other view would depart from the broad language of the statute and Congress' underlying purpose. We accordingly conclude that the criteria of Title 5 are not controlling and that CSC's application of the "economic realities" test to determine the question of the applicability of the FLSA in the Federal sector is proper.

John M. Harmon
Acting Assistant Attorney General
Office of Legal Counsel

---

[6] While the courts have adopted different approaches to this problem, *compare, Walling* v. *General Industries Co.*, 330 U.S. 545, 550 (1947), *Wirtz* v. *Lone Star Steel Company*, 405 F. 2d 663, 669–70 (5th Cir. 1968) (applying the clearly erroneous rule to a question involving the application of the FLSA), *with Rutherford Food Corp.* v. *McComb, supra, Shultz* v. *Hinojasa*, 432 F. 2d 259, 264 (5th Cir. 1970) (regarding the question of FLSA coverage as one of law), the question here, involving the application of a standard to all the circumstances of a given situation, presents a mixed question of law and fact. This appears particularly true where, as here, inferences that are drawn from the facts and are factors in the ultimate determination are subject to conflicting interpretations; your Department's and the Commission's differences on the question of supervision or control are one such example.

May 16, 1977

77-26 MEMORANDUM OPINION FOR THE DIRECTOR OF THE DEPARTMENT OF JUSTICE TASK FORCE ON CRIMINAL CODE REVISION

Detail of Department of Justice Attorneys to Congressional Committees

You have requested the opinion of this Office regarding the legality and ethical propriety of "loaning" one or more attorneys employed by the Department of Justice to the Subcommittee on Criminal Justice of the House Judiciary Committee in connection with that subcommittee's work on the proposed revision to the Federal Criminal Code. You state that this work is expected to take about 18 months to complete. We conclude that such an arrangement would be legal, but that it raises potential ethical problems that should be addressed carefully by those concerned, assuming that the Department is otherwise favorably disposed on the anticipated request from the subcommittee.

The legality of such an arrangement has previously been considered by this Office with regard to the detailing of an Assistant United States Attorney to a House committee. It was concluded that 2 U.S.C. § 72a(f)[1] operates as affirmative authorization for the type of detailing involved here.

Responding to your question concerning the ethical propriety, we have the following comments:

Assuming that an attorney so detailed would continue to be paid by the Department of Justice and that he would expect to return to duty in the Department at the conclusion of his work for the subcommittee, it is reasonable to suppose that he would, in his work on the Code revision, tend to advance the position taken by the Department on that

---

[1] That provision states:

No committee shall appoint to its staff any experts or other personnel detailed or assigned from any department or agency of the Government, except with the written permission of the Committee on Rules and Administration of the Senate or the Committee on House Administration of the House of Representatives, as the case may be.

revision. Thus, Canon 7 of the American Bar Association Code of Professional Responsibility is implicated in that the attorney may not be able adequately to represent the interests of both the Department and the subcommittee. Although the Code of Professional Responsibility, specifically EC 7-16, distinguishes between the role of a lawyer in the legislative process and his role in representing the interests of his client in an adjudicatory process, it may be that the continuing duty owed to the Department by a Department attorney "loaned" to the subcommittee might place that attorney in a difficult position if the interests of the subcommittee and those of the Department were adverse in any given situation.

This problem suggests yet another question—who is the attorney's client, the Department or the subcommittee? If the client is the subcommittee, then the attorney's ability properly to represent his client's interests may be, as shown above, drawn into question. Also, if the subcommittee is the client, the possibility that the attorney will have to draw upon information received by him in confidence in connection with his employment in the Department is great, implicating Canon 4 of the Code of Professional Responsibility.

It is true that under DR 5-105(c) and DR 4-101(c)(1) a lawyer may continue to represent multiple clients and may disclose otherwise confidential information so long as there is full disclosure to all clients and consent by them to his actions. We think that such consent to the proposed arrangement should be worked out in advance if the detailed attorney is to have the subcommittee as his client. If the attorney were instead to be viewed as counsel for the Department detailed by the Attorney General to work *with,* rather than *for,* the subcommittee on the Code revision, the ethical problem would, in our view, no longer exist.

JOHN M. HARMON
Acting Assistant Attorney General
Office of Legal Counsel

May 17, 1977

77-27 MEMORANDUM OPINION FOR THE DIRECTOR OF THE EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

Interchange of Counsel Project—Assistant United States Attorneys and Assistant Public Defenders

This is in response to your memorandum requesting our opinion on the legal and ethical aspects of having one or more Assistant United States Attorneys and Assistant Federal Public Defenders temporarily exchange duties. We understand that the purpose of the proposed exchange is to give the participating attorneys a greater understanding of and sympathy for counsel who appear against them, by allowing prosecutors to defend a number of criminal cases and vice versa. While several types of exchange programs have been conducted, all of the proposed programs necessarily contemplate that the participating attorneys will return to their former duties.

It should be noted at the outset that the attorneys employed by a Federal Public Defender Office are officers of the judicial branch of the Government. They are paid by the Administrative Office of the United States Courts from the appropriation for the judiciary, and they are ultimately responsible to the Judicial Council of the circuit in which they perform their duties. The Department of Justice has no control over them.[1] Assistant U.S. Attorneys, on the other hand, are employees of the Department of Justice.

---

[1] *See* 18 U.S.C. § 3006A(h)(2)(A), (j). The Federal Public Defender Office shares the task of defending indigents accused of Federal crimes with the private bar of the district in which it operates. *See* 18 U.S.C. § 3006A (a), (b).

The statute provides an alternative to the Federal Public Defender Office if the district court and the Circuit Judicial Council prefer the Community Defender Organization. The Community Defender Organization is a private, nonprofit organization funded by a block grant of judicial funds. *See* 18 U.S.C. § 3006A(h)(2)(B). While the statute requires the Community Defender Organization to report its activities and financial position to the Judicial Conference of the United States, it does not appear to prohibit the organization from receiving funds from other sources. Employees of a Community Defender Organization are not Federal employees.

APPLICABILITY OF THE CONFLICT OF INTEREST LAWS AND THE DEPARTMENT'S STANDARDS OF CONDUCT

Section 205 of Title 18, U.S. Code, provides, in pertinent part, as follows:

> Whoever, being an officer or employee of the United States in the executive . . . or judicial branch of the Government . . . otherwise than in the proper discharge of his official duties—
>
> * * * * * * *
>
> (2) acts as agent or attorney for anyone before any department, agency, court-martial, officer, or any civil, military, or naval commission in connection with any proceeding . . . controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest . . .

is guilty of a felony.[2] The statute expressly allows representation "in the proper discharge of . . . official duties." The House committee that drafted the statute stated that its purpose was to protect the "clear public interest in preventing Government employees from *allying themselves* actively with private parties in the multitude of matters and proceedings in which . . . the Government has a direct and substantial interest." [Emphasis added.][3] In the light of this intent, this Office has regarded § 205 as prohibiting Federal attorneys from serving as volunteer or appointed criminal defense counsel in United States and District of Columbia courts. But this limitation does not apply to a Federal Public Defender Office, whose statutory function is to defend Federal criminal cases.

The proposed exchange program therefore differs significantly from other proposals that we have considered. Instead of acting as private individuals or affiliates of a nongovernmental organization, participating Assistant U.S. Attorneys would be assigned by this Department to the Public Defender Office, another Federal Government agency, and would perform the official duties of that organization under its supervision. Those duties would include the defense of Federal criminal prosecutions. Thus, we see no problem as far as § 205 is concerned.[4]

It should also be noted that 18 U.S.C. § 203(a) and 28 CFR 45.735-6(a)(3) prohibit Department attorneys from soliciting or receiving any compensation other than "as provided by law for the proper discharge of official duties" in connection with litigation against the Government. The Department's Standards of Conduct, 28 CFR § 45.735-9(e), permit Department attorneys to provide uncompensated legal assistance to indigents in off-duty time, but in that connection they forbid "represen-

---

[2] The Department's Standards of Conduct, 28 CFR § 45.735-6(a)(2), duplicate the statute.

[3] H.R. Rep. 748, 87th Cong., 1st Sess., p. 9.

[4] This conclusion does not apply to the assignment of Department of Justice attorneys to a private legal services organization, such as a Community Defender Organization.

tation or assistance in any criminal matter or proceeding, whether Federal, State or local." For the reason stated above, we are of the opinion that these provisions do not restrict participation in an exchange program with a Federal Public Defender office.

Ethical Implications

The contemplated exchange program does, however, raise ethical problems. The participating attorney is in a situation where his loyalties may be divided between a temporary and a permanent employer. When a temporary and permanent employer represent conflicting legal interests, the American Bar Association (ABA) Code of Professional Responsibility severely limits the attorney's freedom of action. Here the interest of the Assistant U.S. Attorneys is to prosecute and to establish case precedent conducive to effective prosecution; the interest of the Public Defender is to defend and to develop case law favorable to defendants. There is a certain inherent conflict in the two roles.

The disciplinary rules implementing Canon 5 of the Code of Professional Responsibility embody the ancient maxim that a person cannot serve two masters. Of particular significance is DR 5-105(A), which provides as follows:

> A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

The rule applies not only to open conflicts but also to "subliminal or concealed" influences on the attorney's loyalty. *Goodson* v. *Payton,* 351 F. 2d 905, 909 (4th Cir. 1965); ABA Formal Opinion 30. For that reason it is considered unethical for an active prosecutor to represent criminal defendants in his or her own or another jurisdiction. *See* ABA Formal Opinions 30, 34, 118, 142. Similarly, it is considered unethical for an attorney or his associates [5] to attack the result of his professional efforts on behalf of a former private or governmental employer. ABA Formal Opinions 33, 64, 71. Finally, the rule would prohibit an attorney who is temporarily absent from his employer, with arrangements

---

[5] DR 5-105(D) provides:

> If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue employment.

While this rule clearly applies to colleagues with whom the lawyer shares a common financial interest, it also serves to prevent even the possible appearance of conflicting loyalties or disclosure of confidences within a group of lawyers who practice together. *See* ABA Formal Opinions 16, 33, 49, 296, 306; Informal Opinion 1235.

made for his return, from representing interests adverse to those of the permanent employer. ABA Formal Opinion 192.[6]

In a recent opinion,[7] the ABA considered the propriety of a military legal office providing both prosecution and defense counsel in the same court-martial. It was willing to approve the arrangement only if individual attorneys were assigned, as far as practicable, exclusively to prosecution or defense work. It stated that "performance of adverse roles in succeeding cases within the same jurisdiction, even though the cases themselves may be entirely unrelated, will involve lawyers in potentially awkward situations." The opinion continued:

> Depending on whether a lawyer is cast in a defense or prosecutorial role, he may be required to frame and advocate interpretations of established rules of law or procedure that are, or seem to be, poles apart. He may be required to criticize police actions in one case, then turn about to defend the same or similar actions in a subsequent case where the facts may be, or seem to be, the same. He will deal frequently with the same investigative or police personnel; he may appear before the same [judges]. In the course of this, the temptations may be great to mute the force of advocacy, or adjust the handling of cases in subtle ways.

The opinion also noted that an appearance of impropriety would be created, in violation of Canon 9, when the same attorney represented the prosecution and the defense in succeeding cases.

It is certainly open to argument that any temporary exchange of attorneys between a U.S. Attorney's Office and a Federal Public Defender's Office would create conflicting loyalties in violation of Canon 5 and DR 5-105(A). The interests of the respective offices serving in the same district are plainly adverse. Even if the participants in an exchange program were sent to other districts, they would still be involved in creating precedent adverse to the interests served by their permanent employers. The possibility that they would maintain a conscious or subliminal loyalty to the permanent employer is enhanced by the fact that both the Department of Justice and the Federal Public Defender Offices have considerable discretion in the pay and promotion of their attorneys.[8] It would be difficult to avoid the appearance that a

---

[6] In Formal Opinion 192, the question was whether a lawyer temporarily employed full time by the government could remain a member of his former law firm if he received no compensation from it. The opinion concluded that he could remain a member of the firm only "so long as the firm refrains from representing interests adverse to the employer."

[7] ABA Informal Opinion 1235 (August 24, 1972). *Accord: Goodson* v. *Payton, supra,* at 908. 908.

[8] *See* 18 U.S.C. § 3306A(h)(2)(A); 28 U.S.C. § 548; 28 CFR § 0.15(b)(3)(ii).

public defender, who is on temporary assignment from a prosecutor's office that controls his immediate professional future, might be deliberately or unconsciously devoting less than his best efforts to the defense of his clients. The same would, of course, be true of a public defender assigned to the Department.[9]

The exception to DR 5-105(A) contained in DR 5-105(C)[10] would not appear to apply here. Assuming that "multiple clients" within the meaning of the rule include successive clients with differing interests, the exception applies only when it is "obvious" that the lawyer can adequately represent the interest of each client and all clients have given their fully informed consent. Given the conflict between the interests represented by U.S. Attorneys and the Federal Public Defenders and the control they have over the pay and promotion of their subordinates, it is by no means obvious that an attorney temporarily attached to the one would not retain some permanent loyalty to the other. Moreover, the need to obtain the informed consent of a defendant whenever an Assistant U.S. Attorney is assigned to him could limit considerably the number of cases in which he could participate.

Effective Assistance of Counsel

Finally, the temporary assignment of an Assistant U.S. Attorney as defense counsel would also present a problem with respect to a defendant's Sixth Amendment right to effective assistance of counsel. It is well settled that effective assistance has not been provided "if counsel, unknown to the accused, and without his knowledgeable assent, is in a duplictous position where his full talents—as a vigorous advocate having the single aim of acquittal by all fair and honorable means—are hobbled or fettered, or restrained by commitments to others." [11] The Fourth Circuit, moreover, has held that the possibility of "subliminal or concealed" influences is so great that the assignment of a prosecutor as defense counsel without the consent of the accused is *per se* a denial of the right to counsel.[12] It should also be noted that the Third Circuit, in

---

[9] There appear to be no published ethics opinions of the ABA or other organizations concerning the exchange programs that are being conducted in several States.

[10] DR 5-105(C) provides:

> In the situations covered by DR 5-105(A) . . . a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

[11] *Porter* v. *United States*, 298 F. 2d 461, 463 (5th Cir. 1962). *Accord: United States* v. *Jeffers*, 520 F. 2d 1256 (7th Cir. 1975); *United States el rel Hart* v. *Davenport*, 478 F. 2d 203 (3d Cir. 1974); *Goodson* v. *Payton*, 351 F. 2d 905 (4th Cir. 1965). *See, generally, Glasser* v. *United States*, 315 U.S. 60 (1942).

[12] *Goodson* v. *Payton*, 351 F. 2d 905, 908–09 (4th Cir. 1965) *supra*. The case arose from the Virginia practice, since discontinued, of assigning the prosecuting attorney of one rural county as defense counsel in other counties if no local attorney was available. *Id.* at 906–07; *see, also, Yates* v. *Payton*, 378 F. 2d 57 (4th Cir. 1967).

The Sixth Circuit has declined to adopt a *per se* rule. *See, Dawson* v. *Cowan*, 531 F. 2d 1374, 1376 (6th Cir. 1976); *Harris* v. *Thomas*, 311 F. 2d 560, 561 (6th Cir. 1965).

obiter dictum, has defined "normal competency" of counsel for Sixth Amendment purposes to include "such adherence to ethical standards with respect to avoiding conflicting interests as is generally expected from the bar." [13]

It seems to us that on the basis of these cases an Assistant U.S. Attorney serving temporarily as a public defender could not constitutionally be assigned to a defendant without his informed consent. Regardless of the outcome of litigation on this point, the possibility impairs the usefulness of any assistant participating in an exchange program.

In conclusion, it is our opinion that the statutes governing conflicts of interest and the Department's Standards of Conduct do not as such prohibit the temporary assignment of Assistant U.S. Attorneys to Public Defender Organizations as defense counsel in criminal cases. However, under both the Code of Professional Responsiblity and case law concerning effective assistance of counsel, any assistant so assigned could not represent a defendant without obtaining his informed consent after complete disclosure of his apparent conflicting interests. There is also precedent from one Federal circuit that would appear to make it a *per se* denial of effective assistance of counsel for an Assistant U.S. Attorney to be assigned to a defendant. In our opinion, the requirement of disclosure and consent and the risk of direct or collateral attack on convictions in which a participating Assistant U.S. Attorney was involved, may seriously impair the usefulness of any exchange program involving Assistant U.S. Attorneys.

JOHN M. HARMON
Acting Assistant Attorney General
Office of Legal Counsel

---

[13] *United States ex rel. Hart Davenport,* 478, F. 2d 203, 210 (3d Cir., 1974).

May 24, 1977

77-28 MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION

Standards of Conduct—Application Pursuant to 28 CFR § 45.735-9(c)

This is in response to your request for our evaluation of Mr. A's second application for leave to argue a civil rights case for private plaintiffs.

Before coming to the Department, Mr. A was counsel for the plaintiffs under the auspices of a private nonprofit organization concerned with civil rights policy and litigation. The United States is not a party to the case, and the Department has not appeared as *amicus* or otherwise.

The matter is governed by the Department's Standards of Conduct, 28 CFR § 45.735-9(a), which provide that:

> No professional employee shall engage in the private practice of his profession, including the practice of law, except as may be authorized by or under paragraph (c) or (e) of this section.

Paragraph (c) provides that the Associate Attorney General [1] may make specific exceptions to paragraph (a) in "unusual circumstances." Applications under paragraph (c) must be transmitted through the applicant's superior.[2] Also relevant is 28 CFR § 45.735-9(d), which prohibits employees from engaging in off-duty employment which would interfere with the performance of their official duties, create actual or apparent conflicts of interest, or reflect adversely on the Department.

From the attached documents, we understand that the case in question is a class action, filed in May 1973, which alleged hiring discrimination by the local police and fire departments in violation of 42 U.S.C. §§ 1981 and 1983. In January 1975 the district court found that the police department had engaged in racial discrimination and ordered affirmative relief, including allocation of new hires by race. The decision was affirmed by the circuit court in June 1976. In May of that year, the fire department case was settled by a consent decree provid-

[1] Formerly the Deputy Attorney General.

[2] 28 CFR § 45.735(e), which governs participation in legal aid programs for the indigent, does not apply to this matter.

ing for similar relief. However, in October 1976 the circuit court vacated its decision and remanded the police department case to the district court for rehearing in the light of *Washington* v. *Davis,* 426 U.S. 229 (1976).

Mr. A entered on duty on January 31, 1977. Insofar as we are aware, he could have delayed coming to the Department until he had briefed and argued the case. Instead, on December 26, 1976, he requested leave from the then head of the Civil Rights Division and the then Deputy Attorney General, pursuant to § 45.735-9(c), to brief and argue the case on rehearing after he came to the Department.

In substance, Mr. A alleged that under *Davis* the district court would have to consider the factual issue of the police department's discriminatory intent, and that he was uniquely qualified to argue this issue. In support of the request, Mr. A stated that he had been lead counsel from the inception of the case, that his replacement was unfamiliar with the factual background, that local counsel was not expert in the legal issues involved, that no transcript had been made because the district court preferred to videotape the testimony, and that he had already drafted a substantial portion of the brief. Mr. A asserted that his familiarity with the case, his trial notes, and his legal skills were of critical importance to the successful presentation of the police department case. He also stated that he would disclaim any connection with the United States Government and would receive no compensation for his efforts.

On January 31, 1977, the Acting Deputy Attorney General ruled that in the light of the "unusual circumstances," Mr. A might assist in the preparation of plaintiffs' brief but could not participate in any way in oral argument. Moreover, his ruling was subject to the conditions that Mr. A's efforts not interfere with his official duties, that he receive no compensation, and that his work for the private, nonprofit organization would create neither an actual nor apparent conflict of interest, as required by 28 CFR § 45.735-9(d). Mr. A prepared and signed plaintiffs' brief, in which he stated that he was not acting in his official capacity and that his participation did not represent the Department or the United States. The brief was filed on March 21, 1977. The case is ready for argument, but argument has not yet been scheduled.

The Department has already ruled that Mr. A's involvement in the case was a sufficiently "unusual circumstance" under 28 CFR § 45.735-9(c) to permit him to commit his time and effort to the brief and to identify himself with it. The immediate question here is whether a distinction should be drawn between preparing and signing the brief and participating in oral argument.

The ruling of the Acting Deputy Attorney General does not discuss the distinction between the two. The Executive Assistant to the Associate Attorney General informs us that it is the Department's policy not to allow its attorneys to practice in the Federal courts. He says that an exception was made for Mr. A to finish the brief because he had

already done substantial work on it and there did not appear to be time for his successor to become sufficiently familiar with the case before the brief was due. This was not true of oral argument, which had not yet been set.

The possible impact on the Department if Mr. A argues the case is threefold. First, a portion of his time and energy will be absorbed. Second, there is a risk that the Department will be identified with plaintiffs' position in the public mind, despite any disclaimer by Mr. A. Third, he will continue his professional association with the private organization, which is one that interests itself in litigation related to his official duties. *See* 28 CFR § 47.735–9(d).

The hardship to Mr. A's former clients if he does not argue their case is substantially less than if he had not prepared the brief. His replacement has had more time to familiarize himself with the case, and it should be possible to reduce the videotaped testimony to a transcript. Oral argument has not yet been scheduled. Moreover, as shown by the timing of his initial request, Mr. A knew before he came to the Department that its regulations forbade outside professional employment. He and his clients have had at least 4 months to arrange their affairs accordingly. In the light of these facts, we do not believe that there is sufficient reason to allow Mr. A. to continue his private practice while a Government employee.

In conclusion, the responsibility for ruling on Mr. A's request lies in the first instance with the Assistant Attorney General for the Civil Rights Division and ultimately with the Associate Attorney General. In our opinion, the unusual circumstances that were found to justify Mr. A's appearance on the brief arose during the short time between his entry on duty and the due date of the brief. Because these circumstances no longer exist, our evaluation is that it would not be unduly harsh to deny Mr. A leave to argue the case, although that decision is not ours.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

May 24, 1977

77-29 MEMORANDUM OPINION FOR THE GENERAL COUNSEL OF THE CIVIL AERONAUTICS BOARD

President's Authority To Appoint an Acting Chairman of the Civil Aeronautics Board

This is in response to your letter concerning the President's authority to appoint an Acting Chairman of the Civil Aeronautics Board (CAB). Your communication to the Assistant Counsel to the President took the position that the President may not designate an Acting Chairman as long as it had a Vice Chairman. You based that view on 49 U.S.C. § 1321(a)(2), which provides that the Vice Chairman of the Board "shall act as chairman in the absence or incapacity of the chairman."

Statutes that authorize an officer to "act" for another normally cover three situations: vacancy, absence, and incapacity.[1] The three terms are not synonymous. "Vacancy" connotes the lack of any incumbent, as through death or resignation, while "absence" and "incapacity" describe an incumbent who is physically or legally unable to perform the duties of his office. *See* 63 Am. Jur. 713. Therefore, a statute that deals only with absence or disability does not provide for an acting officer in the event of a vacancy.[2]

Had Congress intended that the Vice Chairman of the CAB should serve as Acting Chairman in case of a vacancy in the office of Chairman, it could readily have so provided by including "vacancy" among the contingencies covered by § 1321(a)(2). Whether it should have, is not the issue. It did not, and nothing in the legislative history of the

---

[1] *See, e.g.,* 12 U.S.C. § 4 (Deputy Comptroller of the Currency); 28 U.S.C. § 508(a) (Deputy Attorney General); 31 U.S.C. § 16 (Deputy Director, Office of Management and Budget); 31 U.S.C. § 42 (Deputy Comptroller General). "Incapacity" and "disability" are used synonymously in these statutes.

[2] *Compare, for example,* 10 U.S.C. § 134(b), which authorizes the Deputy Secretary of Defense to act as Secretary only in the event of absence or disability, *with* 10 U.S.C. § 3017, which empowers the Under Secretary of the Army to perform the Secretary's duties in the event of death, resignation, removal, absence, or disability.

statute shows any intent to the contrary. It is therefore our opinion that § 1321(a)(2) did not preclude the President from designating a member of the Board as Acting Chairman.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

May 24, 1977

77-30 MEMORANDUM OPINION FOR THE CHAIRMAN OF THE RENEGOTIATION BOARD

Determination of Date of Commencement of Service of Federal Officers—Renegotiation Board

This is in response to your letter requesting that this Office advise you whether two recently appointed members of the Renegotiation Board began their service, for purposes of seniority, when their commissions were signed by the President or when they took the oath of office. From your letter, we understand that the President signed the commission of Mr. A four days before he signed the Commission of Mr. B. We further understand that neither commission was stated to be subject to any condition precedent and that both Messrs. A and B took the oath of office on the same day.

The Constitution provides that the President "shall appoint . . . officers of the United States," Art. II, § 2, and that he "shall commission all the officers of the United States." *Id.* § 3. It is silent as to when an appointment is effective. But at an early date the Supreme Court held in *Marbury* v. *Madison,* 5 U.S. 137, 156 (1803), that the last act to be done by the President in the appointment process "is the signature of the commission." And in *United States* v. *LeBaron,* 60 U.S. 73, 79 (1856), the Court stated that with respect to an appointment "[i]t is of no importance that the person commissioned must give a bond and take an oath." Although there appear to be no judicial or administrative holdings directly in point on the questions you pose, it is our opinion that these cases establish the proposition that where two officers in the same body are commissioned on different dates, the officer commissioned first is the senior. Any doubt on this score is resolved by the Acts of Congress dealing with the precedence of Federal judges, which confer precedence according to the date of their commissions. 28 U.S.C. § 4 (Supreme Court), 28 U.S.C. § 45(b) (circuit judges), 28 U.S.C. § 136(b) (district judges), 28 U.S.C. § 172 (Court of Claims).

We therefore conclude that Mr. A takes precedence over Mr. B because his commission was signed prior to the date that Mr. B's was

signed. It should be noted, however, that the beginning of service for other purposes, such as the computation of pay, is determined under different principles.

JOHN M. HARMON
Acting Assistant Attorney General
Office of Legal Counsel

May 31, 1977

77-31 MEMORANDUM OPINION FOR THE DIRECTOR OF THE EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

United States Attorney, Virgin Islands—Hatch Act Applicability

This responds to your request for our opinion regarding the applicability of the Hatch Act or any other law or regulation to the questions posed by the United States Attorney for the Virgin Islands. The first question is whether employees of the Department of Justice (including the attorney and his or her assistants) may run for and serve as delegates to the forthcoming Virgin Islands constitutional convention; and, if so, whether they must or should take a leave of absence from their official positions during the proceedings of the convention.

The U.S. Attorney describes as a given "the nonpolitical, nonpartisan description of the Office of Delegate to the Constitutional Convention," and he has forwarded the relevant Virgin Islands legislation authorized for enactment by Congress in Pub. L. No. 94-584, 90 Stat. 2899. So far as relevant here, the Federal statute merely authorizes the Virgin Islands legislature to call a convention to draft a constitution for local self-government. The Virgin Islands legislation sets forth the qualifications of delegates as follows (§ 4):

> (a) a citizen of the United States; and
>
> (b) a qualified elector of the Virgin Islands; and
>
> (c) a resident of the legislative district from which he or she has been elected for not less than three years immediately preceding the date of election.

It further provides in § 6 for a special election for delegates and that "no political party symbols nor political party designation shall appear on any ballot."

The Hatch Act, 5 U.S.C. § 7321 *et seq.,* does not prohibit the proposed activity. Section 7326(b) states that political activity of Federal executive branch employees is not prohibited where the activity is "in connection with . . . a question which is not specifically identified with a National or State political party or political party of a territory or

possession of the United States." The section goes on to state that "questions relating to constitutional amendments, referendums, approval of municipal ordinances, and others of a similar character, are deemed not specifically identified with a National or State political party or political party of a territory or possession of the United States." It is clear that the activity here involved is not prohibited.[1]

The applicable regulation appears in 28 CFR § 45.735.19, which merely embodies the restrictions of the Hatch Act. We also note that with respect to 5 U.S.C. § 7326, the Federal Personnel Manual states that "Even if section 7326 permits the political activity involved in securing and holding an office, the holding of the office must not interfere with the efficient discharge of the duties of the Federal office. On this question the head of the Federal department or agency is the sole judge." We believe that this is an issue for you to decide in the light of whether the functions of the Virgin Islands office nevertheless can be effectively carried on; obviously, the officials involved should not be absent from their jobs for protracted periods that would leave their offices vacant or be unduly diverted from performing their normal tasks.

As to the second question, concerning a leave of absence, we are not aware of any legal requirement therefor. It may be that what is meant is "leave without pay." On this point we refer you to the Federal Personnel Manual, Chapter 630, Subchapter 12. The appropriate officials in the Office of Management and Finance should also be consulted.

Leon Ulman
Deputy Assistant Attorney General
Office of Legal Counsel

---

[1] It should be noted that in 1966 this Office advised the Deputy Attorney General that the Hatch Act did not permit a United States Attorney to run for the office of delegate to a State constitutional convention where the delegates would be nominated by their political parties and run under the party name and emblem.

June 2, 1977

77-32 MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

"Office under the United States"—National Commission on Neighborhoods

You have asked for our opinion concerning the question of whether service by a State official as a member of the National Commission on Neighborhoods would constitute holding an office under the authority of the United States. It is our opinion that it would not be so construed under the Federal Constitution. Article I, Section 6, Clause 2 provides in part that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." The legislation establishing the agency itself includes as members two Members of the Senate and two Members of the House. Obviously, it was not intended that they must relinquish their congressional offices.

The practice of Presidents in appointing Members of Congress as commissioners to negotiate treaties and agreements with foreign governments is noted in Constitution of the United States of America, Revised and Annotated, 1972, p. 523: Such appointments "are ordinarily merely temporary and for special tasks, and hence do not fulfill the tests of 'office' in the strict sense." The classic definition of an office in the constitutional sense is found in *United States* v. *Hartwell,* 6 Wall. 385, 393 (1867):

> An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties.

The Court determined that Hartwell, a clerk in the office of the Assistant Treasurer of the United States, was an officer, in part because "his duties were continuing and permanent, not occasional and temporary."

Your attention is also invited to the discussion (in an 1899 House Judiciary Committee report (Rep. No. 2205, 55th Cong., 3rd Sess.)) of whether holding positions on certain commissions constituted holding office within the meaning of the Constitution.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

June 3, 1977

77-33 MEMORANDUM OPINION FOR THE SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Constitutionality of S. 1397—Federal National Mortgage Association

The Attorney General has asked that we respond to your request for an opinion concerning the constitutionality of the provisions of S. 1397. The proposed legislation would amend the Federal National Mortgage Association Charter Act to increase the size of the Board of Directors of the Federal National Mortgage Association (FNMA), and would make FNMA subject to the Freedom of Information Act.

FNMA's counsel has prepared a legal memorandum arguing that S. 1397 raises Fifth Amendment questions regarding the prohibitions against the taking of private property without "due process of law" or "just compensation." Your legal counsel prepared a rebuttal paper to FNMA counsel's arguments, and concluded that FNMA's arguments were without merit. We have reviewed the proposed legislation and relevant case law and it is our conclusion that the enactment of S. 1397 would constitute a legal exercise of congressional power and clearly stand within the boundaries of the Constitution.

At present, the Board of Directors of FNMA (the Board) consists of 15 persons, 5 appointed annually by the President and 10 elected annually by the common stockholders.[1] S. 1397 would amend § 308(b) of the National Housing Act to allow the President to appoint 9 directors while leaving the number elected by the common stockholders at 10. This proposed amendment raises four questions of law that require discussion in order to determine the ultimate question of the constitutionality of S. 1397.

(1) Did the charter granted to FNMA by the Government create contractual rights between the Government, FNMA, and the stockholders?

---

[1] *See* 12 U.S.C. § 1723(b) (1970). Initially, FNMA's preferred stock was held by the Secretary of the Treasury. It was retired in accordance with the Act, and FNMA became a privately owned corporation. *See* 12 U.S.C. § 1718 (1970).

(2) Are contractual rights derived from a legislative act protected by the Constitution?

(3) Do the stockholders of FNMA have vested rights to the continuation of FNMA's charter in its present form?

(4) If the proposed legislation were enacted into law, would it effect a "taking" of FNMA's stockholders property without "due process of law" or "just compensation"?

In our opinion, the answer to the first two questions is yes and to the latter two is no.

The starting point, more out of tradition than legal necessity, is the *Dartmouth College Case.*[2] The Supreme Court held that the granting of a charter by the State of New Hampshire to the school created a contract between the State, the trustees, and the individuals who conveyed property to the corporation. When the State of New Hampshire attempted to amend the charter to increase the number of trustees, the Supreme Court held that the legislation amending the charter violated Article I, § 10 of the United States Constitution, which, *inter alia,* states that "[n]o state shall . . . pass any . . . Law impairing the obligation of Contracts."

While the congressional action proposed in S. 1397 is analogous to that involved in the *Dartmouth College Case,* it is well settled that "[t]he Contract Clause . . . is a limitation on state rather than federal action."[3] And, the question whether the Federal Government can pass laws that modify, amend, or repeal contracts between it and private parties has been answered in the affirmative.[4] However, "a measure of protection against contract impairment by the federal government is given by the Fifth Amendment."[5] The Supreme Court, in *Lynch* v. *United States,*[6] held that rights under a contract with the Government are property, which the Fifth Amendment protects from a statutory "taking" without just compensation.[7]

It seems clear that (1) the Federal Government is not restrained by Article I, § 10 of the Constitution from impairing the obligation of contracts; (2) the Federal Government, through legislation, can create contractual rights with private parties; and (3) these contractual rights are property that is protected by the Fifth Amendment. Thus, we conclude that the Federal Government has the power to alter the obligation of contracts and "need only adhere to the due process requirements of the Fifth Amendment."[8]

---

[2] *Dartmouth College* v. *Woodward,* 17 U.S. (4 Wheat) 518 (1819).

[3] *John McShain, Inc.* v. *District of Columbia,* 205 F. 2d 882, 883 (D.C. Cir., 1953).

[4] *See cases cited infra,* at notes 9, 10, and 12.

[5] *John McShain, Inc.* v. *District of Columbia, supra,* note 3, 205 F. 2d at 884.

[6] 292 U.S. 571 (1934).

[7] *Id.* at 579.

[8] *United States* v. *One 1962 Ford Thunderbird,* 232 F. Supp. 1019, 1021 (N.D. Ill., 1964).

The case law supports the foregoing conclusion.[9] As the Supreme Court stated in *Federal Housing Administration* v. *The Darlington, Inc.*,[10] " '[s]o long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it. Immunity from federal regulation is not gained through forehanded contracts.' " [11]

Moreover, at least one case suggests that the Federal Government can modify or rescind a contract by later legislation without regard to the prohibitions of the Fifth Amendment, except where rights are vested.[12] This raises the question whether the stockholders of FNMA have a vested right to the continuance of FNMA's charter in its present form.

The case of *Fahey* v. *O'Melveny & Myers* [13] teaches that, to determine whether the stockholders of FNMA have a vested right in its present form, one must look first at the nature of the contract. Although not the same case, *O'Melveny & Myers* points to the right legal direction in the present matter. Like FNMA, the privately owned corporation in *O'Melveny & Myers* was a creature of Federal legislation. The predecessor of the Federal Home Loan Bank Board had abolished the Federal Home Loan Bank of Los Angeles and Portland (Oregon) and merged them into a new Federal Home Loan Bank of San Francisco. The court reviewed the Home Loan Bank Act and the contractual obligations it established, and concluded that

> ". . . a Federal Home Loan Bank is a federal instrumentality . . . neither the bank nor its association members, although they are nominally stockholders, acquire under the provisions of the Bank Act, any vested interest in the continued existence of said bank or any legally protected private rights which would enable them to invoke the due process clause."[14]

The court noted that "[t]his legislatively created system of Home Loan Banks exemplifies the principle that whatever rights and privileges Congress may constitutionally confer, it may withhold. . . ." [15]

Similarly, the Federal National Mortgage Association Charter Act provides the only authority for the creation of FNMA, and expressly

---

[9] *See, Norman* v. *B. & O. R. Co.*, 294 U.S. 240, 309-310 (1935), holding that "[t]here is no constitutional ground for denying to the Congress the power expressly to prohibit and invalidate contracts although previously made, and valid when made, when they interfere with the carrying out of the policy it is free to adopt;" *Hart* v. *Aluminum Co. of America*, 73 F. Supp. 727, 728 (W.D. Pa., 1947), stating that "[b]y a subsequent statute Congress may withdraw rights granted by a statute without violating any provision of the Constitution"; and *Home Building & Loan Association* v. *Blaisdell*, 290 U.S. 398, 437 (1934), where the Court stated that "[t]he economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts."

[10] 358 U.S. 84 (1958).

[11] *Id.* at 91.

[12] *Southwestern Petroleum Corporation* v. *Udall*, 361 F. 2d 650, 654 (10th Cir., 1966).

[13] 200 F. 2d 420 (9th Cir., 1952).

[14] *Id.* at 446.

[15] *Ibid.*

authorizes its business existence. While, under the statute, after a transition period, it was to become a privately owned corporation, it is a corporation of the United States. Unlike *O'Melveny & Myers*, the charter did not invest FNMA "with all the attributes and characteristics of a purely private corporation and immediately clothed it and all of the properties in its control and possession with all of the protections provided by general law as in a case where a purely private corporate enterprise was involved."[16]

The legislative history demonstrates that FNMA was to be a "Government-sponsored private corporation" with "a status analogous to that of the Federal land banks and the Federal home loan banks." [17] Moreover, 12 U.S.C. § 1723a(h) provides that "[t]he Secretary of Housing and Urban Development shall have general regulatory power over the Federal National Mortgage Association and shall make such rules and regulations as shall be necessary and proper to insure that the purposes of this subchapter are accomplished."[17]

FNMA was organized to carry out a public policy.[18] Its organization and incorporation are pursuant to a law of Congress which authorized its undertaking. Thus, all obligations on the part of the Government and any rights of the shareholders derived from those obligations "must be understood as having been made in reference to the possible exercise of the rightful authority of the Government, and that no obligation of a contract 'can extend to the defeat' of that authority."[19]

As previously noted, it is true that Congress intended that the stock of FNMA be privately owned, but it also intended that the hand of the Federal Government would continue to rest upon its shoulder; it remains subject to the regulatory oversight of both the Department of Housing and Urban Development and the Department of the Treasury.[20] It has been stated that "[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." [21]

It is our opinion that FNMA's stockholders have no vested right [22] to the continued existence of FNMA in its present form and no protected private right that would enable them to invoke the prohibitions of the Fifth Amendment.[23] To vest them with such a right would be to tie the

[16] *Fahey* v. *O'Melveny & Myers, supra,* note 13, 200 F. 2d at 442.

[17] *See* S. Rep. No. 1123, 90th Cong., 2d Sess. 79 (1968).

[18] 12 U.S.C. § 1723a(h) states that "[t]he Secretary may require that a reasonable portion of the corporation's mortgage purchases be related to the national goal of providing adequate housing for low and moderate income families. . . ."

[19] *Norman* v. *B. & O. R., supra,* note 9, 294 U.S. at 305. "Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as postulate of the legal order . . . ." *Home Building & Loan Association* v. *Blaisdell, supra,* note 9, 290 U.S. at 435.

[20] *See* 12 U.S.C. §§ 1717(a)-(b), 1718, 1719, and 1723a(h) (1970).

[21] *FHA* v. *The Darlington, Inc., supra,* note 10, 358 U.S. at 91.

[22] *See text, supra* at pages 5-7 and note 35, *infra*.

[23] *See text, supra* at notes 14 and 15, and note 35, *infra*.

hands of Congress in its attempt, through legislation, to provide adequate housing for its citizens.[24] Only recently, the Supreme Court stated that "[a]s is customary in reviewing economic and social regulation, however, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure."[25]

The final question on this matter is whether S. 1397 would result in "taking" of FNMA's stockholders' property without "due process of law" or "just compensation"? For the reasons set forth above, we respond in the negative. We concluded above that FNMA stockholders have no vested rights in the continuation of the FNMA charter in its present form. However, even if FNMA's stockholders have an "inchoate" or a "vested" right that is protected by the Fifth Amendment, we do not think the action contemplated by the proposed legislation would enable them to invoke the prohibitions of the Fifth Amendment. As was pointed out in *El Paso* v. *Simmons*,[26] ". . . it is not every modification of a contractual promise that impairs the obligation of contract under federal law . . . ."[27] particularly, where a revision of law makes no real substantive change.

Furthermore, Congress expressly reserved the right to dissolve FNMA's charter.[28] Because Congress has the right under the enabling law to abolish FNMA, it arguably has the right to amend or otherwise alter the charter as it sees fit.[29] But, if FNMA's stockholders had an "inchoate" or "vested" right to its continuing in its present form, then a stockholder's right could be materially affected differently if the corporation continued under a different managerial scheme than if it were dissolved and liquidated.[30] These considerations, however, carry little import in the present matter.

As noted above, the proposed legislation would increase the number of persons appointed to the Board by the President from five to nine, leaving the number elected by the common stockholders standing at 10. Therefore, S. 1397 would have the effect of reducing the number of directors elected by FNMA's stockholders from two-thirds to one more than one-half. But, what effect would this contemplated action have on

---

[24] "The presumption is that such a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *Dodge* v. *Board of Education*, 302 U.S. 74, 79 (1937).

[25] *United States Trust Company* v. *New Jersey*, 431 U.S. 1, at 23–24 (1977).

[26] 379 U.S. 497 (1965).

[27] *Id.* at 506–507.

[28] *See* 12 U.S.C. § 1717(a)(2)(B) (1970).

[29] Congress has the constitutional power to abolish a legislatively created corporation, even if it does not expressly reserve such power. Whatever rights and privileges Congress is authorized to give, it is also authorized to take away. *See text, supra* at note 15. It seems unnecessary to say that an existing legislature could not pass a law that a subsequent legislature could not amend or repeal.

[30] Upon liquidation the stockholders would be entitled to a *pro rata* share of the corporation's assets after payment of all indebtedness. Under a new managerial scheme, assuming they decided to end their association with the corporation, they would be forced to sell their stock at the market price, which might be more or less than they would receive if the corportion was dissolved.

any "inchoate" or "vested" rights of FNMA's stockholders? On its face it would appear to impair their ability to exercise control over the policies and business judgments of the corporation.[31]

First, as the Supreme Court stated in *Norman*, "[c]ontracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity."[32]

Thus, as was pointed out in *O'Melveny & Myers*, ". . . men do not go blindly into these Home Loan Bank ventures—they assume all of the obligations with all of the legislative and administrative 'strings' attached when a charter is granted to them by the Board."[33] In the present matter, the stockholders entered the arrangement with "all of the legislative and administrative 'strings' attached." One of those "strings" was the chance that a subsequent legislature would exercise its constitutional authority and amend FNMA's charter.

Second, § 4.09 and § 4.12(b) of the bylaws make clear that policies and business judgments can be made by a simple majority.[34] Thus, stockholders would still elect a majority of the Board's members.

Moreover, the extent to which the Board of Directors sets policies and makes business judgments must be considered in light of the fact that 12 U.S.C. § 1723a(b) provides that "[n]o stock, obligation, security, or other instrument shall be issued by the corporation without the prior approval of the Secretary."[35] This requirement stands whether the majority vote on a particular matter is 51 percent or 100 percent.[36] Thus, the proposed legislation would leave the stockholders close to where it found them; the harm, if any, is relatively small when all of the appropriate factors are considered.[37]

As we stated at the beginning, S. 1397 also would make FNMA subject to the provisions of the Freedom of Information Act. Little

---

[31] It should be noted that the proposed legislation in no way tampers with FNMA's common stock, and thus does not diminish its value to the stockholders or its voting strength.

[32] *Norman* v. *B. & O. R. Co.*, *supra* note 9, 294 U.S. at 307–308.

[33] *Fahey* v. *O'Melveny & Myers*, *supra* note 13, 200 F.2d at 444.

[34] A two-thirds affirmative vote of the Board of Directors is required to alter, amend, or repeal the bylaws. See Article 7 of the ByLaws of the Federal National Mortgage Association, as amended.

[35] " 'A vested right * * * [is] one which is absolute, complete, and unconditional to the exercise of which no obstacle exists, and which is immediate and perfect in itself and not dependent upon a contingency.' " *Hutton* v. *Autoridad Sobre Hogares De La Capital*, 78 F. Supp. 988, 994 (Puerto Rico, 1948). Under 12 U.S.C. § 1723a(h), the Board of Directors do not have this absolute, complete, and unconditional right, the stockholders' right can be no greater. *See also* note 18, *supra*.

[36] It could be argued that the Secretary is more likely to approve a decision of the Board if its vote is 10 to 5 as opposed to 10 to 9. But the matter in question calls for an interpretation of the law, not a forecast of the Secretary's probable actions.

[37] "Laws which restrict a party to those gains reasonably to be expected from the contract are not subject to attack under the Contract Clause, notwithstanding that they technically alter an obligation of a contract." *El Paso* v. *Simmons*, *supra*, note 26, 379 U.S. at 515.

need be said on this issue except that Congress, as a matter of public policy, has the constitutional power to subject the FNMA to the Freedom of Information Act. It is worth noting that Amtrak, a privately owned corporation,[38] is already subject to the Act.[39]

For the foregoing reasons we are of the opinion that S. 1397 is constitutional.

JOHN M. HARMON
Acting Assistant Attorney General
Office of Legal Counsel

---

[38] Like FNMA, Amtrak is a privately owned corporation that was created by an Act of Congress.

[39] *See* 45 U.S.C. § 546(g) (Supplement V, 1975).

June 7, 1977

77-34 MEMORANDUM OPINION FOR THE GENERAL COUNSEL OF THE AGENCY FOR INTERNATIONAL DEVELOPMENT

Reprogramming—Legislative Committee Objection

This is in response to your request for our opinion on two questions arising out of the administration of the Agency for International Development (AID). The first is whether the legislative history of a provision in Title I of the Foreign Assistance and Related Programs Appropriations Act, 1977, Pub. L. No. 94-441, 90 Stat. 1467, can be read to convert that provision into more than a report-and-wait provision. We believe that the legislative history of the provision cannot be so read, and it is our opinion that the executive branch is in no sense legally bound to abide by an objection of the appropriations committees of Congress with regard to a specific reprogramming.

The second question concerns the extent to which the Administrator of your agency might be able to bind the agency, the State Department, or the President not to go forward with reprogramming action over the objection of these congressional bodies. We think that the Administrator may give his or her personal assurance to Congress, orally or in writing, of his intention to give the greatest weight to such an objection, and that he may also convey, if authorized to do so, similar assurances by the Secretary of State and the President. But the Administrator may not legally bind himself, his agency, the Secretary of State, or the President to honor the objection, because such an agreement would constitute formal acceptance by the executive branch of a legislative veto that is constitutionally suspect.

I. The Effect of the Provision

Under the provision in question, your agency may not reprogram funds for fiscal year 1977 "unless the Appropriations Committees of both Houses of the Congress are previously notified fifteen days in advance." Thus, the provision constitutes a so-called "report and wait" provision of the type that we regard as constitutionally permissible. However, the conference report that deals with this provision discusses

the fact that the provision represents a compromise between the House and Senate managers of the bill, the latter having brought into conference a Senate-passed bill that purported to prevent reprogramming of AID funds without affirmative approval by the appropriations committees of the two Houses. The report states that the compromise "is based on the firm expectation of the conferees that the Executive Branch will follow the historical pattern of honoring objections" to reprogrammings. H.R. Rep. No. 1642, 94th Cong., 2d Sess. 8 (1976). The conference report was approved by both Houses. 122 Cong. Rec. H 11142 (daily ed. Sept. 27, 1976); 122 Cong. Rec. S 16811 (daily ed. Sept. 28, 1976). The question is whether the quoted language, taken together with the language in Title I quoted above, binds your agency or the executive branch to abide by committee "vetoes" of reprogramming decisions as a statutory matter. We think it plain that it does not.

Whatever the "firm expectations" of the conferees might have been in reaching this compromise, their expectations cannot be read as if the Senate version had been enacted into law. As Mr. Justice White recently wrote for the Supreme Court, "legislative intention, without more, is not legislation." *Train* v. *City of New York,* 420 U.S. 35, 45 (1975). Thus, even if we were to read into the conference report an intent to bind the executive branch to follow its historical practice, we would nevertheless conclude that the legislation enacted was inadequate to fulfill that purpose.

II. Express Agreements Binding the Executive Branch to Abide by Congressional Directives

We think that an express agreement purporting to bind the Administrator to follow the dictates of congressional committees presents both statutory and constitutional issues. In assessing the validity of such an agreement, we would first characterize it as one in which the Administrator places his actual decisionmaking authority concerning specific reprogramming in the congressional body. Thus, while the Administrator exercises some discretion in what reprogramming proposals are to be submitted to the cognizant committee, the latter body would exercise the final decisionmaking authority by virtue of the veto power it would have under the agreement.

A. The Statutory Question

As a statutory matter, therefore, the question is whether the Administrator possesses the authority to delegate his decisionmaking power to a congressional body. The Administrator's own power over reprogramming decisions derives from § 101 of Executive Order 10973, 3 CFR 493 (1959–1963 Compilation), by which the President delegated to the Secretary of State the functions assigned to the President under the Foreign Assistance Act of 1961, 75 Stat. 424, 22 U.S.C. §§ 2151 *et seq.* In that order the President directed the Secretary of State to establish AID, which the latter did by Public Notice 199, 26 Fed. Reg. 10608. In

§ 2(a)(1) of the notice, the Secretary of State specifically delegated to the Administrator his § 101 powers. Nothing in the notice would purport to give the Administrator the authority to delegate beyond himself, much less to a congressional body, his discretion to administer the provisions of the Foreign Assistance Act involved here.

Thus, as a threshhold matter the Administrator does not possess the power to make the kind of delegation of authority contemplated by the proposed agreement. More importantly, we think that if either the order or the public notice attempted to confer such power upon either the Secretary of State or the Administrator, respectively, those documents would be contrary to § 621(a) of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2381(a), which states that the "President may exercise any functions conferred upon him by this chapter through such agency or officer of the United States Government as he shall direct." We believe that § 2381(a) effectively prohibits delegation of reprogramming decisions to any person outside the executive branch, including congressional bodies or individual Members of Congress.

We end our discussion of this question by pointing out that, under our analysis in Part I, *supra,* of the Appropriations Act, nothing in that Act could be said to qualify the express language of § 2381. We therefore conclude that the Administrator has no power to make the proposed delegation and that any delegation of such power by him would violate § 2381(a).

B. The Constitutional Question

Although our resolution of the statutory question makes it unnecessary to examine the constitutional issue, we briefly address the latter because we think the answer is reasonably well established. As a practical matter, an agreement purporting to bind the Administrator to follow the dictates of a congressional body, if assumed to be binding, would constitute nothing less than a formal committee veto provision. Such provisions have been considered unconstitutional by former Presidents. *See, e.g., Public Papers of the Presidents: Dwight D. Eisenhower,* 1955, at 688-89; *John F. Kennedy,* 1963, at 6. They have also been declared to be unconstitutional by two former Attorneys General. *See* 37 Op. A.G. 56 (1933); 41 Op. A.G. 230 (1955). The fact that here the Administrator would be a party to the agreement, constitutionally, does nothing to remove the taint.

The Administrator cannot delegate his executive power with respect to reprogramming decisions to the chairman of a congressional committee. To do so would be to delegate an executive function to the legislative branch in violation of the doctrine of separation of powers.

III. Express Agreements Binding the Executive Branch to Consult with Congressional Bodies

Given our view that the Administrator lacks statutory and constitutional authority to enter into an agreement effectively surrendering his

decisionmaking authority to a congressional body, the question remains as to what type of agreement the Administrator may enter into and the extent to which he would bind himself and his agency by doing so.

We believe that the Administrator may enter into an express agreement by which he would consult with a congressional body prior to making a reprogramming effective and agree to give great deference to the views of that body in reaching a final decision. The crucial point is that the Administrator must retain at all times the authority to make the final decision.

We also think that such a commitment on the part of the Administrator could be made binding on AID if published in the Federal Register. *See* 44 U.S.C. § 1510. A somewhat analogous situation was presented by the action of Acting Attorney General Bork regarding the authority of the Watergate Special Prosecutor to contest an assertion of executive privilege. This commitment was published as a regulation and was said by the Supreme Court to have "the force of law" so long as it was extant. *See, United States* v. *Nixon,* 418 U.S. 683, 695 (1974).

We also believe that such an agreement, whether or not published as a regulation, could be revoked at will by the Administrator or his successor. As the Court said of the regulation involved in the *Nixon* case, "it is theoretically possible for the Attorney General to amend or revoke the regulation. . . ." *Id.* at 696. Once revoked, the agreement would have no further effect.

John M. Harmon
Acting Assistant Attorney General
Office of Legal Counsel

June 8, 1977

77-35 MEMORANDUM OPINION FOR THE GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

Rental Fees for Spaces in Military Trailer Parks

This is in response to your letter requesting our opinion whether 5 U.S.C. § 5911 authorizes the Office of Management and Budget (OMB) to determine that the rental fee for trailer spaces in military trailer parks are to be based upon the prevailing rates for comparable private facilities.

In our opinion, OMB has correctly concluded that 5 U.S.C. § 5911, and OMB Circular A-45, require the Department of Defense (DOD) to base the rental fee for these trailer parking spaces on their "reasonable value," determined by comparison with comparable private trailer courts.

The mobile home parks in question consist of hard-surface trailer spaces, streets, curbs, gutters, and utility hookups on military installations. Military personnel, primarily enlisted men in the lower grades, park their mobile homes there, and occupy them as personal residences. It has been DOD's practice to charge the occupants a rate sufficient to amortize the space over a 15-year period.

Section 5911(c) provides that the rental rate for "quarters" occupied by a member of the uniformed services shall be based on the "reasonable value of the quarters and facilities to the . . . member concerned, in the circumstances under which the quarters and facilities are provided, occupied, or made available." Section 5911(a)(5) defines "quarters" for the purpose of the section as "quarters owned or leased by the Government."

Thus, the disputed issue is whether the term "quarters" includes trailer facilities consisting of a parking space, streets, curbs, gutters, and a utility hookup. We conclude that it does.

Although the legislative history of § 5911 does not explicitly define the term "quarters" (beyond a repetition of the statutory definition), it does, as both DOD and OMB recognize, show that Congress used the term "quarters" as a synonym for "housing." S. Rep. No. 829, 88th

Cong., 2d Sess.; H.R. Rep. No. 1459, 88th Cong., 2d Sess. Likewise, the comments from the then Bureau of the Budget that were set forth at length in each committee report use "housing" and "quarters" interchangeably. Accordingly, Congress' construction of the word "housing" provides some guidance for determining the proper construction of the term "quarters."

Although OMB has drawn our attention to the use of the term "housing" in several recent Acts, the uses of this term by the 88th Congress (which enacted § 5911) are, we believe, the most pertinent. The Military Construction Authorization Act, Pub. L. No. 88-390, 78 Stat. 341, is closely related to the subject matter of § 5911. In Title V, captioned "Military Family Housing," Congress authorized the Secretary to construct "family housing units and trailer court facilities." § 501. Section 505 made the inclusion of trailer facilities in "housing" even more explicit; it provided that funds were authorized "(a) for construction and acquisition of *family housing, including* . . . construction and acquisition of *trailer court facilities*. . . ." [Emphasis added.] Moreover, as the more recent Military Construction Authorization Acts cited by OMB demonstrate, Congress consistently has continued to employ a broad construction of the term "housing"—explicitly including trailer facilities—in the context of military housing. Section 508 of Pub. L. No. 93-552, 88 Stat. 1745, Section 509 of Pub. L. No. 92-545, 86 Stat. 1145.[1]

We believe that Congress intended the term "quarters" to be given a similarly broad construction in § 5911. One of the primary purposes of the legislation was to ensure the uniform application of what the House committee termed "the equitable principle that the Government should charge its employees the 'reasonable value' of quarters and related items furnished to them." H.R. Rep. No. 1459, 88th Cong., 2d Sess. 3 (hereinafter House report). The enactment of § 5911 clarified the applicability of this principle to military personnel and to persons who were not Government employees (such as employees of contractors). House report at 2, 3-4. Congress also sought to ensure "uniform and equitable application" and "uniform implementation" by authorizing the President to issue regulations to carry out the Act, 5 U.S.C. § 5911(f). House report at 6-7.[2] The only indication of any exception to the "general principle" of the Act was § 7, now § 5911(g), which provides—

[1] DOD cites several statutory examples to support its contrary argument that Congress has consistently viewed "quarters" as limited to rooms, bedrooms, shelter, etc. In view of the recent expressions of congressional intent just noted, we question the pertinence of the three statutes enacted in 1922 or earlier, at least 40 years before the enactment of § 5911. The remaining provision, 10 U.S.C. § 2684, was enacted in 1973 as § 509(a) of the Military Construction Authorization Act, Pub. L. No. 93-166, 87 Stat. 661. Section 511(1) of the same Act authorized funds for "family housing, including . . . construction and acquisition of mobile home facilities . . . ."

[2] The President delegated this authority to OMB in § 9(l) of Executive Order No. 11609, 3 CFR 586 (1971-1975 Compilation).

> Section 3 of this Act shall not be held or considered to repeal or modify any provision of law authorizing the provision of quarters or facilities, either without charge or at charges or rates specifically fixed by law.[3]

DOD, however, suggests that Congress has authorized the present rental rates, which amortize the construction costs of the trailer facilities over a 15-year period. It relies upon the Senate report on the 1962 Military Construction Appropriation Act, which states the committee's conclusion that the "parking rate" should be based upon an amortization period of 15 years rather than 28 years. S. Rep. No. 732, 87th Cong., 1st Sess. 4–5.

In our view, this expression of intent is no longer controlling. One of the primary purposes of the enactment of § 5911, as described above, was to clarify the applicability of the reasonable value rental principle to members of the uniformed services. As the House committee observed, the legislation would "provide a basis for fixing rental rates and related charges for rental housing occupied by members of the uniformed services. . . ." House report at 2. Prior statutory provisions authorizing occupancy of certain quarters by military personnel, in contrast, "did not specify how the rental rates were to be determined." House report at 4. When Congress enacted § 5911 in 1964, it not only extended the "reasonable value" rental concept to the armed services, but also provided an exception from this rule only where another rate was set by statute (*i.e.,* "specifically fixed by law"). Thus, the 1962 expression of the Senate committee's view is no longer controlling.

Nor are we persuaded that the various dictionary definitions cited by DOD require a contrary conclusion, because Congress is in no way restricted to a particular dictionary definition; moreover, the cited definitions are sufficiently broad to encompass trailer park facilities. Although one common thread in the definitions is a shelter or a space within a shelter, *i.e.,* a building or rooms within a building, another thread common to these definitions is a "[p]lace of lodging" or "[p]lace of residence." Webster's New International Dictionary (2d ed. 1954), Webster's New Collegiate Dictionary (1956), American College Dictionary (1970). A trailer park space may be such a place of residence or lodging.

In conclusion, we believe that construing the term "quarters" to include trailer facilities is consistent with Congress' intent to broaden the application of the equitable principle that Government housing should be rented to employees for its reasonable value. Civilian employees, contractors' employees, and members of the military all were to be covered. Quarters, whether owned by the Government or leased by it,

---

[3] The language of this section was altered slightly in the general nonsubstantive recodification of Title 5 in 1966; it now provides:

> Subsection (c) of this section does not repeal or modify any provision of statute authorizing the provision of quarters or facilities, either without charge or at rates or charges specifically fixed by statute.

were to be subject to this principle. 5 U.S.C. § 5911(a)(5). "Facilities" made available in connection with the rental of quarters—such as household furniture and equipment, garage space, utilities, subsistence, and laundry service—were also covered by § 5911. 5 U.S.C. § 5911(a)(6).

The President was authorized to promulgate regulations to ensure uniform enforcement. 5 U.S.C. § 5911(f). An arbitrary exemption from the application of the principle in favor of military employees living in trailer parks would be contrary to Congress' intention. DOD has urged that the majority of those affected are junior enlisted members, who are the least able to afford adequate housing. It does not appear, however, that Congress was persuaded to make an exception in their favor.

JOHN M. HARMON
Acting Assistant Attorney General
Office of Legal Counsel

June 10, 1977

77-36 MEMORANDUM OPINION FOR THE ACTING GENERAL COUNSEL, FEDERAL ENERGY ADMINISTRATION

State Jurisdiction to Regulate Pollutant Emissions

This is in reply to your letter concerning the proposed oil tanker terminal that a major oil company seeks to operate at Long Beach, Calif. A major question that has arisen in a California Air Resources Board administrative proceeding, is whether the State would have "jurisdiction and authority to regulate pollutant emissions from oil tankers using the proposed terminal, while such tankers are operating beyond the 3-mile territorial limit of the State but are . . . within the South Coast Air Basin . . . [that is, within an area extending up to 12 miles from shore]."

1. Introduction and Summary

Preliminarily, it is necessary to distinguish between (1) the general question of the extent of California's authority or jurisdiction over tankers using the proposed terminal, and (2) the question of the validity of particular emission-control requirements which the State might seek to impose. We shall consider the former, but not the latter.[1] Our views may be summarized as follows: Regarding operations in the contiguous zone (*i.e.*, the area extending up to 12 miles from the shore) of ships using the proposed terminal, California would have some authority to prescribe and enforce air pollution controls. However, the State's authority would not be unlimited. The validity of a particular requirement or enforcement action would depend upon several factors. One requirement is that there be a sufficient connection between the regulated activity and air quality within the State's geographic limits. Other pertinent factors include feasibility and practical consequences (*e.g.*, cost), the relationship to Federal standards (*e.g.*, safety standards promulgated by the Coast Guard), and, in particular, action taken by the

[1] Our discussion does touch upon certain of the conditions proposed by the oil company, but we do not attempt to assess their validity. Issues concerning the various means of enforcing the pollution-control requirements are also significant, but we do not discuss them.

U.S. Environmental Protection Agency (EPA) regarding the proposed terminal.

2. Factual Background

The main purpose of the proposed terminal would be to accommodate tankers transporting crude oil from the North Slope of Alaska. The bulk of the oil received at the terminal would then be sent, via pipeline systems, to refineries in the Midwest and on the Gulf Coast.

The Los Angeles-Long Beach area, where the terminal would be built, has severe air pollution problems. Before the project can proceed, it must be approved by State environmental authorities and by EPA.

Now pending before the California Air Resources Board is the oil company's request for a construction permit. This proceeding is based upon State law. To date, EPA has not approved California's procedures for review, under the Clean Air Act, of new stationary sources of emissions. Such approval may be granted in the future, but, if it is not, the oil company's ability to go forward will depend upon issuance of a permit by EPA,[2] as well as a State permit. Issuance of a permit by EPA will not occur until after issuance of a permit by the State; it is possible that the terms and conditions of the EPA permit would simply follow those of the State permit.

In connection with the proceeding before the State agency, the oil company has proposed a set of conditions to deal with the problem of air pollution from the tankers. Some of the conditions pertain to vessel design or equipment, *e.g.*, ballast capacity (§ 1) and inert gas systems (§ 4). Others relate solely to tanker operations occurring within the port, *e.g.*, unloading procedures (§§ 3, 6). A third category consists of conditions which apply to operations occurring not only within the 3-mile limit but also within an area extending as much as 12 miles from the coast, *e.g.*, ballasting operations (§ 1), prohibition on expulsion of hydrocarbon vapors (§ 2), and use of low sulfur fuel (§ 7).

The California authorities are reluctant to agree to the permit conditions proposed by the oil company unless the State is assured that it would have authority to enforce them with respect to activities beyond the 3-mile limit. Presumably, the State's concern relates only to the third category of conditions. The terminal will be within the territory of California so the extraterritorial issue is not raised by the rules concerning unloading or other activities at the terminal itself. In addition, to the extent that the rules involve vessel characteristics or equipment (as opposed to operations), the extraterritorial question appears to be irrelevant.

3. Discussion

There are several types of conditions that may raise certain legal questions. For example, one of the conditions would require that the

[2] For the EPA regulation concerning the granting of such permits in California, *see* 40 CFR 52.233.

tankers have ballast capacity of a certain type (§ 1); another would require the vessels to have an inert gas system or comparable equipment (§ 4). Each of these matters is now addressed in Coast Guard regulations.[3] Clearly, the issues of preemption and burdens on commerce apply generally to the proposed conditions.

Another point that should be mentioned is that pertinent laws are in a process of change. Amendments to the Clean Air Act are now being considered in Congress.[4]

In March, President Carter sent to Congress a message concerning oil pollution of the oceans. 13 Weekly Compilation of Presidential Documents 408 (1977). He pointed out that he had directed the Secretary of Transportation to develop new regulations concerning oil tanker standards, including the matters of segregated ballast and inert gas systems. Proposed rules to this effect have been published in the Federal Register.[5]

Another pertinent bill, S. 682, the Tanker and Vessel Safety Act, was recently passed by the Senate. *See* 123 Cong. Rec. S. 8823 (daily ed., May 27, 1977). The bill deals, in part, with design and operating standards for all tankers entering U.S. ports. Probable jurisdiction was noted in *Ray* v. *Atlantic Richfield Co.,* 95 S. Ct. 1172 (1977), a case now pending before the Supreme Court, which involves the preemptive effect of the Ports and Waterways Safety Act. Relevant changes in international law may result from the Law of the Sea Conference.

The developments mentioned above are pertinent because their outcome may affect California's authority to regulate tanker operations.

The subjects we have addressed are solely issues of Federal law. We did not look into questions of California law, *e.g.*, the extent of the authority of the State regulatory bodies, or into the possible significance of contract or real estate law (*i.e.*, reliance on conditions set forth by the Port of Long Beach in its lease with the company, in addition to use of the State's police power).

Although we did not give separate attention to the existence of Federal authority to regulate the tanker operations in question, it is important to note that certain possible Federal limits upon the State's authority—for example, preemption—have no application to the Federal Government. A related matter that could become significant is the possibility of State enforcement of federally prescribed pollution control requirements. *See, e.g.*, § 304 of the Clean Air Act, as amended, 42

[3] *See* 46 CFR 32.53 (inert gas system); 33 CFR 157.09 (segregated ballast). *See also* proposed amendments to the Coast Guard regulations set forth in 42 Fed. Reg. 24868 (segregated ballast) and 24874 (inert gas system).

[4] Recently, an amendment bearing directly upon the present issues was introduced in the House of Representatives, debated, and then withdrawn. *See* 123 Cong. Rec. H 5067–72 (daily ed., May 25, 1977). The sponsor stated that a similar amendment might be offered in the future. 123 Cong. Rec. H 5072 (daily ed., May 25, 1977) (Remarks of Representative Miller).

[5] See footnote 3, *supra.*

U.S.C. 1857h-2, which authorizes the bringing of certain types of "citizen suits."

a. Preemption

(1) The Clean Air Act

One question is whether the Clean Air Act furnishes a basis for regulating emissions from vessels. Your Office and EPA have taken the position that it does, and we agree. *See, Texas* v. *EPA,* 499 F. 2d 289, 316–317 (5th Cir. 1974).

Under the Clean Air Act, EPA sets national ambient air quality standards for widespread pollutants, such as hydrocarbons. § 109, 42 U.S.C. 1857c-4. The basic means of achieving compliance with standards is a State implementation plan. § 110, 42 U.S.C. 1857c-5. The Act expressly provides that "primary responsibility for assuring air quality within . . . [its] geographic area" belongs to each State. § 107, 42 U.S.C. 1857c-2. If a State plan is inadequate in some respects, EPA is required to cure the deficiency by issuing its own regulation. As noted previously, EPA has not approved California's procedure for review of new sources and has promulgated a regulation providing for review by EPA.

It is clear that, with limited exceptions not pertinent here, the Clean Air Act does not preempt State authority, *i.e.,* use of the State's police power to impose standards regarding air pollution. The Act contains a provision, § 116, 42 U.S.C. 1957d-1 (1975 Supp.), which provides that there is no such preemption, so long as the standard based upon State law is not less stringent than standards set forth in the Act.

According to your memorandum, EPA has stated that the conditions proposed by the oil company are not less stringent than standards EPA would impose in connection with its review of the terminal. Of course, the action ultimately taken by EPA will be highly significant. One possibility would be that, after issuance of a permit by the California agency, EPA would issue a permit setting forth the same conditions. Such action by EPA would lend substantial support to the action taken by the State agency. On the other hand, a finding by EPA that one or more of the State's conditions would not be sufficiently strict would probably mean that any such condition would be revised.

(2) Ports and Waterways Safety Act

Title I of the Ports and Waterways Safety Act of 1972 (PWSA) authorizes the Coast Guard to establish vessel traffic control systems and to regulate certain types of vessel operations, in order to prevent damage to vessels, bridges, and other structures and to protect the navigable waters from environmental harm. 33 U.S.C 1221 (1975 Supp.). More pertinent here is Title II, 46 U.S.C. 391a (1975 Supp.), which directs the Coast Guard to establish regulations concerning the design and operations of certain kinds of vessels, including oil tankers, in order to protect the navigable waters of the United States and the

resources of those waters and adjoining land. Such regulations have been issued. *See* 33 CFR 157.

The District Court in *Atlantic Richfield Co.* v. *Evans,* a case now pending in the Supreme Court,[6] held that the PWSA preempted the field so as to render invalid Washington statutes regulating the size and design of oil tankers operating in Puget Sound. We believe that even assuming the District Court correctly decided the *Atlantic Richfield* case, the facts differ significantly from the present situation.

Here, if a California permit containing the oil company's conditions is ratified by EPA, the issue will not be preemption by the PWSA, but the relationship between that statute and the Clean Air Act. *Cf., Texas* v. *EPA, supra.* In the event of conflict or inconsistency between the California (or EPA) conditions and Coast Guard regulations, the result will depend upon the specific facts. The task will be to reconcile the two statutes, bearing in mind that a basic objective of the Clean Air Act is to preserve the primary role of the States with respect to control of air pollution. *Cf., Huron Portland Cement Co.* v. *Detroit,* 362 U.S. 440 (1960).

To summarize, it does not appear that the subject in question—controlling air pollution caused by oil tankers—is preempted by the PWSA or any other Federal law.[7] Still, depending upon the particular facts, the PWSA or Coast Guard regulations issued under it might have the effect of overriding certain requirements imposed by California.

b. Burden on Commerce; Foreign Relations

The *Huron Portland Cement Co., supra,* case and others that deal with the question whether State laws impose an unconstitutional burden on interstate commerce support the view that the proposed California standards would not be invalid on this ground. However, depending upon the factual record, certain of the requirements might be vulnerable. Congress has indicated its view that, with regard to control of air pollution, variation from State to State is permissible. Even if the California standards were to impose requirements going beyond Coast Guard regulations and entailing substantial expense (*e.g.*, additional equipment or changes in the vessels), California could assert that the seriousness of its air pollution problem justifies the measures it has adopted.

The next matter to be discussed is the possible impairment of the foreign relations of the United States, resulting from the application of the California standards to foreign ships. In this regard, the decision in *Zschernig* v. *Miller,* 389 U.S. 429 (1968) should not be given much weight. That case involved an Oregon statute relating to the ability of

[6] The decision of the District Court, No. C-75-648-M (W.D. Wash. Sept. 23, 1976), is not reported.

[7] A number of other statutes deal with aspect of oil tanker operations. *See, e.g.,* the Oil Pollution Act, 33 U.S.C. 1002. There are also international conventions relating to the subject, *e.g.*, the International Convention for the Safety of Life at Sea, 16 U.S.T. 185.

nonresident aliens to inherit Oregon property; its provisions were such that the State courts passed judgment upon the laws and practices of the foreign country and the credibility of foreign officials. It was this kind of inquiry that caused the Supreme Court to find an unconsitutional intrusion by the State into the realm of foreign affairs. Here, in contrast, the question would be one of applying to foreign ships State regulations of general applicability. No question of discrimination against foreign ships would be presented.

In general, the police power of a State extends to foreign persons within its jurisdiction.[8] *See* concurring opinion of Mr. Justice Harlan in *Zschernig,* 389 U.S. at 459. An added factor here is that the California requirements might have the imprimatur of EPA. Thus, we question whether the *Zschernig* issue indicates the need for exemption or special treatment of foreign ships.

c. Operations Outside the 3-Mile Limit

It is our opinion that with respect to tankers using the proposed terminal, California has authority to regulate operations taking place beyond the 3-mile limit. This assumes, of course, that there is a proper nexus between those operations and the quality of the air over the State's territory.

It is significant that the proposed conditions are limited to ships using the terminal; the State does not seek to regulate all vessels coming within the contiguous zone.

It seems clear that Congress has the power to reach conduct occurring in the contiguous zone, but one issue is whether the Clean Air Act was intended to have that effect. A general rule of statutory construction is that "the legislation of Congress will not extend beyond the boundaries of the United States unless a contrary legislative intent appears." *Steele* v. *Bulova Watch Co.,* 344 U.S. 280, 285 (1952).

The view that the Clean Air Act has extraterritorial effect (at least to the extent involved here) rests upon the purpose of the statute, rather than any specific provision or legislative history. Your Office and EPA have concluded that the Act does have that effect. We are in accord with your view. Because the purpose of the State's requirements concerning operations in the 12-mile zone would be to protect the air over the State's territory, not the air over the high seas. This would seem to be a reasonable means of implementing the Act.[9]

In addition, as pointed out above, the States retain the authority to exercise independent police power to deal with air pollution. If the requisite nexus exists, that authority could be used to reach conduct in

[8] Another pertinent consideration may be whether a foreign-flag ship is owned or controlled by United States persons. *Cf., Lauritzen* v. *Larsen,* 345 U.S. 571 (1953).

[9] Clearly, the present situation differs from one in which State A sought to regulate, on the basis of the Clean Air Act, activities in State B. *But see, Illinois* v. *City of Milwaukee,* 406 U.S. 91, 103–108 (1972) (water pollution suit based on Federal common law of nuisance).

the contiguous zone. *Cf., Skiriotes* v. *Florida,* 313 U.S. 69, 77 (1941). This is another area where the issue of jurisdiction over foreign ships is raised. In our opinion, California possesses some regulatory authority over such ships.

The Federal Government may impose reasonable conditions upon foreign ships using its ports. *Cf., Cunard Steamship Co.* v. *Mellon,* 262 U.S. 100, 124 (1923) (application of prohibition law). Such conditions may relate to conduct beyond the 3-mile limit.

For purposes of international law, the authority to impose such conditions may be exercised not only by the Federal Government, but also by a State government. Therefore, assuming there is no conflict with an applicable treaty (or Federal statute or regulation), California would have authority to regulate foreign ships, as well as United States ships, using the proposed terminal.

JOHN M. HARMON
Acting Assistant Attorney General
Office of Legal Counsel

June 14, 1977

77-37 MEMORANDUM OPINION FOR THE DIRECTOR OF THE EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

Request of a Federal Employee—Appearance on Behalf of His Daughter in IRS Audit

This is in response to your request for our views as to whether Mr. A, an employee in the office of a United States Attorney, may appear on behalf of his daughter in an Internal Revenue Service (IRS) office audit of her tax return. It appears that Mr. A prepared his daughter's tax return based on information she supplied to him.

A Federal employee is prohibited by 18 U.S.C. § 205(2) from acting "as agent or attorney" for anyone, otherwise than in the proper discharge of his official duties, before any agency or court in connection with any matter in which the United States is a party or has a direct and substantial interest. This provision has not been construed to prohibit a Federal employee from assisting another person in the preparation of a tax return, but it does generally prohibit a Federal employee from representing the taxpayer in subsequent administrative or judicial proceedings involving the tax return.

However, 18 U.S.C. § 205 contains an exception permitting an employee to act as agent or attorney, with or without compensation, for his or her parents, spouse, or child, except in matters in which he or she has participated personally and substantially or are under his or her official responsibility. It does not appear that Mr. A participated as a Government employee in matters relating to his daughter's tax return. He is a collecting agent after a civil or criminal judgment or fine has been imposed, but he would not appear to have any "official responsibility" within the meaning of 18 U.S.C. § 202(b) for IRS audits or other administrative proceedings relating to tax collection. Therefore, it is our opinion that Mr. A's representation of his daughter in the audit and related administrative proceedings is permitted by 18 U.S.C. § 205. However, the statute and Department of Justice regulations require Mr. A to receive the approval of the U.S. Attorney before he appears on his daughter's behalf. *See* 28 CFR 45.735-6(d).

It is not apparent from the materials you sent to us whether Mr. A is employed as an attorney in the U.S. Attorney's Office, so that the practice of law is his profession within the meaning of 28 CFR 45.735-9(a). If so, his representation of his daughter would presumably constitute outside practice of law, requiring the approval of the Deputy Attorney General under 28 CFR 45.735-9(c).

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

June 15, 1977

77-38 MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

Power of the President to Designate Acting Member of the Federal Home Loan Bank Board

This is in response to your inquiry as to whether the President has the power to designate an individual to perform the duties of and act as a member of the Federal Home Loan Bank Board (hereafter "the Board") pending the appointment of a member of the Board by the President by and with the advice and consent of the Senate. We believe that the President has this power, but that its exercise may be subject to judicial or congressional challenge absent the submission of a nomination for that office prior to or within a reasonable time after the designation of the acting member.

The Board is an independent Agency in the executive branch. 12 U.S.C. § 1437(b). It consists of three members appointed by the President by and with the advice and consent of the Senate. The members serve staggered terms expiring on June 30 of the relevant year. Reorganization Plan No. 3 of 1947, § 2, 12 U.S.C. § 1437, note. There is no holdover provision.

There is now a vacancy on the Board. We understand that the President is about to submit a nomination for the position to the Senate. It is possible, however, that the Senate may not confirm the nominee prior to June 30. On that date the term of another Board member will expire. It thus may be that beginning July 1, 1977, there will be only a single member of the Board. It generally is recognized that a collective body is empowered to act only if a quorum consisting of a simple majority is present. *See, FTC* v. *Flotill Products,* 389 U.S. 179, 183 (1967).

We assume that many, especially routine, functions of the Board have been delegated to subordinate officers. Still, the Board will not be able to make the more important decisions that it has reserved to itself. This raises the question of whether the President has the power to prevent such an incapacity of the Board by making temporary designations of acting members.

As stated above, the Board is an independent Agency within the executive branch. Whatever the term "independent" may mean in this context, the continued functioning of the Board is plainly included in the constitutional responsibility of the President as the head of the executive branch to take care that the laws be faithfully executed.

In the Vacancy Act (5 U.S.C. §§ 3345–3349) Congress has given the President specific authority to make such temporary designations in the executive and military departments for a period not in excess of 30 days. The Board, however, is not such a department. *See* 5 U.S.C. §§ 101, 102. It is necessary to consider, therefore, whether the President has the power to make such designations with respect to agencies other than those departments, absent statutory authority.

This Office has taken the position that the power to make such interim designations flows from the President's responsibility to keep executive branch agencies in operation; hence, that the Vacancy Act is not a source, but rather a regulation of that power. This view was challenged in *Williams* v. *Phillips,* 360 F. Supp. 1363 (D.C.C. 1973). In that case the District Court took the position that the President could make a temporary designation to the position of Director of the Office of Economic Opportunity, a position that required Senate confirmation, only in the presence of a statutory authorization. This view apparently was based on the assumption that such a temporary designation constituted an appointment; it also ignored a governmental practice going back more than a century.

The Government sought a stay in the Court of Appeals pending appeal. While that court denied the stay (482 F. 2d 669), it did indicate that it did not necessarily agree with the theory of the District Court. It said that it could be argued that the President had the "implied [constitutional] power in the absence of limiting legislation . . . to appoint an acting director," for a reasonable period of time before submitting the nomination of a new director to the Senate. 482 F. 2d at 670. But even if that view were sustained, it would not establish that the President was entitled to wait for 4–1/2 months before submitting such nomination. At 670–671. The Court of Appeals said that the measure of a reasonable period for the submission of a nomination would be the 30-day period provided by the Vacancy Act. It therefore denied the stay because it was not likely to hold that the President was entitled to retain the acting official in office for a 4–1/2 month period without any nomination. *Ibid.* It stated:

> ". . . Assuming, without deciding, that the court on the merits might disagree with the District Court's approach and might conclude that Phillips' appointment was not invalid *ab initio,* this would not undercut the determination as to the prospective invalidity of his holding office." 482 F. 2d at 671.

The opinion of the Court of Appeals can perhaps be read as disagreeing with the approach of the District Court, namely, that no designa-

tion to fill a vacancy can be made in the absence of an authorizing statute; similarly, as perhaps agreeing with the Government's view that the President does have the power to fill a vacancy pending confirmation in the absence of a limiting statute, subject, of course, to the condition that he must submit a nomination within a reasonable time. It is to be noted that this condition is far less rigid than the 30-day limitation of the Vacancy Act.[1] It permits service beyond that period where the President has submitted a nomination within the period but the Senate has not acted on the nomination before the period has expired.

It may be safe, but obviously not absolutely so, to regard the Court of Appeals opinion as indicating that the court would be chary about holding that the President lacks the power to fill vacancies temporarily, in the absence of authorizing legislation, if he submits a nomination prior to or within a reasonable time following the designation. The 30-day period of 5 U.S.C. 3348 would be considered a guideline as to what constitutes a reasonable period. This view would certainly be strengthened if the person designated by the President were, in analogy to 5 U.S.C. 3347, a current official appointed after Senate confirmation.

In recent months this Office has given similar advice respecting the Community Services Administration and the United States Arms Control and Disarmament Agency. We may mention that, as far as we know, this question has not arisen in the past in connection with a multimember agency. The reason for this is probably that, as a rule, a vacancy in such an agency does not deprive it of a quorum and thus does not impede its operations in a substantial way. However, where, as here, a vacancy in the Agency has the effect of seriously impeding its

---

[1] The Attorney General has interpreted 5 U.S.C. 3348 in its application to the executive departments to the effect that the power of an acting official comes to its end on the 30th day following the day on which the vacancy arose even though a nomination is pending. For the operation of the Vacancy Act in such a situation, *see* 32 Op. A.G. 139 (1920), which involved the following: Upon the resignation of the Secretary of State, the Under Secretary of State became Acting Secretary by operation of the Vacancy Act. Thereafter a nomination for Secretary of State was submitted. On March 13, 1920, the Acting Secretary advised the Attorney General that the 30-day period of the Vacancy Act had expired without the confirmation of the nominee and asked for advice about his status. The Attorney Generai advised the Under Secretary that in view of the expiration of the 30-day period it would be "probably safer to say that you should not take action in any case out of which legal rights might arise which would be subject to review by the courts."

In 1880 the Attorney General advised the Secretary of the Treasury that because the office of the Secretary of the Navy had been vacant in excess of the statutory period (then 10 days), no person in the Department of the Navy was authorized to sign requisition on the Department of the Treasury on account of Navy payments. 16 Op. A.G. 596 (1880).

functions the reasons which, in our opinion, authorize the President to designate a person to perform the duties of an office filled by a single official should apply with equal force to a multimember agency.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

June 21, 1977

77-39 MEMORANDUM OPINION FOR THE UNITED STATES ATTORNEY, JUDICIAL DISTRICT OF MAINE

Borrowing Practices of Bank Examiners

Our opinion has been requested whether the provisions of 18 U.S.C. §§ 212-13 are violated if (1) the spouse of a bank examiner borrows money from a federally insured State bank, or (2) a bank examiner borrows money from such a bank where the State superintendent of banking has first revoked the examiner's authority to examine that bank. For the reasons that follow, it is our conclusion that no violation of 18 U.S.C. §§ 212-13 would be presented by the second approach; the first approach, however, poses problems that we believe are best avoided.

We shall first discuss the problems presented under 18 U.S.C. §§ 212-13 by a loan to the spouse of a bank examiner. Section 212 prohibits bank officers of any federally insured bank, under penalty of criminal sanction, from making or granting "any loan or gratuity . . . to any examiner or assistant examiner who examines or has authority to examine such bank." Section 213 provides for a corresponding prohibition on bank examiners from accepting "a loan or gratuity from any bank . . . examined by him or from any person connected therewith." It is quite apparent that neither of these provisions explicitly imposes any restrictions on the spouses of bank examiners. According to the general rule requiring strict construction of criminal statutes, the activities of a spouse would not normally come within the provisions of such laws.

However, we question whether this result will always follow. Our problem here stems from the decision in *United States* v. *Bristol,* 343 F. Supp. 1262 (S.D. Tex. 1972), *affirmed,* 473 F. 2d 439 (5th Cir. 1973). In that case it was held that a bank officer's loan funneled through an entity not subject to 18 U.S.C. 213, nevertheless came within the provisions of that statute. The courts reasoned that, even though criminal statutes must be strictly construed, § 213 should not be interpreted so as to depart from the evident congressional intent "to proscribe certain financial transactions which could lead to a bank examiner

carrying out his duties with less than total, unbiased objectivity." 473 F. 2d at 442.

We believe that this same reasoning would apply to at least some loans made to spouses of bank examiners. In the most egregious case, the loan to the spouse may in actuality be a loan to the bank examiner. Even if the transaction did not partake of this type of fraudulent behavior, it seems to us that, in certain circumstances, a loan to the spouse of a bank examiner could easily cause that examiner to perform his or her duties with respect to the particular bank in less than an unbiased and objective manner. In both sorts of situations the courts might then adopt the approach in *Bristol* and apply 18 U.S.C. §§ 212-13 to such loans.

The Federal Deposit Insurance Corporation apparently shares this view, for it has laid down criteria that must be met before the spouse of an examiner may borrow from an uninsured bank. These criteria generally mandate that the loan be based entirely on the spouse's credit, be supported by the spouse's own income or assets, and be employed for the spouse's own personal use. While these criteria largely alleviate our concerns here, they do not entirely eliminate them. For example, it is possible that the borrowed funds could allow the examiner's income to be used for purposes for which they might not otherwise be available. A default on the loan, although theoretically enforceable only against the spouse, could also bear on the examiner's standard of living and might even end up being paid out of the examiner's own funds.

It thus seems that a bank examiner cannot be entirely insulated from the effects of his spouse's loan transactions in every circumstance. We therefore cannot conclude that the purposes underlying 18 U.S.C. §§ 212-13 would not encompass a loan to a bank examiner's spouse in every situation, and that the courts would not follow *Bristol* and apply those statutes to such situations. While this may not often occur, we do believe that this prospect poses significant problems and precludes the view that loans to the spouse of a bank examiner will never violate 18 U.S.C. §§ 212-13. We would therefore recommend that this practice be followed, if at all, with extreme caution.

We have no problem, however, with the second alternative of revoking a bank examiner's authority to examine particular banks and allowing him to obtain loans from those banks.[1] We do not believe it appropriate for this Office to comment on the authority of the superintendent of banking to take this action; this is a question of State law and should therefore be decided by the State authorities. However, assuming that this authority exists, we believe that the revocation of an examiner's authority to examine certain banks would meet the purposes served by 18 U.S.C. §§ 212-13. The examiner would, then, never be in

[1] We note here that 18 U.S.C. § 213 does not expressly refer to those banks that the examiner has authority to examine, but only includes banks "examined" by the examiner. No such limitation appears in 18 U.S.C. § 212, however, and so the question of the examiner's authority is at least relevant to the bank officers' liability.

a position of having dealings with a bank he could examine, and this would serve to guarantee the examiner's unbiased objectivity in the performance of his duties. We would caution, however, that 18 U.S.C. § 213 would still prohibit any dealings with a bank that the examiner has already "examined."

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

June 23, 1977

77-40 MEMORANDUM OPINION FOR THE GENERAL COUNSEL, NUCLEAR REGULATORY COMMISSION

Damage Claims Under the Atomic Energy Act

This is in response to your request for our opinion concerning the effect of a floor amendment proposed by Senator Hathaway (Hathaway Amendment), and included in the Act of December 31, 1975, Pub. L. 94-197, 89 Stat. 1111 (1975 Act), amending the Atomic Energy Act of 1954, as amended. The provisions of that Act involved here are known as the Price-Anderson Act, 71 Stat. 576 (Sept. 2, 1957), incorporated in sections 2, 11, 53, and 170 of the Atomic Energy Act, 42 U.S.C. §§ 2012(i), 2014(j)-(u), 2073(e)(8), 2210 (Act).

You suggest that the Hathaway Amendment should be read to eliminate all provisions of the Price-Anderson Act that allow the reasonable costs of investigation, settlement, and defense of damage claims (costs) resulting from a nuclear incident to be absorbed from the various sources of funds that the Act makes available. For the reasons given below, we believe that costs are properly excludable only from the Nuclear Regulatory Commission's (NRC) indemnity amount.

The Act establishes a complex scheme for meeting public liability claims arising out of accidents at nuclear reactor facilities. First, the Act limits the maximum aggregate liability for any single incident to $560 million. § 170(e); 42 U.S.C. § 2210(e) (Supp. V, 1975). Second, the Act requires each licensee to maintain "financial protection," usually insurance, in an amount determined by the NRC, currently $125 million. Third, the Act provides that for awards in excess of the "financial protection" coverage up to the aggregate liability limit described above, the NRC will indemnify the licensee for the excess over the "financial protection" coverage. § 170(c); 42 U.S.C. § 2210(c) (Supp. V, 1975). Because the maximum aggregate liability is $560 million, and the currently required financial protection is $125 million, the maximum indemnity presently payable by the NRC is $435 million.

The Price-Anderson Act was extended and amended by the 1975 Act. The 1975 Act provides for the establishment of a deferred premi-

um scheme that, over the course of time, will replace the NRC indemnity with one funded by the nuclear power industry.[1] Thus, when the 1975 Act is implemented, the funds available for paying public liability claims will be composed of (1) "financial protection" (insurance); (2) the deferred premium insurance scheme; and (3) the NRC indemnity. On the floor of the Senate, Senator Hathaway introduced an amendment to the 1975 Act that provided, with respect to the NRC indemnity, that costs were to be excluded in calculating the indemnity amount. Prior to this, the Act clearly provided that the costs of investigating, settling, and defending claims were included in the amount charged against the maximum liability—$560 million. No amendment was proposed expressly to exclude costs from the amount required to be covered by the financial protection provided by licensees and, indeed, the previous statutory language expressly including such costs was reenacted in the 1975 Act. Further, the provisions of the 1975 Act that added the deferred premium scheme to the Act, expressly included costs within the sum to be made up by deferred premium payments. Finally, no amendment was proposed to exclude costs from the maximum liability limits established under the Act. The Hathaway Amendment was adopted by the Senate and enacted into law.[2]

The literal result of the Hathaway Amendment is to provide that costs are to be excluded from that part of the maximum aggregate liability payable by the NRC and included for purposes of the financial protection and deferred premium plans. Thus, as the NRC's exposure declines as the deferred premium plan assumes a greater part of the exposure, the aggregate amount payable to the public will decline, because a greater portion of the amounts available within the aggregate liability limitation will be exposed to the payment of costs, which, as a result of the Hathaway Amendment, are not included in that portion of the aggregate liability limitation attributable to the NRC indemnity.

Although the words of the Hathaway Amendment changed the treatment of "costs" only with respect to the NRC indemnity, Senator Hathaway may well have intended this change to apply to all elements of the Act. In introducing his amendment, he described it as follows:

> Quite simply, what this amendment does is to require that the entire resources of the $560 million fund—or whatever limit is established through the retrospective premium system—be used only for the purpose of compensating people who are injured or sustain damages as a result of a nuclear accident. It amends several

[1] Under the deferred premium scheme, in the event of a nuclear accident that exhausts the licensees' financial protection coverage, all licensees will, in effect, be assessed up to $5 million per facility as the deferred premium feature of the 1975 Act takes effect. § 170(b) of the Act; 42 U.S.C. § 2210(b) (Supp. V, 1975).

[2] The amendment itself amended, *inter alia*, five sections of the Act: § 170(c), 42 U.S.C. § 2210(c) (Supp. V, 1975); § 170(d), 42 U.S.C. § 2210(d) (Supp. V, 1975); § 170(h), 42 U.S.C. § 2210(h) (Supp. V, 1975); § 170(k), 42 U.S.C. § 2210(k) (Supp. V, 1975); and § 170(l), 42 U.S.C. § 2210(l) (Supp. V, 1975).

provisions of the Price-Anderson Act which at present permit the payment of investigative costs, settlement fees, and defense costs out of the overall liability limit. My amendment specifically excludes these costs from any determination as to when the overall liability limitation has been reached. 121 Cong. Rec. S. 40966 (1975).

However, in a later colloquy with Senator Baker, the comanager of the bill, Senator Hathaway indicated that his amendment was not intended to change the existing practice of including costs within the amounts to be provided by financial protection (insurance).[3]

It is difficult to reconcile the inconsistency between Senator Hathaway's statements about what he intended. An intent to exclude costs entirely from the liability limit is incompatible with including them in one of the three elements of that limit. In addition, the intent to exclude costs is incompatible with the pre-1975 language of § 170(e), which expressly included reasonable costs in the limit on liability. Yet the same language was reenacted by the very bill to which Senator Hathaway's proposal was directed. § 170(e) of the Act. *See also* 121 Cong. Rec. 40959 (1975). If Congress desired to require that costs might not be deducted from the limit on liability, it had only to strike from § 170(e) the language that authorized such deduction; instead, the same authorization was included in the revised § 170(e), which Senator Hathaway did not amend.

Still a third inconsistency is evident. The deferred premium scheme, the heart of the 1975 revision of the Price-Anderson Act, makes costs an element of the premiums themselves. Act, § 170(b). *See also* 121 Cong. Rec. 40958-9 (1975). As with revised § 170(e), this language, too, was included in the bill both before and after adoption of the Hathaway Amendment. Finally, the 1975 extension continues in effect the existing definition of "financial protection," specifically including the costs of investigation, settlement, and defense of claims. Act § 11(k); 42 U.S.C. § 2014(k).

Whatever may have been Senator Hathaway's intention, Congress went forward and enacted the bill expressly excluding costs from the indemnity provision (as per the Hathaway Amendment) and expressly including costs in the deferred premium and financial protection provisions. Thus, even were it clear that the subjective congressional intent was to completely eliminate costs, it is unmistakably clear that its objective manifestation and the language chosen was insufficient to achieve the intended result; "legislative intention, without more, is not legislation" *Train* v. *City of New York*, 420 U.S. 35, 45 (1975). As the Supreme Court noted in that case, legislative action can simply be

[3] Mr. Baker: "The cost of the investigation ordinarily is charged against the insurance before it ever gets to the indemnity side. Is there anything in your [amendment] that changes that relationship?"

Mr. Hathaway: "No." 121 Cong. Rec. 40967 (1975).

"inadequate" to its ends *id.* at 44, and, in our view, that is the case here, as the following review of the principles of statutory construction indicates.

The language of a statute is the prime indicator of legislative intent. Chief Justice Marshall, in one of his earliest opinions, said that a "law is the best expositor of itself" *Pennington* v. *Coxe,* 6 U.S. (2 Cranch) 33, 52 (1804), a rule that he stated more completely in *The Paulina* v. *United States,* 11 U.S. (7 Cranch) 52, 60 (1812):

> In construing [a statute] it has been truly stated to be the duty of the court to effect[uate] the intention of the legislature; but this intention is to be searched for in the words which the legislature has employed to convey it.

Accord, United States v. *Wiltberger,* 18 U.S. (5 Wheat.) 76, 94–95 (1820) (Marshall, C. J.). The rule no more than states the obvious. In interpreting a statute one must first look to the language that Congress employed. *E.g., Flora* v. *United States,* 357 U.S. 63, 65 (1958); *A. Magnano Co.* v. *Hamilton,* 292 U.S. 40, 46–47 (1934); *United States* v. *Standard Brewery,* 251 U.S. 210, 217 (1920); *United States* v. *Union Pacific R. Co.,* 91 U.S. 72, 79 (1875).

> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. *United States* v. *American Trucking Ass'ns Inc.,* 310 U.S. 534, 543 (1940).

This is not to say that other meanings may not be attributed to ambiguous or contradictory statutory phrases. Where that is the case, resort to the rules of construction or to implications which may be found in legislative history are of course appropriate. But "[w]ords used in a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary. . . ." *Burns* v. *Alcala,* 420 U.S. 572, 580–81 (1975).

Applying this rule, we note that the language of the revised Price-Anderson Act is clear and unambiguous concerning "costs" and the limit on liability; § 170(e) of the amended Act includes costs within that limit in unmistakable terms. To impose a contrary interpretation on the Act, despite the words of § 170(e), would amount to a finding that the section has been amended by necessary implication from the indemnity portions of the Act that were more directly changed by Senator Hathaway's amendments. Repeal and amendments by implication are strongly disfavored. *Amell* v. *United States,* 384 U.S. 158, 165–166 (1966); *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 357 (1963); *Mercantile Nat. Bank* v. *Langdeau,* 371 U.S. 555, 565 (1963); *United States* v. *Borden Co.,* 308 U.S. 188, 198–99 (1939). A new statute will not be treated as amending portions of an older one, not mentioned in

the former, unless there is a positive repugnancy between the two, *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 134 (1974), and it cannot be suggested that the various provisions of the revised Price-Anderson Act cannot be harmonized. We find no irreconcilable inconsistencies or absurdities of result if the Act be taken on its face and given its open and obvious meaning.

It is a "well-settled rule of statutory construction that all parts of a statute, if at all possible, are to be given effect." *Weinberger* v. *Hynson, Westcott & Dunning, Inc.,* 412 U.S. 609, 633 (1973); *Jarecki* v. *G. D. Searle & Co.,* 367 U.S. 303, 307–308 (1961); *D. Ginsberg & Sons, Inc.* v. *Popkin,* 285 U.S. 204, 208 (1932). To accept your view of the revised Price-Anderson Act would mean that not only would such sections of its text as, for example, the definition of "financial protection," be given no force, but that many of its provisions must be read directly contrary to their terms. Where the statute sets an upper limit on all public liability from a nuclear incident, we would see only a limit on payments to claimants, disregarding all costs.

So drastic a reversal of the ordinary meaning of the statutory language cannot be supported by the meager evidence of a single statement by the proponent of an amendment, itself at odds with his later words and the terms of his amendment. We have been unable to discover in the legislative record any showing of a congressional—as distinct from individual—purpose to change the inclusion of costs within the limit on liability. Upon the available record, we simply cannot conclude that Congress, by accepting Senator Hathaway's amendment concerning the treatment of costs under the Governmental indemnity, intended to make a similar change in their separate treatment under the limit on public liability.[4]

Nor do we find support for the view that costs are now excluded from financial protection insurance and deferred-premium payments, despite the explicit statutory language that includes costs in those amounts. It could not be contended, for example, that the inclusion of costs in financial protection insurance was an obscure or hidden matter. It is evident on a single reading of the definition of "financial protection," § 11(k), 42 U.S.C. § 2014(k), and is accepted by insurers, licensees, and the Commission alike. Reenactment of a statute that has acquired a settled significance ordinarily adopts that meaning in the absence of a plain indication to the contrary. *Heald* v. *District of Columbia,* 254 U.S. 20, 23 (1920). We should point out that with respect to financial protection, even Senator Hathaway's own intent is ambiguous. His reply to Senator Baker, *supra,* denies any purpose to alter the existing relationship between indemnity and financial protection, in

[4]You suggest that the trade press and certain staff members of the Joint Committee on Atomic Energy understood the Hathaway Amendment to exclude costs from all parts of the Price-Anderson scheme. Such "sources" for determining legislative intent hardly suffice to enable one to decide that when Congress used the word "including" it really meant "excluding."

which "costs" were subtracted from that insurance coverage before the indemnity could be reached.

Thus, we find no basis for concluding that Congress has altered the meaning of § 11(k)—including costs as an element of the term "financial protection"—or that Congress intended to abrogate existing insurance contracts that, we understand, similarly provide that the insurer's liability for costs and claims is limited to the required amount of financial protection.

We are likewise unable to conclude that the 1975 revision to the Price-Anderson Act has mandated an exclusion of costs from the deferred-premium element of its system. To do so would be to contradict the explicit language of § 3 of the 1975 Act. Section 3 expressly includes costs in ascertaining the amount of deferred premiums against nuclear licensees.

It is suggested that somehow the Supreme Court's recent decision in *Train* v. *Colorado Public Interest Research Group, Inc.,* 426 U.S. 1 (1976), provides a basis for concluding that when Congress used the word "including" it intended the word "excluding." In that case, the Supreme Court held that the words "radioactive material" in the Federal Water Pollution Control Act did not include source, byproduct, or special nuclear materials, all of which were already regulated under the Atomic Energy Act, and that the courts could properly consider traditional legislative history materials in construing the words of a statute, even where the statutory words themselves may seem to be clear on superficial examination.[5] In that case, however, the House report, the Senate debates, and the conference report all indicated clearly that source, byproduct, and special nuclear materials were not intended to be within the statutory definition of "radioactive material." Thus, the available legislative materials in that case were substantially different from the inconsistent statements of Senator Hathaway here present. Moreover, a determination that "radioactive materials" does not mean "all radioactive materials," is substantially different from a determination that "including" means "excluding."

Finally, it is suggested that "policy" considerations support the view that the Hathaway Amendment should apply even to the unamended portions of the Act. The policy principle cited to support this view is that the licensee is to be responsible for providing financial protection to the public. Unfortunately, the Price-Anderson Act attempts to reconcile several conflicting policies, of which the principle noted above is only one. Others include providing protection to the public and a financial source from which damage awards may be paid, and the perceived need to protect the nuclear power industry from unlimited or "unaffordable" liability—a policy evidenced in the maximum liability limitations of the Act. That policy perhaps supports the view that, at least with respect to that portion of the maximum exposure that is the

[5] *Train, supra,* at 9–11, 24–25.

responsibility of the licensees, costs were intended to be included so that the maximum exposure could be determined with certainty.

In short, we conclude that the Price-Anderson Act, as amended, excludes the costs of investigation, settlement, and defense of claims under the remaining Federal indemnity. The 1975 revision of that Act did not change the treatment of those costs under either the overall limit on public liability arising from a single nuclear incident, the financial protection insurance required of licensees, or the industry-funded deferred-premium elements of the statutory compensation system.

JOHN M. HARMON
Acting Assistant Attorney General
Office of Legal Counsel

July 7, 1977

77-41 MEMORANDUM OPINION FOR THE CHAIRMAN, CIVIL SERVICE COMMISSION

Retirement Benefits of Tax Court Judges

This is in response to your request to the Attorney General of May 13, 1977, for an opinion concerning the proper construction of 26 U.S.C. § 7447, which governs retirement benefits for Tax Court judges. The question posed is whether such a judge is entitled to receive an annuity under the Civil Service Retirement (CSR) System for covered services rendered as a Government official before becoming a Tax Court judge or after leaving the Tax Court where, while a judge, he elected to receive retired pay under the separate retirement system provided for Tax Court judges but thereafter failed to qualify to receive such benefits.

The task is one of statutory construction. Section 7447[1] provides for the payment of an annuity upon the retirement of a Tax Court judge under certain conditions. Those conditions concern principally the judge's age and length of service, provided the judge has elected to receive such retired pay during his tenure as a judge. The election, once made, is irrevocable, and his right to retired pay is forfeited if he thereafter accepts Federal office or employment.

The critical language of § 7447 provides that with respect to a judge who has made the election, "no annunity or other payment shall be payable . . . under the civil service retirement laws with respect to any service performed . . . (whether performed before or after such election is filed and whether performed as judge or otherwise)." § 7447(g)(2)(A). You inquire whether an election is effective on the day it was filed or whether it only becomes effective at the time the judge becomes entitled to receive retirement benefits under the Tax Court system. It is argued that if the election is effective on the date of filing, the judge would be precluded from receiving an annuity under both the Civil Service Retirement System and the Tax Court system, a result Congress did not intend. The argument refers to a statement appearing in

[1] The section is part of the Internal Revenue Code of 1954, 26 U.S.C. § 1 *et seq.*

the Senate report on the subsequent Tax Reform Act of 1969, which stated that "the bill retains the provisions of present law that a Tax Court judge may not receive both civil service retirement and Tax Court pensions . . ." S. Rep. 91–552, 91st Cong., 1st Sess., at 305. The post-legislative statements by the Chairman of the Senate Finance Committee and the Chairman of the House Committee on Ways and Means are to the same effect. The implication apparently is that it was not the intention of Congress to preclude the receipt of an annuity under the Civil Service Retirement System if the judge could not receive an annuity under the Tax Court system.

We have considered both sides of the matter carefully, and it is our conclusion that a Tax Court judge who has made an election to participate in the court's retirement system, and thereafter fails to serve the minimum number of qualifying years, is nevertheless barred from receiving an annuity under the Civil Service Retirement System for prior or subsequent Federal service. The plain language of § 7447(g)(2)(A) so provides, and our examination of § 7447 as a whole indicates that this result is consistent with its purpose.

Section 7447 plainly restricts the freedom of choice of a Tax Court judge who has elected the court's retirement system. He is eligible for benefits only at age 70, after 15 years of service at age 65, or after 15 years of service when he requests but does not obtain reappointment.[2] A retired judge forfeits retirement pay for one year if he does not return to service when recalled.[3] In addition, a retired judge completely forfeits any benefits under the system if he accepts any other civil office under the United States or privately practices law or accountancy related to the court's subject matter jurisdiction.[4]

In return for accepting these restrictions, a judge who elects the system receives a financial benefit. If he has served 10 years, he may receive his full salary.[5] Under the Civil Service Retirement System, in contrast, he could receive no more than 80 percent of his average salary for his highest consecutive 3 years of service.[6]

Thus, the statute provides that to be eligible for the higher retirement benefits provided by the Tax Court system, the judge must serve until the end of a full term of office or until he reaches the mandatory retirement age. To remain eligible, he must return to the court as requested and must forgo employment that might be inconsistent with his past or future judicial duties. In particular, he must forgo any subsequent civilian employment with the United States other than as a Tax Court judge. It is apparent that one purpose of the statute as a

[2] 26 U.S.C. § 7447(b), (d). Judges are appointed for 15-year terms. 26 U.S.C. § 7443(e). The mandatory retirement age for Tax Court judges is 70, and no person over 65 may be appointed.

[3] 26 U.S.C. § 7447(f).

[4] 26 U.S.C. § 7447(f).

[5] 26 U.S.C. § 7447(d)(1).

[6] *See* 5 U.S.C. §§ 8331(4), 8339(a), (e).

whole is to provide a financial incentive for persons appointed to the Tax Court to remain in its service instead of leaving to accept other positions in the Federal Government. We believe it consistent with this purpose to regard an irrevocable election to receive benefits under the Tax Court retirement plan as effective when made. Ineligibility to receive a civil service retirement annuity for prior or subsequent Federal services reinforces the financial incentive to remain on the court.

We do not believe that the statement in the explanation of § 7447 in the 1969 Senate report is evidence of a contrary legislative intent. The basic structure of the section, including the loss of any civil service annuity by an electing judge, was enacted in 1953.[7] The House Ways and Means Committee report on the section states that an election to receive retirement pay under the Tax Court plan is "irrevocable," and that a judge who has elected the plan "is not to be entitled to any annuity" under the Civil Service Retirement System.[8] The section was reenacted without change in the Internal Revenue Code of 1954. In 1969, subsection (g) was amended to allow an electing judge a refund of previous contributions to the civil service system, but the basic structure of § 7447 was unchanged.[9] There is no indication that Congress considered the problem whether a judge who leaves the Tax Court before he is eligible under its retirement system loses the right to future civil service retirement benefits. Because the issue was not raised in 1969, the statement concerning § 7447 in the Senate report offers no guidance to the intention of the Congress that originally enacted it in 1953. *See, United States* v. *Price,* 361 U.S. 304, 313 (1960); *Rainwater* v. *United States,* 356 U.S 590, 593 (1958). The legislative history, therefore, provides no basis for concluding that § 7447 does not operate according to its plain meaning.

Nor should weight be given to the postenactment explanations of congressional intent by the Chairman of the Senate Finance Committee and the Chairman of the House Committee on Ways and Means. It is settled that postenactment explanations of legislative intent by subsequent statements of individual Members, however deeply involved in the passage of a statute, are not evidence of the intent of Congress as a whole at the time of enactment. *See, United States* v. *Philadelphia National Bank,* 374 U.S. 321, 348–49 (1963); *United States* v. *United Mine Workers,* 330 U.S. 258, 282 (1947); *Selman* v. *United States,* 498 F. 2d 1354, 1359 n. 6 (Ct. Cl. 1974); *Epstein* v. *Resor,* 296 F. Supp. 214, 216 (D. Cal. 1969). *See, generally,* 2A Sutherland, Statutory Construction § 48.16.

Finally, we do not believe it unduly harsh to regard a judge's election of the Tax Court system as being final when made. A judge is free to elect to participate or to decline to do so. He may defer his decision

[7] Act of August 7, 1953, 67 Stat. 482; Internal Revenue Code of 1939, § 1106.

[8] H.R. Rep. 846, 83rd Cong., 1st Sess. (1953) pp. 6, 8.

[9] *See* Tax Reform Act of 1969, § 954(c), Pub. L. No. 91-172, 83 Stat. 731; S. Rep. 91-552, 91st Cong., 1st Sess., at pp. 304–05.

until the last day of his tenure without any financial loss. Once he has elected, he is entitled to a refund of his previous payments to the Civil Service Retirement System.[10] Moreover, the language of § 7447(g)(2) is not misleading, for it clearly states that after election, no civil service annuity shall be paid for any Federal service. Under our interpretation of the statute, a judge may decide whether or not to elect the Tax Court retirement plan on a rational basis with minimal risk.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

---

[10] *See* 5 U.S.C. § 8331(8); 26 U.S.C. § 7447(g)(2)(C).

July 20, 1977

77-42 MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION

Compensation of Court-Appointed Expert Witnesses *(United States* v. *R.J. Reynolds Tobacco Company)*

This is in response to your request for our opinion regarding the United States' obligation, if any, to compensate court-appointed expert witnesses.[1] A brief march through some of the history of the matter that raises the question should prove helpful.

In the pending case of *United States* v. *R.J. Reynolds Tobacco Co.*, the district court, pursuant to Rule 706 of the Federal Rules of Evidence, appointed an expert witness. Initially, the court ruled that the Goverment would pay 50 percent of the expert witness' compensation and the two defendants would pay 25 percent each, with a final allocation of cost to be made at the conclusion of the litigation. The Antitrust Division referred the order appointing the expert witness to this Office for review and advice. We advised that "the Order in the present case meets the formal requirements for application of Rule 706." However, it was concluded that the duties involved were not "substantially and essentially those of an expert witness" and that the "fees and expenses" of the witness "for the performance of his functions under the instant order [were] not properly chargeable to the parties under Rule 706." [2]

The court was informed of our opinion, whereupon the trial judge threatened dismissal if the Government did not agree to pay its share of

[1] It should be noted that Federal Rule of Civil Procedure 54(d), and 28 U.S.C. §§ 1821, 1920 and 2412 are peripherally raised in this matter. Rule 54(d) provides that costs against the United States shall be imposed only to the extent permitted by law. 28 U.S.C. § 2412 provides that the United States shall be liable for a judgment for costs as enumerated in 28 U.S.C. § 1920. The latter section does allow for fees of witnesses; however, 28 U.S.C. § 1821 seems to limit such fees to subsistence and mileage, and it makes no distinction between an expert witness and a regular witness. The courts have confirmed this interpretation. *See, e.g., Harrisburg Coalition Against Ruining the Environment* v. *Volpe*, 65 F.R.D. 608, 610 (D. Pa. 1974). Thus, if a court can require the United States to pay a share or all of a court-appointed expert witness' compensation, its power must be found in Rule 706.

[2] The doctrine of sovereign immunity was not raised in the Division's inquiry of last year or in our response thereto.

the expert witness' compensation. Apparently, this Office was informed of the court's position and, according to the Antitrust Division, orally authorized payment.[3]

The case has now reached the stage where final allocation of costs will be made, and the question asked is "whether the Division should invoke the doctrine of sovereign immunity either in an attempt to recover payments already made or to resist an anticipated attempt by the defendants to tax the cost of the court's expert witness completely to the United States." For the reasons set forth below, we conclude that the word "parties," as used in Rule 706, includes the United States.

The Federal Rules of Evidence are the culmination of many years of study, which began in 1961 with the appointment of an advisory committee to study the advisability and feasibility of uniform rules of evidence for use in the Federal courts. They became effective in June 1975, with their stated congressional purpose "to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."[4] Any construction that we give these Rules should attempt, if at all possible, to carry out the stated congressional purpose.[5]

It has been stated that Rule 706 recognizes the inherent power of a trial judge to appoint an expert of his own choosing.[6] That may be true, but an expert appointed pursuant to Rule 706 has characteristics uncommon to a court's expert; he is also an expert for the parties.[7] For example, the expert witness is required to advise the parties of his findings; he may be called to testify by the court or any party; and he is subject to cross-examination by each party, including a party calling him as a witness. Such an expert witness is, to all intents and purposes, an employee of the court, the plaintiff, and the defendant, and the compensation provision of Rule 706 recognizes this.

Subsection (b) provides that the court-appointed expert witness' compensation is to be:

> payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the Fifth Amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such

---

[3] Rather than authorizing payment, we took the position that our Office had given its legal advice and that the decision to pay was the Antitrust Division's to make.

[4] Rule 102.

[5] *See, e.g., United Shoe Workers of American, AFL-CIO* v. *Bedell,* 506 F. 2d 174, 187–188 (D.C. Cir. 1974); *March* v. *United States,* 506 F. 2d 1306, 1314 (D.C. Cir. 1974).

[6] The Advisory Committee's Note to Rule 706 cites *Scott* v. *Spanjer Bros., Inc.,* 298 F. 2d 928 (2d Cir. 1962), and *Danville Tobacco Assn.* v. *Bryant-Buckner Associates, Inc.,* 333 F. 2d 202 (4th Cir. 1964), to support the proposition that the trial judge has the inherent power to appoint his own expert witness.

[7] Rule 706 also permits the trial judge to request the parties to submit nominees and allows him to appoint any expert witnesses agreed upon by the parties.

proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

Whether the United States can be charged the cost of a court-appointed expert witness in the latter class of actions, is the question we address.

As will be seen from the discussion that follows, the present matter does not fit smoothly into the kinds of legal disputes where the doctrine of sovereign immunity has traditionally been invoked. The doctrine is generally invoked to prevent private parties from using the judicial process to restrain the Government from acting, to compel it to act, or to collect monies from the public treasury. The doctrine is, in effect, a prohibition against private parties suing the United States without its consent. As matters now stand, that is not the posture of the present case.[8] In *Larson* v. *Domestic & Foreign Commerce Corp.*,[9] the Supreme Court articulated the doctrine's rationale. The Court stated:

> There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. The Government, as representive of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right. As was early recognized, "the interference of the courts with the performance of the ordinary duties of the executive departments of the government would be productive of nothing but mischief . . . ."[10]

Thus developed the rule that generally a court cannot entertain an action against the United States without specific authority, and it is said that sovereign immunity must be expressly waived and that "[w]aiver by implication will not be endorsed."[11] This latter principle, however, has never been universally accepted. It is a presumptive axiom of declining followers rather than a rule of law.[12]

However, the doctrine of sovereign immunity, like its "associated doctrines," is not without exceptions.[13] In his article on sovereign immunity, Roger C. Cramton (formerly Assistant Attorney General, Office of Legal Counsel) notes that historically there have been many reasons advanced for the doctrine, but that "[t]he only rationale for the doctrine that is now regarded as respectable by courts and commenta-

---

[8] If in its final allocation of costs and expenses, the court requires the United States to pay part or all of the court-appointed expert witness' compensation and the United States refuses, it is possible that the expert witness may institute an action to compel the United States to pay.

[9] 337 U.S. 682 (1949).

[10] *Id.* at 704.

[11] *Vincenti* v. *United States*, 470 F. 2d 845, 848 (10th Cir. 1972).

[12] *See, Littell* v. *Morton*, 445 F. 2d 1207, 1213–14 (4th Cir. 1971); *Frederick* v. *United States*, 386 F. 2d 481, 488 (5th Cir. 1967); and cases cited in note 13, *infra*.

[13] *See, e.g.*, *Larson* v. *Domestic & Foreign Commerce Corp.*, *supra*, note 9, 337 U.S. at 703–04; *Dugan* v. *Rank*, 372 U.S. 609, 621–622 (1963); *FHA* v. *Burr*, 309 U.S. 242, 245 (1940); *White* v. *Bloomberg*, 501 F. 2d 1379, 1385 (4th Cir. 1974); *Kletschka* v. *Driver*, 411 F. 2d 436, 445 (2nd Cir. 1969); *United States* v. *Moscow-Idaho Seed Co., Inc.*, 92 F. 2d 170, 173 (9th Cir. 1937).

tors alike is that official actions of the Government must be protected from undue judicial interference." [14] The doctrine, as one court so crisply pointed out, "is wearing thin," [15] and its protective walls were further eroded by the last Congress with the enactment of Public Law 94–574. [16] In sum, we think that as a general rule the doctrine of sovereign immunity is to be invoked where judicial proceedings will result in "substantial bothersome interference with the operation of government." [17]

Using the counsel of the Supreme Court in *Larson,* we do not believe that the established judicial reasons for invoking the doctrine are compelling in the instant matter.[18] The compensation of court-appointed expert witnesses certainly will not cause the Department of Justice to be "stopped in its tracks" in enforcing the antitrust laws. Indeed, the stated congressional purpose of the Federal Rules of Evidence is just the opposite.[19] However, our conclusion does not rest on that single foundation. In our opinion, even when the other accepted judicial reasons for invocation of the doctrine are tested against the instant matter, the result must be the same.

As noted earlier, there are exceptions to the doctrine. For example, it has been stated "that when the sovereign sues it waives immunity as to claims of the defendant which assert matters in recoupment—arising out of the same transaction or occurrence which is the subject matter of the Government's suit . . . ."[20] Given this judicial ruling and the fact that the doctrine is generally invoked to prevent a court from entertaining a case,[21] rather than from resolving an issue once the case is properly before the court, it would appear that invocation of the doctrine in the present matter is inappropriate. However, the axiom that once the Government sues it submits itself to "the nature and appropriate incidents of legal proceedings," has not been the only pronouncement. In *United States* v. *Chemical Foundation,*[22] the Court stated that "[t]he general rule is that, in absence of a statute directly authorizing it, courts will not give judgment against the United States for costs or expenses."[23] Thus, the case law seems to say that the mere fact that the

[14] Cramton, Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant, 68 Mich. L. Rev. 389, 397 (1969–70).

[15] *Estrada* v. *Ahrens,* 296 F. 2d 690, 698 (5th Cir. 1961).

[16] This act makes it considerably easier for private parties to seek judicial review of Federal administrative agency actions.

[17] *Littell* v. *Morton, supra,* note 12, 445 F. 2d at 1214. *See also, Larson* v. *Domestic & Foreign Commerce Corp., supra,* note 9, 337 U.S. at 704.

[18] *Id.*

[19] *See* text, *supra,* at note 4.

[20] *Frederick* v. *United States, supra,* note 12.

[21] The case law suggests that the controlling principle behind this ancient doctrine is to prevent the courts from entertaining actions initially of the kind that would interfere with the Government's carrying out its ordinary duties of public administration, rather than to protect itself against rulings of the court once a case is properly before the court.

[22] 272 U.S. 1 (1926).

[23] *Id.* at 20.

Government has entered the courthouse and submitted to the court's jurisdiction, is not enough where costs or expenses are an issue; there must be a statute authorizing payment.

We think that Rule 706, on its face, clearly waives the presumption against the United States' suability and authorizes payment for the compensation of court-appointed expert witnesses. Indeed, any other interpretation would strike a crippling blow to this Rule. Fundamental to statutory construction is the principle that absent a contrary indication, words will be read according to their common usage. The word in question here is "parties." We should pause to note at this point that the terms "United States" and "Federal Government" are not used in Rule 706.

Subsection 706(b) establishes two categories of cases for determining how court-appointed expert witnesses are to be compensated. First, are expert witnesses appointed in criminal and condemnation cases, as to which compensation is "payable from funds which may be provided by law"? Although, the Federal Government is not mentioned by name, it is clear that the Government is to pay from appropriated funds[24] the entire cost of court-appointed expert witnesses in this class of cases.[25] In the very next sentence the second category is established by the language: "In other civil cases the compensation shall be paid by the parties in such proportion and at such time as the judge directs . . . ." We think that the term "parties" as used in the quoted language comports with common legal usage, and that common legal usage includes the United States.[26]

The matter we thresh out here is somewhat analogous to the legislative directive the court faced in *United States* v. *Friedman.*[27] In that case a bank sought reimbursement for the cost of complying with an Internal Revenue Service summons. The court stated:

> 'We conclude that from the very fact that enforcement of a § 7602 summons is by § 7604(b) entrusted to the judiciary, this court has the power to fashion appropriate rules as to the fairness of the enforcement order. * * *. We conclude that the district court possessed the power to require the Government to reimburse the

[24] Within this first category are two means for paying court-appointed expert witnesses fees. In criminal cases, the expert witness is to be compensated from funds appropriated to the Administrative Office of the United States Courts for the expenses of maintenance of the courts. In condemnation cases the expert witnesses fees are to be paid from the general operating funds of the agency initiating and litigating the action.

[25] The Advisory Committee Note to Rule 706 states that: "The special provision for Fifth Amendment compensation cases is designed to guard against reducing constitutionally guaranteed just compensation by requiring the recipient to pay costs."

[26] *See* 18 U.S.C. §§ 203, 205, and 207, which identify the United States as a "party." It would appear that the United States is a party in more judicial proceedings than any other single party.

[27] 532 F. 2d 928 (3rd Cir. 1976).

bank for the reasonable cost of production of the requested bank records.[28]

So it is in the present matter; not only is it a clear implication from the statute that Congress intended the term "parties" to include the United States, but also that the establishment of the duties and responsibilities of court-appointed expert witnesses, the amount of compensation, and the proportions the parties are to pay such expert witnesses are matters entrusted to the judiciary.

Moreover, the cost attending a court-appointed expert witness cannot be compared to the situation where a party is attempting to have the cost of his own expert witness charged to the Government.[29] When a party selects his own expert witness, the attending cost is a result of independent action, whereas the cost resulting from a court-appointed expert witness, in the main, is occasioned by judicial action. In the latter situation, cost is more akin to a docket fee, fees of the clerk and marshal, or fees of the court reporter.[30] The effect of Rule 706 is to make the cost of court-appointed expert witnesses a necessary expense of litigation, an expense as to which sovereign immunity cannot serve as a protective shield.[31] In sum we think that compensation for a court-appointed expert witness is fundamentally different from payment to an opposing party for the expense of his own expert witness.[32] And we think Congress recognized this by requiring the United States to pay the entire cost for such expert witnesses in condemnation cases.[33]

One of the most salient reasons for enacting the Federal Rules of Evidence was to ensure that the judiciary shall function properly. As we noted earlier, if Rule 706 is construed as not requiring the Government to pay its fair share of the cost for court-appointed expert witnesses, it could frustrate the congressional purpose. It would undoubtedly discourage a trial judge from appointing an expert witness where the Government is a party. Courts are unlikely to embrace enthusiastically such an inequitable interpretation of the Rule. Indeed, in the present case the trial judge threatened to dismiss the action unless the Government agreed to pay its fair share.

We conclude that the doctrine of sovereign immunity cannot be invoked either to recover payments already made or to resist a defend-

[28] *Id.* at 937.

[29] Subsection (d) of Rule 706 states: "Nothing in this rule limits the parties in calling expert witnesses of their own selection."

[30] 28 U.S.C. §§ 1920 and 2412 allow judgments for costs against the United States for docket fees, fees of the clerk and marshal, and fees of the court reporter.

[31] In *United States* v. *Ringgold,* 8 Peters 150, 162 (1834), the Court stated "that no court can give a direct judgment against the United States for costs, in a suit to which they are a party, either on behalf of any suitor, or any officer of the government. *But it by no means follows from this, that they . . . are not liable for their own costs.*" [Emphasis added.]

[32] *See, e.g., Sperry Rand Corporation* v. *A-T-O, Inc.,* 58 F.R.D. 132, 137 (D.Va., 1973).

[33] The United States is not required to compensate an expert witness of the landowner's own choosing. This was also the law prior to Rule 706. *See, e.g., United States* v. *Easement and Right-of-Way,* 452 F. 2d 729 (6th Cir. 1971).

ant's attempts to charge the cost of the expert witness completely to the United States on the basis of sovereign immunity. We think the law, public policy, and fundamental fairness, as well as logic, dictate this conclusion. To say that this is a proper case to invoke the doctrine of sovereign immunity would be to allow legal gymnastics to triumph over the congressional purpose of the Federal Rules of Evidence.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

July 20, 1977

77-43 MEMORANDUM OPINION FOR ASSISTANT GENERAL COUNSEL OF THE GENERAL ACCOUNTING OFFICE

Compensation of Court-Appointed Witnesses*

This is in response to your request for our opinion on the proper agency to make payment for the compensation of court-appointed expert witnesses in cases handled by the Department of Justice. We conclude that where a court appoints an expert witness pursuant to Rule 706 of the Federal Rules of Evidence,[1] as a matter of law either the Administrative Office of the United States Courts or the litigating agency is required to compensate such witnesses as set forth in subsection (b) of Rule 706. It is our opinion that in criminal cases it is the Administrative Office, and in condemnation and "other civil cases" it is the agency initiating and litigating the action.[2]

In our view, Rule 706(b) establishes two categories of cases for determining how court-appointed expert witnesses are compensated. In the first category are those expert witnesses appointed in criminal and condemnation cases, as to which the expert witness is to be compensated entirely by the United States. Within this category are two means for paying court-appointed expert witnesses' fees. In criminal cases the expert witness is to be compensated by the Administrative Office from funds appropriated for expenses of maintenance of the courts, and in condemnation cases by the agency handling the action from its general

---

**See* the subsequent related decision of the Comptroller General, B-139703 (February 6, 1979).

[1] It should be noted that a trial judge has the inherent power to appoint his own expert. *See, e.g., Scott* v. *Sprange Bros. Inc.*, 298 F. 2d 928 (2d Cir. 1962). Such an expert may not qualify as an expert witness under the specific requirements of Rule 706 of the Federal Rules of Evidence. In this situation it is our opinion that the court's expert is to be compensated by the Administrative Office of the United States Courts from funds appropriated for expenses of maintenance of the courts. This has been recognized as the appropriate method of compensation by the Comptroller General. *See* 39 Comp. Gen. 133 (1959).

[2] Of course, in "other civil cases" the expert witness' compensation may be paid in part or whole by the private party, if so directed by the court. *See* subsection (b) of Rule 706.

operating funds.[3] The second category includes "other civil actions," where the expert witness is to be compensated by the parties.

The matter that occasioned this opinion is a dispute between the Administrative Office and the Tennessee Valley Authority (TVA) over which Agency should pay the compensation of a court-appointed expert witness in a condemnation case initiated and litigated by TVA. The dispute centers on the interpretation to be given the lanugage in subsection (b) of Rule 706, which reads: "The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the Fifth Amendment."

We conclude that three interpretations can be drawn from the language quoted above. In considering all three interpretations, we think it well advised to consider the old judicial admonition that words, phrases, or language in a statute should not be construed in isolation, but in the context of the whole law and the overall congressional purpose. We also think it important to underscore the fact that the elastic word "may" is used in the language quoted above, rather than the restrictive word "shall." Thus, we must attempt to reason out why Congress settled on the word "may" and what kind of directional signal it is supposed to furnish.

First, it could be argued that the "which may be provided by law" language simply means that if funds are appropriated for the purpose of paying court-appointed expert witnesses' fees, then, compensation can be made therefrom. If not, the court must look elsewhere, presumably to the private party, to compensate the expert witness, or refrain from appointing one. This interpretation does not provide for a realistic scheme, because in condemnation cases the cost of the expert witness can never be charged to the landowner.[4] It is also wanting in criminal cases, because many accused are indigents and would be unable to compensate the expert witness. If accepted, this interpretation would have the ultimate impact of completely frustrating the stated congressional purpose: The possibility of any portion of a court-appointed expert witness' fees being passed on to the private parties in condemnation cases and in many criminal cases is, for all practical purposes, nonexistent.

A second interpretation is that the language "which may be provided by law" is used to give recognition to the fact that Congress has already provided funds for court-appointed expert witnesses in criminal cases through appropriations to implement the Criminal Justice Act.

[3] Generally, the Agency initiating and prosecuting actions on behalf of the United States will be the Department of Justice. However, where another agency has the authority to initiate and prosecute actions on behalf of the United States the court-appointed expert witness should be paid from that agency's general operating funds.

[4] *United States* v. *2,186.63 Acres of Land, Wasatch County, Utah*, 464 F. 2d 676, 678 (10th Cir. 1972); *United States* v. *Easement and Right-of-Way*, 452 F. 2d 729, 730 (6th Cir. 1971).

We think this is the most rational approach, because all funds received by an agency, for specific purposes or for its general operations, are provided by law. Unless Congress intended to refer to specific funds by this language, it was surplusage and unnecessary. We believe it was used to denote the two means by which an expert witness could be compensated in the first category of cases: in criminal cases by funds appropriated to implement the Criminal Justice Act and in condemnation cases by the litigating agency from its general operating funds.[5] This appears to be consistent with Rule 706 and existing law.[6] However, the language used to articulate this intent is far from clear.[7]

It could be argued that it was intended that court-appointed expert witnesses in criminal and condemnation cases be treated alike because they are included in the same category, and the Advisory Committee's Note to Rule 706 states that a "comprehensive scheme for court-appointed experts was initiated with the adoption of Rule 28 of the Federal Rules of Criminal Procedure in 1946" and that "[t]he present rule expands the practice to include civil cases." However, that would be an overbroad interpretation of that language. It is true that Rule 706 expanded the practice already employed in criminal cases to civil cases, but it does not necessarily follow that it also expanded the criminal method of compensation to civil cases. And the language of subsection (b) of Rule 706, which states that in "other civil cases" the parties are to compensate the expert witness, makes this position even more compelling. Moreover, two years after enactment of the Federal Rules of

[5] *See* note 3, *supra.*

[6] "Without exception, the decisions hold that in an original proceeding for the condemnation of land the costs arising in that proceeding fall on the condemnor. The reason therefor is that to take the land against the landowner's wishes and then charge him for the cost of taking would violate the constitutional prohibition against the taking of private property without just compensation." *Grand River Dam Authority* v. *Jarvis,* 124 F. 2d 914, 916 (10th Cir. 1942).

[7] A third interpretation would be that Congress intended to give the trial judge some discretion in determining whether a court-appointed expert witness should be compensated entirely by the United States or whether the parties should share this expense, as in "other civil cases." Perhaps this interpretation would be proper in criminal cases where the accused is not an indigent. It would not be proper in condemnation cases because the landowner could not be required to pay any part of a court-appointed expert witness' compensation. *See, e.g., United States* v. *2,186.63 Acres of Land, Wasatch County, Utah, supra,* note 4. It would reduce just compensation, a result prohibited by the Fifth Amendment. This interpretation does not seem reasonable, because no distinction was made between criminal and condemnation cases relative to the trial judge's discretion in determining whether the United States should pay the expert witness' fee in full or whether it should be borne by the parties.

Evidence, Congress has not appropriated any funds specifically for the purpose of Rule 706(b).[8]

We think the basic reason for establishing the special category for criminal and condemnation cases was simply to place those cases in which the United States is the sole compensator in a separate and distinct category. And, as we noted earlier, we conclude that the language "which may be provided by law" was intended to signify that the means for compensating court-appointed expert witnesses in the two types of cases in this category are different.

We also conclude that Rule 706 has the effect of making the fees of court-appointed expert witnesses ordinary expenses of litigation. For the Government such expenses are generally paid by the litigating agency rather than the Administrative Office. Indeed, because the monies appropriated to the Administrative Office are for the expense of maintenance of the courts, it would seem to violate 31 U.S.C. § 628 for that Office to use such funds for any other purpose.[9]

It is our opinion that in condemnation cases or "other civil cases," the agency that initiates and prosecutes the action has responsibility for compensating the court-appointed expert witness. In *United States* v. *109 Acres of Land,*[10] it is our opinion that had the expert witness been appointed pursuant to Rule 706, TVA would be responsible for compensating the expert witnesses. However, the expert witness was appointed before the Federal Rules of Evidence were enacted into law, and the court stated that the expert witness was appointed "[u]nder its inherent power so to do . . . as an aid to the Court in discharging its official duty." We think that while Rule 706 recognizes a trial judge's power to appoint his or her own expert, an expert witness appointed pursuant to Rule 706 and an expert appointed by the judge pursuant to his inherent power are not necessarily coequals.[11] Thus, we conclude that in this case the Administrative Office should pay the compensation of the court-appointed expert witnesses as expenses of maintenance of the courts.[12]

In the future the practice of the Department will be to pay for the full compensation of court-appointed expert witnesses in condemnation

---

[8] The Senate and House reports accompanying H.R. 5463, a bill to establish rules of evidence for certain courts and proceedings, state that would "entail no cost to the Government of the United States." *See* S. Rep. No. 1277, 93rd Cong., 2d Sess. 28 (1974) and H.R. Rep. No. 650, 93rd Cong., 1st Sess. 19 (1973). That is undoubtedly an overbroad statement unless Congress did not intend the purpose for enacting the rules to be carried out. Moreover, as noted in the text, funds were already being provided for expert witnesses in criminal cases, and their fees would not be passed on to the landowner in condemnation cases. However, this language can serve as an indication that Congress was of the opinion that the funds to carry out the purpose of the new law already existed.

[9] That section states that "Except as otherwise provided by law, sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others."

[10] 404 F. Supp. 1392 (D. Tenn. 1975).

[11] *See* note 1, *supra.*

[12] *See* note 1, *supra.*

cases and as directed by the court in "other civil cases" where it is the litigating agency. However, we are of the opinion that it would be more efficient and less burdensome from an administrative point of view, if Congress appropriated funds to the Administrative Office for the purpose of compensating all court-appointed expert witnesses.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

July 28, 1977

77-44 MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

Disposition of Nixon Memorabilia

This is in response to your request for our opinion with respect to the proper disposition of the personalized memorabilia of former President Nixon, which were left in the Old Executive Office Building when he resigned on August 9, 1974. The memorabilia are now in custody of the White House Gift Unit, a part of the White House Office. We understand that most of these items were acquired with private funds or by the Republican National Committee for the use of President Nixon. The remainder are gifts to him by private persons. We further understand that the Gift Unit's records allow it to determine the source of the particular items.[1] It should be noted at the outset that the materials include copies of White House documents prepared for President Nixon. Under § 101(b) of the Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2107 note, these and any other documents are historical materials that must be turned over to the Administrator of General Services. *See* 44 U.S.C. § 2101; H.R. Rep. 93-1507, 93rd Cong., 2d Sess., at 9.

The remainder of the memorabilia, which were purchased with private funds, were originally the property of the purchasers rather than of the United States Government.[2] Due to the circumstances in which they were found, they have, however, become the property of the

---

[1] Certain of the items appear to have been purchased in the People's Republic of China during President Nixon's tour. For example, a three-piece tea set was listed in the Gift Unit's inventory. We are informed by the Gift Unit that these are private purchases and not official gifts from the People's Republic.

It should be noted, however, that under the Foreign Gifts and Decorations Act of 1966, 5 U.S.C. § 7342, any gift from a foreign government or its agent of more than minimal value is accepted on behalf of the United States and becomes the property of the United States. The President, members of his staff, and members of their families are subject to this statute. 5 U.S.C. § 7342(a)(1). Under regulations promulgated by the Department of State, such gifts are to be deposited with the Chief of Protocol. 22 CFR § 3.5(c). Gifts of minimal value remain the property of the recipient, but the burden of showing minimal value is on him. 22 CFR § 3.5(b).

[2] We do not have the information necessary to determine the respective interests, if any, of the private purchases.

United States under 40 U.S.C. § 484(m). That statute authorizes the Administrator of General Services "to take possession of abandoned or other unclaimed personal property on premises . . . owned by the United States, to determine when title thereto vested in the United States, and to utilize, transfer, or otherwise dispose of such property." Under regulations promulgated by the General Services Administration (GSA), title to abandoned or unclaimed property on Government premises vests in the United States 30 days after it is found, except that title reverts to the former owner if he files a claim before the property is used, transferred to another agency for use, or sold.[3] "Abandoned or unclaimed property" includes any personal property found on Government premises.[4] Because the Nixon memorabilia were found more than 30 days ago, title thereto has vested in the United States, subject any claim by the former owners.

Under the GSA regulations, the agency that finds the property is responsible for it and must either use it or report it to GSA as excess property.[5] Once the property is reported, GSA will either furnish it to other Federal agencies or dispose of it as surplus.[6] The former owner is entitled to payment for the reasonable value of any abandoned or unclaimed property used by the United States or to the proceeds of any sale.[7] As the Agency that found the memorabilia, the White House Office is responsible for their custody, for evaluating claims for their return, and for reporting unusable items to GSA.[8]

Neither the statute nor the regulations requires the finding agency to notify possible former owners that the property has been found before it is disposed of. However, due process of law requires that potential claimants be given reasonable notice and an opportunity to submit claims before the United States cuts off their right to have unclaimed

---

[3] 41 CFR § 101–43.403.1.

[4] 41 CFR § 101–43.401(a).

[5] 41 CFR §§ 101–43.403–1, 101–43.403.2.

[6] *See* 41 CFR §§ 101–43.301, 101–43.318–1, 101–45.404(b). Sales are conducted by GSA and are normally by sealed bids, spot bids, or auction. *See, generally*, 41 CFR §§ 101-45.301, 101–45.304. Abandoned or unclaimed property may be sold at any time after title vests in the United States. 41 CFR § 101–45.404(b).

[7] 40 U.S.C. § 484(m); 41 CFR §§ 101–43.403.4, 101–45.401.1. Claim for payment must be made within 3 years of the date that title vested in the United States. 40 U.S.C. § 484(m).

[8] The White House Office is within the meaning of the term "executive agency" as defined in the statute and regulations. *See* 40 U.S.C. § 472(a); 41 CFR § 101–43.001–6.

property returned.[9] *See, Security Savings Bank* v. *California,* 263 U.S. 282, 287 (1923); *Cf., Mullane* v. *Central Hanover Trust Co.,* 339 U.S. 306, 311–13 (1950). When the names and addresses of potential claimants are known or can be found through ordinary diligence, due process requires that they be given actual notice by mail. *See, Mullane* v. *Central Hanover Trust Co., supra,* at 315–20.

The White House Office should therefore notify Mr. Nixon, the Republican National Committee, and any other persons who your records indicate may have owned the memorabilia before any action is taken to use or dispose of them. The notice should state that the described items were apparently abandoned on August 9, 1974, that the United States took title to them under 40 U.S.C. § 484(m) and 41 CFR § 101–43.403–1 on September 9, 1974, that the former owners can file a claim of ownership within 30 days,[10] and that any property that is not claimed by its former owner within that time will be reported to GSA for disposal as surplus property under 41 CFR § 101–45.404(b).[11]

Items which are not successfully claimed should be reported to GSA for disposal through normal channels.

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

---

[9] Since abandonment results from the former owner's intent to divest himself of all interest in the property, appropiration by the United States of abandoned property would not appear to be a taking of a property right. *See, generally, United States* v. *Cowan,* 396 F. 2d 83, 87 (2d Cir. 1968); *Nippon Shoshen Kaisha, K.K.* v. *United States,* 238 F. Supp. 55, 58 (D. Cal. 1964); 1 Am. Jur. 2d "Abandoned Property," § 16, at p. 16. Strictly speaking, notice to the former owner would not be constitutionally required. *Mullane* v. *Central Hanover Trust Co.,* 339 U.S. 306, 316 (1950). However, intent to abandon is a question of fact, so that reasonable notice is required before determining whether property is abandoned or merely unclaimed. *Anderson National Bank* v. *Luckett,* 321 U.S. 233, 246 (1944). Moreover, failure to respond to personal notice is evidence of intent to abandon. *See* 1 Am. Jur. 2d, *supra,* § 16 at pp. 16–17.

[10] This is an arbitrary figure that appears to provide a reasonable time for response.

[11] The form for the report is set forth at 41 CFR § 101–43.311–2.

July 28, 1977

77-45 MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

National Commission on Neighborhoods— Appointment of Members

This memorandum responds to your request for our opinion on the meaning of the phrase "members of the same political party" in § 203(b) of the National Neighborhood Policy Act, Pub. L. No. 95-24, 91 Stat. 57, establishing the National Commission on Neighborhoods. The pertinent language reads as follows:

> The two members appointed pursuant to clause (1) may not be members of the same political party, nor may the two members appointed pursuant to clause (2) be members of the same political party. Not more than eight of the members appointed pursuant to clause (3) may be members of the same political party.

At the outset, we would note that the statute does not require that an appointee be a member of *any* political party. In particular, an appointee need not be a registered Democrat or Republican; the statute imposes no such requirement, and in fact would raise serious constitutional questions if it did. *Williams* v. *Rhodes*, 393 U.S. 23 (1968). The President thus remains free to appoint those only tangentially affiliated with the two major parties, members of lesser-known political parties, and independents. Indeed, such appointments would further the statutory purpose of fostering a political diversity on the Commission. *See* H.R. Rep. No. 42, 95th Cong., 1st Sess. 6 (1977); 123 Cong. Rec. H. 1946 (daily ed. March 10, 1977) (remarks of Rep. Annunzio).

The only statutory restriction is a prohibition on the appointment of more than one-half of the members of the Commission from the same political party. Despite its initial appearance, this is not a prohibition susceptible of easy application. While in may instances an appointee's status will be obvious, in may other situations it may not be so clear whether a certain individual is a "member" of a "political party." The determination will often depend on all the facts and circumstances of a

particular case; we will, nevertheless, give our own general views on this subject.

A political party is generally defined as an organization consisting of electors who have the same basic theories or principles of government, *see, Socialist Labor Party* v. *Rhodes,* 290 F. Supp. 983, 988 (D. Ohio 1968), *aff'd in part, modified in part,* 393 U.S. 23; *United States* v. *Shirey,* 168 F. Supp. 382, 385 (D. Pa. 1958), *rev'd on other grounds,* 359 U.S. 255 (1959), which they strive to put into effect through the election of party members to public office. *State* v. *Cleveland-Cliffs Iron Co.,* 169 Ohio St. 42, 157 N.E. 2d 331, 333 (1959); *People* v. *Kramer,* 328 Ill. 512, 160 N.E. 60, 64 (1923); *Kelso* v. *Cook,* 184 Ind. 173, 110 N.E. 987, 994 (1916); *Chambers* v. *I. Ben Greenman Ass'n.,* 58 N.Y.S. 2d 637, 640 (N.Y. Sup. Ct. 1945), *aff'd,* 58 N.Y.S. 2d 3. We doubt that this definition occasions great problems. The Republican and Democratic parties are obviously political parties, and the President is unlikely to appoint members of other political organizations in such numbers as to give rise to many questions.

More substantial problems arise in determining whether a potential appointee is a "member" of a political party. In contrast with some other statutes, *see, e.g.,* 50 U.S.C. § 844, the provision in question lists no criteria to be considered in determining membership; the legislative history is also of little help. The courts, in construing the term "member" in other contexts require that the individual have the desire to belong to an organization and the organization recognizes him as a member. *Killian* v. *United States,* 368 U.S. 231, 249–51 (1961); *Fisher* v. *United States,* 231 F. 2d 99, 107 (9th Cir. 1956). We think that this construction, even though rendered in a criminal context, can at least provide the framework of a definition here. To elaborate on this framework, we believe that a "member" of a political party must (1) share the basic beliefs of the party, since a party is composed of individuals of similar principles; (2) desire to belong to the party; and (3) perform certain actions in furtherance of its goals. This last requirement is drawn from the fact that the party must "recognize" one's membership; because party affiliation is usually a matter of great informality, *Alexander* v. *Todman,* 337 F. 2d 962, 974 (3rd Cir. 1964), it would appear that party "recognition" may be achieved upon an individual's active support of the party and its goals.

The type of active support sufficient to constitute membership is a question that must depend on all the facts and circumstances of a particular situation. We doubt, however, that mere support of a party's candidates in a general election, even if over a long term, is sufficient by itself to constitute membership. While such a pattern may show interest in, and sympathy for, the party's goals, this has not been deemed sufficient to fulfill the definition of "membership" in other contexts. *See, National Council* v. *Subversive Activities Control Board,* 322 F. 2d 375, 388 (D.C. Cir. 1963); *Travis* v. *United States,* 247, F. 2d 130,

136 (10th Cir. 1957). Moreover, if Congress had intended to allow mere electoral support to be determinative here, it presumably would have used a term less connotative of belonging to a group—such as, for example, "affiliation" or "sympathy." *Bridges* v. *Wixon,* 326 U.S. 135, 143 (1945).

On the other hand, registration in a party would most often be indicative of membership in that party, since it usually reflects a commitment to the party's goals and involves a role in choosing the party's candidate. *Cf., Bendinger* v. *Ogilivie,* 335 F. Supp. 572, 576 (D. Ill. 1971). In the absence of a formal registration, membership might be shown by other evidence of active support of a party—financial support, attendance at meetings, volunteer activity, speeches, or service as an officer might all be considered in determining whether an individual is a member of a party. *Cf.* 50 U.S.C. § 844; *Galvan* v. *Press,* 347 U.S. 522, 528-29 (1954); *National Council* v. *Subversive Activities Control Board, supra,* at 388; *Fisher* v. *United States, supra,* at 107.

In short, there is no definitive formula for determining membership, although reliable indicia of memberhsip are available.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

August 12, 1977

77-46 MEMORANDUM OPINION FOR THE DIRECTOR OF THE OFFICE OF MANAGEMENT AND BUDGET

Legal Questions Raised by the Library of Congress Critique of Reorganization Plan No. 1 of 1977

This is in response to the request of your Office for my opinion on the legal questions raised by the Library of Congress Critique of Reorganization Plan No. 1 of 1977. The critique raises many questions of policy and discusses a number of general legal issues, but it specifically challenges the legality of only a few aspects of the plan. Our response is limited to those specific legal challenges. For the reasons that follow, we do not believe that the critique's conclusions respecting these aspects of the plan are warranted.

Domestic Council Staff

Section 1 of the plan provides that "the Domestic Council staff is hereby designated the Domestic Policy Staff"; it further provides that "the staff shall continue to be headed by an Executive Director who shall be an Assistant to the President, designated by the President, as provided in Section 203 of Reorganization Plan No. 2 of 1970." The critique asserts that this provision violates Section 904 of the Reorganization Act of 1977, 5 U.S.C. § 904, by failing to provide for Senate confirmation of the Executive Director of the Domestic Policy Staff. Section 904 reads in pertinent part:

> A reorganization plan transmitted by the President containing provisions authorized by paragraph (2) of this section may provide that the head of an agency be an individual or a commission or board with more than one member. In the case of an appointment of the head of such an agency, the term of office may not be fixed at more than four years, the pay may not be at a rate in excess of that found by the President to be applicable to comparable officers in the executive branch, and if the appointment is not to a position

in the competitive service, it shall be by the President, by and with the advice and consent of the Senate.

As is readily apparent from this provision, the requirement respecting Senate confirmation is not made applicable to every official who has some vague connection with a reorganization plan; rather, it applies only "in the case of an appointment of the head of such an agency." The term "the head of such an agency" can only refer to those officials described in the previous sentence. The sentence allows the head of an agency to be an individual or a multimember board; what is more important for our purposes, however, is that it clearly contemplates an appointment of such officers pursuant to paragraph (2) of § 904. The term "the head of such an agency," then, refers to heads of agencies appointed in accordance with the provisions of that paragraph.[1]

We do not believe that the Executive Director of the Domestic Policy Staff is such an official. Paragraph (2) applies only to officials for whom arrangements regarding appointment and pay must be made "by reason of a *reorganization*" [emphasis added], and we doubt that the action taken by the plan with respect to the Domestic Council fits within § 904's definition of "reorganization." Section 904 defines that term to "mean a transfer, consolidation, coordination, authorization, or abolition, referred to in Section 903 of this title." 5 U.S.C. § 902(2). These terms defining "reorganization" and their elaboration in section 903 contemplate a change in the functions of an agency; but no such changes are effectuated here. The functions of the staff will remain the same as before; under both plan No. 1 of 1977 and plan No. 2 of 1970, the staff is (by reason of the duties imposed on the Executive Director) to "perform such functions as the President may from time to time direct." We thus believe that the requirement of Senate confirmation is inapplicable here.

The purposes underlying the requirement of Senate confirmation would also seem to support this result. It would make little sense to require Senate confirmation of an official not previously subject to this requirement merely because he or she is in some way involved in a reorganization—particularly where, as here, his or her functions remain exactly the same. Rather, the requirement appears designed to protect congressional prerogatives in situations where *new offices* are created. This intent seems apparent in Congress' linking the requirement of Senate confirmation to situations where provisions for appointment and pay of officials are necessary—and such provisions would be necessary only where new offices are being created. The legislative history of the predecessor of § 904 bears this out; it reveals that Congress wanted to

[1] This interpretation is further supported by the fact that the provision requiring Senate confirmation was originally included within a provision which is the precursor of paragraph (2). *See* Reorganization Act of 1945, ch. 582, § 4(2) 59 Stat. 614. The statute was later amended to reflect its present form, Act of Dec. 10, 1971, Pub. L. No. 92-179, § 3, 85 Stat. 575, but the legislative history clearly indicates that no substantive changes were intended. *See* S. Rep. No. 485, 92nd Cong., 1st sess. 4-5 (1971).

impose restrictions on the President's power to reorganize "with respect to the creation of *new positions.*" S. Rep. No. 638, 79th Cong., 1st Sess. 6 (1945). [Emphasis added.] The plan can hardly be said to have created a new position here. It expressly states that the staff "shall *continue* to be headed by an Executive Director" [emphasis added], and it confers no new functions on the Executive Director or the staff by which he could be regarded as having a new position.

Finally, another aspect of the plan supports our conclusion. Because all it purports to do is to change the name of the staff of the Domestic Council, the plan would appear to fall within the provisions of paragraph (1) of § 904. This paragraph allows the President to

> change . . . the name of an agency affected by a reorganization and the title of its head. . . .

Because Congress structured § 904 to require Senate confirmation only with respect to officials provided for under paragraph (2), we believe it would be contrary to Congress' intent to extend this requirement to situations where only action under paragraph (1) has been taken.

The critique further argues that the Executive Director of the Domestic Council should have been required to be confirmed by the Senate under Reorganization Plan No. 2 of 1970. If this be so, the fact that under plan No. 1 of 1977 the Executive Director would continue in his previous position, seems to require an adjustment to provide for Senate confirmation. However, the Attorney General had ruled that the arrangement in the plan No. 2 of 1970 did not violate provisions similar to those at issue here. The Attorney General relied on the fact that then—as now—the Executive Director was to be an Asistant to the President appointed under other statutory provisions, and commented that "carried to its logical conclusion, this argument would require the 'reappointment' in accord with 5 U.S.C. § 904(2) of any properly appointed officer given an additional title and duties by a reorganization plan." [2] While there were those in Congress who took a contrary view, *see, e.g.,* H.R. Rep. No. 1066, 91st Cong., 2d Sess. 3-6, 56-57 (1970), the fact remains that Congress did not disapprove the 1970 reorganization. We think this fact strongly implies that Congress regarded Reorganization Plan No. 2 of 1970 as complying with existing law and congressional intent, because it was done with full knowledge of the objections to its approval. We do not believe that Reorganization Plan No. 2 of 1970 was in violation of law, and, accordingly, there is no need to provide for Senate confirmation in plan No. 1 of 1977.

We conclude that there is no requirement under § 904 of the Reorganization Act of 1977 that the position of Executive Director of the Domestic Policy Staff be made subject to Senate confirmation.

---

[2] Letter from the Attorney General to the Chairman of the Subcommittee on Government Operations, House of Representatives, dated May 6, 1970.

Assistant Secretary of Commerce

The critique argues that the wording and intent of Section 4 of the plan, regarding the appointment of an Assistant Secretary of Commerce, is ambiguous. We disagree.

That section now reads:

> There shall be in the Department of Commerce an Assistant Secretary for Communications and Information who shall be appointed by the President, by and with the advice and consent of the Senate, and who shall be entitled to receive compensation at the rate now or hereafter prescribed by law for Level IV of the Executive Schedule.

While the language "there shall be . . . an Assistant Secretary" could conceivably suggest that a present Assistant Secretary is to be delegated new functions, we doubt that this language would be used if there were such intent. Moreover, any doubt on the matter is resolved by the President's statement that certain functions were being "transferred to a *new* office within the Department of Commerce, headed by a *new* Assistant Secretary for Communications and Information" [emphasis added]; the message also stated that the plan would "create" an Assistant Secretary—which implies that there is to be an Assistant Secretary where none had previously existed.

Compliance with House of Representatives Rules

Clause 2 of Rule XXI of the House of Representatives provides that no appropriations may be reported by the House Appropriations Committee in any general appropriations bill for expenditures not previously authorized by law. The critique notes that, if the Domestic Policy Staff is subsumed in the White House Office, a violation of this clause will result. The reason given is that several budget accounts in the Executive Office of the President—including the White House Office—are already in violation of this clause in whole or in part.

We do not believe it appropriate for us to respond to this aspect of the critique. If there is a violation, it is a violation of an internal rules of procedure that the House of Representatives has the responsibility to interpret and apply.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

August 18, 1977

77-47 MEMORANDUM OPINION FOR THE SECRETARY OF AGRICULTURE

Price Support for Sugar Producers—Agriculture Act of 1949

This is in response to your request for our opinion whether the proposed price support program for sugar is authorized under the Agricultural Act of 1949, as amended.

I

The program is set forth in proposed regulations that were published in the Federal Register on June 14, 1977. The program, as we understand it, would function in the following way:

At the close of each marketing quarter the Agricultural Stabilization and Conservation Service (ASCS) would make a cash payment to each eligible processor who had marketed refined beet sugar or raw cane sugar during the quarter, if the "national average price" of refined beet sugar or raw cane sugar had been less than 13.5 cents per pound for the quarter. The amount of the payment would be determined by applying a rate to the number of pounds of sugar that the eligible processor had marketed during the quarter. The rate would equal the difference between (1) the "national average price" of processed sugar for the quarter, and (2) 13.5 cents per pound; but it would not exceed 2 cents per pound.

A processor would be eligible to receive a quarterly payment if, but only if, he had entered into a written contract with each producer who had provided him with unprocessed sugar beets or sugarcane for the quarter, and the contract had prescribed (1) that the producer would receive an agreed share of the proceeds generated from the sale of the processed product, and (2) that the processor would pay the producer the full amount of any ASCS payment received by the processor on account of the sale, less any administrative expenses incurred by the processor in connection with receiving and forwarding the ASCS payment.

In short, the proposed program would provide producers of sugar beets and sugarcane with supplemental cash payments, pegged to production and to the differential between the market price for sugar and 13.5 cents per pound, which payments would be channeled to them through the processors.

The program would assure that producers receive an aggregate return on sugar beets and sugarcane in excess of that which the processors themselves could afford to pay in light of the current market prices for processed sugar. In addition, the program would encourage continued production of sugarcane and sugar beets and would thereby stabilize the market. The question is whether the Act authorizes a program of this kind.

II

The Act authorizes the Secretary of Agriculture to provide "price support" to the producers of certain nonbasic agricultural commodities, including sugar beets and sugarcane. 7 U.S.C. § 1447. The Act specifies that the Secretary shall provide this support, if at all, through "loans, purchases, or other operations." *Id.*

The proposed program would not provide price support to producers through "loans" or "purchases." The issue thus is whether it would provide price support to producers through "other operations." The Act does not define this term, and we know of no court decision that defines it. "Other operations" are operations other than loans or purchases, but the phrase is otherwise unknown to the law. Legislative history is the only guide.

First, whatever the extent of the Secretary's authority to provide price support to producers through "other operations," it is clear that Congress did not intend to give the Secretary authority to make direct payments to producers to compensate them for shortfalls in the market price of a nonbasic commodity, where that price is otherwise unsupported. It is clear that the Secretary was to have no authority to make "production payments," and while that term was given no precise definition in the legislative history, it was understood to refer generally to direct payments to producers (other than payments made pursuant to loans or purchases) in circumstances where the market price of their produce was unsupported and the payments were prompted by a shortfall in the price. Hearings Before the Senate Committee on Agriculture and Forestry on Farm Price-Support Program, 81st Cong., 1st Sess. 120–21 (1949); S. Rep. No. 1130, 81st Cong., 1st Sess. 4 (1949).

Second, there is some evidence that the Act was intended to provide the Secretary with authority to make direct payments to *processors* (other than in connection with loans or purchases) as a means of providing price support to producers in certain circumstances. At least one Senator took that view during the hearings on the relevant bills. Senator Anderson stated that if the price of an *unprocessed* commodity

were supported by other means, the Secretary would have authority to make compensatory payments to processors to defray the expenses incurred by them in paying the support price, provided the market prices for the *processed* commodity were so low that the processors could not otherwise afford to pay the support price. He stated that a program of this kind would be an example of one of the "other operations" by which the Secretary could provide price support to producers. Our research discloses that Senator Anderson's example is the only such example given in the legislative history. Hearings, *supra,* at 120.

It should be noted that Senator Anderson's interpretation is supported to some extent by the language of the Act itself. The Act suggests that, in fact, a price support operation may involve payments to processors. The Act does not describe the circumstances in which these payments may be made. It simply states that whenever a price support operation is carried out through "purchases from or loans *or payments to processors*" [emphasis added], the Secretary shall receive assurances from the processors that producers will receive "maximum benefit" from the operation. 7 U.S.C. § 1421(e).

III

In light of the legislative history, the question might be resolved by determining the extent to which the proposed program resembles or differs from the two nonpurchase, nonloan programs that are described in the legislative history: (1) the program of "production payments," which the Act prohibits; and (2) the program of compensatory payments to processors, described by Senator Anderson, which the Act perhaps permits.

It is our opinion that there would be no distinction in substance between the proposed program and a program of "production payments." It is true that there would be a distinction in form: the payments would be made, not to the producers directly, but to processors, as forwarding agents for the producers. But the effect of the program would be precisely the same as the effect of a program of production payments. The market price for the processed commodity would float; the producers' share of that price would be determined by private agreement in an otherwise unsupported market; and the ASCS payments would be made, where necessary, to subsidize the producers on account of shortfalls in the market price.

On the other hand, there would be a significant difference between the proposed program and a program such as the one suggested by Senator Anderson. A program of that kind would presuppose that processors would pay a support price for the unprocessed commodity. Payments to the processors would then be made, not to subsidize the producers, but to compensate the processors for the additional costs incurred by paying the support price. The proposed program, in contra-

distinction, would have no short-run impact upon the prepayment price of the unprocessed commodity.[1] That price would be unsupported in the short run; and payments to the processors would be made for the purpose of subsidizing the producers, protecting them from the depressed market.

In short, the proposed program is indistinguishable from a program of production payments, which the Act prohibits; and it is distinguishable in substance from the one program that the legislative history puts forward as an example of an authorized "other operation." It is true that there would be a formal similarity between the proposed program and a program of compensatory payments to processors, but considerations of substance must override considerations of form to the extent that they may conflict. Accordingly, it is our conclusion that the proposed program is unauthorized. In the face of the clear expression of congressional intent with regard to production payments, a program of indirect payments to producers is not one of the "other operations" that the Secretary is authorized to employ. We do not wish to suggest, however, that price support to producers may never be provided by means of direct payments to processors, but if it is to be so provided, the processors must act as something more than forwarding agents for payments that are otherwise indistinguishable from production payments.

Finally, without question, payments made under the proposed program would tend to stabilize the market, inasmuch as they would encourage producers to remain in the market; however, the same would be true if the payments were to be made to the producers directly.

For the reasons given above, we conclude that the program is prohibited under the Agricultural Act of 1949, as amended.

PETER F. FLAHERTY
Deputy Attorney General[2]

[1] In light of the absence of any direct impact upon the prepayment price of the unprocessed commodity, the argument could be made that the proposed program is not authorized under the Act for the simple reason that it does not provide "price support." We have not found it to be necessary to accept or reject that argument in determining whether the proposed program is an authorized "other operation."

[2] This opinion was prepared by the Office of Legal Counsel.

September 1, 1977

77-48 MEMORANDUM OPINION FOR THE GENERAL COUNSEL OF THE CENTRAL INTELLIGENCE AGENCY

Weissman v. *Central Intelligence Agency*—District of Columbia Circuit—Effect of Decision

This is in response to your request for our opinion with respect to the consequences of the recent decision of the Court of Appeals for the District of Columbia Circuit in *Weissman* v. *Central Intelligence Agency*, 565 F. 2d 692 (D.C. Cir. 1977).[1] We understand that the decision has been made by the Solicitor General not to seek Supreme Court review in this instance. We have discussed with his office informally our general views on the *Weissman* case, but we were not directly involved in the consideration of the question whether this was an appropriate case in which to seek certiorari. The question that remains is whether, and to what extent, the *Weissman* case proscribes the activities of the Central Intelligence Agency (CIA). For the reasons that follow, we are unable at this juncture to provide your Agency with a definitive opinion on the scope and consequences of the D.C. Circuit's opinion. We are able, however, to suggest the considerations that ought to be applied by the CIA in developing procedures dealing with the types of activities potentially affected by *Weissman*.

The troublesome portion of the decision in *Weissman* is the court's treatment of the Government's claim that certain documents generated as part of an investigation of Mr. Weissman need not be disclosed to him by reason of exemption seven of the Freedom of Information Act. 5 U.S.C. § 552(b)(7). The district court had ruled that the CIA investigation fulfilled that exemption's requirement that the investigation be lawful, and that therefore the exemption protected the documents at issue from disclosure. The court of appeals held, however, that exemption seven was not available to the CIA for the sort of activity involved here, and remanded the case to the district court to determine

[1] This was an action under the Freedom of Information Act to compel the Central Intelligence Agency to turn over certain documents.

whether other exemptions could protect the documents against disclosure in the absence of that exemption.

The court's rationale is not clear. However, the ruling appears to be based on its belief that the investigative procedures used were not legally authorized where the target of those procedures was a United States citizen having no connection with the CIA. The court indicated its opinion as to the CIA's authority in this regard in several statements:

> [The proviso in 50 U.S.C. § 403(d)(3)] was intended, at the very least, to prohibit the CIA from conducting secret investigations of United States citizens, in this country, who have no connection with the Agency. 565 F. 2d at 695.
>
> [The responsibility of the Director of Central Intelligence to protect intelligence sources and methods] contains no grant of power to conduct security investigations of unwitting American citizens. *Id.* at 696.
>
> A full background check within the United States of a citizen who never had any relationship with the CIA is not authorized . . . . *Id.* at 696.

These three statements, apparently, form the basis of the court's ruling that exemption seven is not available.

Neither the above statements nor the rest of the court's opinion explain exactly what sorts of investigations the court believed were illegal; the court's opinion is ambiguous, for example, as to the scope of permissible investigations and the "connection" that the person under investigation must have with the CIA. In assessing the opinion, and in endeavoring to determine what restrictions it imposes upon the CIA, we believe that there are several factors that ought to be taken into consideration.

First, a restrictive interpretation of the court's language is justified in view of the context in which it was rendered. The opinion was rendered in a case involving the Freedom of Information Act, and not in an injunctive or declaratory action directly challenging the CIA's practices. The court was not presented with a full and direct briefing and consideration of the complex issues that must be evaluated in ascertaining the proper limitations on the CIA's substantive activities.

Second, this is the decision of only one court of appeals in a single case. The Government in other contexts has not always accorded final effect to the decisions of lower Federal courts. For instance, in the areas of tax and labor law, the Government frequently has pursued in one circuit a statutory interpretation at odds with pertinent rulings by courts in other circuits. Moreover, there is reason to believe that further elaboration of the court's view of the CIA's authority will be forthcoming in the not too distant future. As you know, the Government has now filed with the D.C. Circuit Court of Appeals its appellee brief in *Marks* v. *Central Intelligence Agency,* No. 77-1225. The Govern-

ment devotes considerable attention to a discussion of the potential sweep of the *Weissman* case, and it may well be that the court will take this opportunity to expand upon or clarify its views.

Additionally, we do believe that a substantial argument can be made that the case was decided wrongly. As you know, Executive Order 11905 3 CFR 90 (1976) prohibits foreign intelligence agencies from collecting information concerning the domestic activities of United States persons, except, among other things, for information collected to determine the suitability or credibility of persons who are reasonably believed to be potential sources or contacts. § 5(b)(7)(iii). *See also* § 4(b)(8). The court did not discuss this provision at all. Additionally, the Senate Select Committee to Study Intelligence Activities recognized that the CIA previously had conducted such investigations, and apparently did not object to them as violations of the CIA's charter legislation; in fact, the Committee recommended that the practice be allowed to continue. *See* S. Rep. No. 755, Book II, 94th Cong., 2d Sess., pp. 302–03 (1976). In a perplexing footnote, the court of appeals referred to that treatment of the question by the Committee, but it is unfortunately quite difficult to determine whether the reference was intended as a favorable comment upon the practice or as a simple statement of historical fact. *See, id.* at 696, fn. 8. We believe that given the court's ambiguous treatment of these important questions, we should be slow to adopt any interpretation of the court's language that would be at odds with these conclusions drawn, respectively, by the executive and legislative branches. Nonetheless, this is the only judicial interpretation and its import cannot be ignored.

With those considerations in mind, the following are our general comments about the meaning of the *Weissman* case:

1. Knowledge of the subject. Your letter to our Civil Division expresses a concern that the court's opinion might be read to require that the subject of any proposed investigation be "made aware of both the fact and the CIA sponsorship of the investigation." The Civil Division does not believe this to be the case, and neither do we. While the court at times refers to investigations of "unwitting" Americans, 565 F. 2d at 696, other statements in the opinion are not predicated on the factor that the investigation is unknown to the subject. *See, e.g., id.* at 695, 696. Rather, these statements find investigations unauthorized by reason of the lack of a "relationship" or "connection" with the CIA. While in many cases an individual will be aware of his relationship with the CIA, the lack of an explicit requirement to this effect in the court's opinion indicates that the court did not deem this to be an invariable prerequisite to an investigation.

2. Requisite connection with the CIA. The court made clear in several instances that the prohibition on CIA security investigations applied only to those "who have no connection with the

Agency" or "who never had any relationship with the CIA." This implies that the CIA might under appropriate circumstances conduct investigations of those who have some connection with the CIA; the opinion, however, does not specify what sorts of connections might justify a security investigation. While the end result makes clear that the CIA's unilateral, undisclosed interest, by itself, is not sufficient, much more than this may not be required to establish the requisite relationship. For example, all those performing work for or on behalf of the CIA might have a sufficient relationship with the Agency to justify a security investigation—even if they are unaware of CIA sponsorship or involvement. Individuals who consent to an investigation, in the hope of becoming an employee or asset, also would seem to have a connection with the Agency that would justify a security investigation.

3. Permissible scope of the investigation. The court at one point states that "a full background check" is not authorized; we do not believe, however, that this is the *only* type of investigation which is prohibited. The court at other points states that the CIA is barred from "secret investigations" or "surveillance and scrutiny" of United States citizens, and this would indicate that some initiatives less than a full background check are precluded. At the same time, we agree with the Civil Division that *all* such initiatives are not precluded. The court's references to a "full background check" (p. 696), to "surveillance and scrutiny," to a "Gestapo" and a "secret police," and to a prying "into the lives and thoughts of citizens" (p. 695), together with the context of the thorough investigation that the court assumed occurred in this case, suggest that the court was concerned about the more intrusive security checks. The court also emphasized the extensiveness of the investigation, pointing out that it spanned a "five year period." (p. 695). Additionally, in endeavoring to ascertain the limits of the court's opinion, the reference in footnote 8 deserves attention. In discussing the Committee's recommendations, the court pointed out that a line had there been drawn between investigations "through surveillance" and those, which the Committee approved, "to collect information through confidential interviews about 'individuals or organizations being considered by the CIA as potential sources of information . . . .' " 565 F. 2d 696, fn. 8.

4. The relationship between "connection and intrusiveness." It is clear that the court was concerned about investigations of those who have no "connection" with the CIA. It is also clear that the court was sensitive to the extensiveness and intrusiveness of such investigations. On the basis of the court's opinion, however, there simply is no definitive way to determine the precise relationship between those two factors. Plainly, an investigation that is as long-lived as was the *Weissman* investigation, and involves "detailed

background checks" of a person who is unaware that he is being considered by the CIA and who has no "connection" with the Agency, would be inconsistent with the decision. However, it is difficult to anticipate whether the *Weissman* case has any further reach. The opinion offers little guidance in interpreting the statutory limitations upon your Agency's activities.

Given this ambiguity, we would suggest that the most productive course might be for the CIA to draft procedures governing the types of activities that require it to conduct investigations of United States citizens within the United States who have no clear connection with the CIA. This Office would be happy to review those procedures and to cooperate with you in any other way we can.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

September 12, 1977

77-49 MEMORANDUM OPINION FOR THE UNITED STATES ATTORNEY FOR THE DISTRICT OF COLUMBIA

Proposed District of Columbia Uniform Controlled Substances Act

This is in response to your request for our opinion whether, under District of Columbia (D.C.) Code § 1-147(a)(3), the District of Columbia Council has the authority to enact § 503 of the subject bill. D.C. bill 2-53 provides for forfeiture of narcotics and other property to the District. It is suggested that § 503 would conflict with the right of the United States under 21 U.S.C. § 881 to property forfeited on controlled-substances grounds. After careful consideration of the question, we believe that D.C. Code § 1-147(a)(3) denies to the Council that authority.

Section 602(a)(3) of the District of Columbia Self-Government and Reorganization Act, 87 Stat. 754, D.C. Code § 1-147(a)(3), restricts the legislative authority of the District of Columbia Council as follows:

> (a) The Council shall have not authority to pass any act contrary to the provisions of this Act except as specifically provided in this Act, or to—
>
> * * * * * * *
>
> (3) enact any act, or enact any act to amend or repeal any Act of Congress, which concerns the functions or property of the United States or which is not restricted in its application exclusively in or to the District.

Under the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 881(a), all controlled substances manufactured, dispensed, distributed, or acquired in violation of the Act, all raw materials and equipment used in manufacturing these substances, all containers for the substances, certain conveyances used to transport controlled substances, raw materials, or equipment, and all books and records used in violation of the Act are subject to forfeiture to the

Attorney General. The procedure followed is the same as for the customs laws: notice, suit for condemnation by the United States on showing of probable cause, and judicial hearing with the burden of proof on the claimant. 21 U.S.C. § 881(d); *see* 19 U.S.C. §§ 1595–1615. The Attorney General may retain such forfeited property for official use, transfer it to the General Services Administration, or forward it to the Drug Enforcement Administration for medical or scientific use. 21 U.S.C. § 881(e).

Under a District of Columbia law enacted in 1956, all unlawfully possessed narcotics and dangerous drugs seized by the District are forfeited to the Secretary of the Treasury pursuant to § 4733 of the Internal Revenue Code of 1954. D.C. Code §§ 33–417, 33–711; *see* 26 U.S.C. § 4733 (1964 ed.). The forfeiture now runs to the Attorney General. Reorganization Plan No. 1 of 1968, § 1, 82 Stat. 1367, 21 U.S.C. § 881. The District of Columbia Code does not currently provide for forfeiture of raw materials, equipment containers, conveyances, and books and records connected with the violation of the controlled substances laws. Thus, under the law in force in the District when the Self-Government and Reorganization Act took effect in 1973, all of the items enumerated in 21 U.S.C. § 881(a) became property of the United States even though seized by District officers.

Section 503(a) of the bill would subject to forfeiture to the District exactly the same types of property covered by 21 U.S.C. § 881(a), if used in violation of the District of Columbia Controlled Substances Act. Moreover, the bill's penal provisions cover the same conduct as the Federal statute. As a result, the bill would give the District a competing claim to property in which the United States now possesses the sole right of forfeiture.

Therefore, it is our opinion that § 503 "concerns the functions or property of the United States," a matter subject to the prohibition in D.C. Code § 1–147(a)(3).

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

September 19, 1977

77-50 MEMORANDUM OPINION FOR THE DIRECTOR OF THE NAVY PETROLEUM AND OIL SHALE RESERVES, DEPARTMENT OF THE NAVY

Transfer of Authority of the Secretary of the Navy to the Secretary of Energy—Naval Petroleum Reserve

This is in response to your request for our opinion concerning the effect of the Department of Energy Organization Act, Pub. L. No. 95–91, 91 Stat. 565 upon § 9 of the contract between the United States, acting through the Secretary of the Navy, and a major oil company.

The purpose of the contract was to provide a unit plan of development and operation in producing petroleum from the lands owned by the oil company and the Navy within the boundaries of Naval Petroleum Reserve No. 1. Section 9 of the contract in substance provides that:

> (a) In the event the Operating Committee is unable to agree upon any matter arising in the performance of its functions, such matter shall be referred to the Secretary of the Navy for determination; and his decision in each instance shall be final and shall be binding upon Navy and the oil company.
>
> (b) In the event the Engineering Committee is unable to agree unanimously upon any matter subject to determination by it, said Committee shall notify both Navy and the oil company thereof and shall refer such matter to the Secretary of the Navy for determination. Thereupon the Secretary of the Navy on his own initiative may, and upon the request of [the oil company] shall, submit the matter to an independent petroleum engineer, to be selected by him, for the purpose of securing an advisory report thereon from such engineer. The compensation and expenses of such engineer shall be borne by Navy and [the oil company] in the respective percentages then obtaining under Section 2, and a copy of such report shall be supplied to [the oil company]. After consideration

> of the matter, the Secretary of the Navy shall render his decision thereon and such decision in each such instance shall be final and shall be binding upon Navy and [the oil company].

Section 307 of the Act provides in part:

> There are hereby transferred to and vested in the Secretary all functions vested by chapter 641 of title 10, United States Code, in the Secretary of the Navy as they relate to the administration of and jurisdiction over—
>
> (1) Naval Petroleum Reserve Numbered 1 (Elk Hills), located in Kern County, California, established by Executive order of the President, dated September 2, 1912. . . .

The question you have asked is whether the Secretary of the Navy's role in determining disputes under § 9 of the Contract has devolved upon the Secretary of Energy by reason of § 307 of the Act.

The Secretary of the Navy acquired his authority over and his responsibility for Naval Petroleum Reserve No. 1 by reason of the statutory provisions now codified in Chapter 641 of Title 10, United States Code. In the absence of that chapter, the Secretary of the Navy would have no authority to undertake to settle disputes between the United States and the oil company concerning the operation of Naval Petroleum Reserve No. 1. Because the Secretary of the Navy's role in settling disputes under the Contract was vested in him by Chapter 641 of Title 10, United States Code (as well as by agreement of the parties), and because the functions of the Secretary of the Navy under Chapter 641 have now been transferred to the Secretary of Energy by operation of law pursuant to § 307 of the Act, the function of the Secretary of the Navy under § 9 of the Contract has also been transferred to the Secretary of Energy.

The correctness of this conclusion can be more readily seen by assuming that the contract provided that disputes were to be settled by, for example, the Administrator of the Energy Research and Development Administration, an Office that will terminate when its functions are assumed by the Secretary of Energy. Act, §§ 301(a), 703. In such a case, it would be beyond dispute that the function of settling disputes under the hypothetical contract would vest in the Secretary of Energy. Because the Act provides in § 705(a) that all contracts in effect on the date the Act becomes effective shall remain in effect, it is clear that the hypothetical contract would not terminate. It is equally clear that the existence of the contract could not be a basis for continuing the otherwise terminated Office of the Administrator. Because the Secretary of the Navy has other duties in addition to those transferred to the Secretary of Energy, he will continue to hold his Office as Secretary of the Navy; however, this does not support a different result with respect to those of his functions transferred to the Secretary of Energy than would obtain in the hypothetical case above.

Accordingly, it is my opinion that § 307 of the Act transfers the function of resolving disputes under the Contract from the Secretary of the Navy to the Secretary of Energy when the Secretary of the Navy's other functions under Chapter 641, Title 10, United States Code, are transferred.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

September 22, 1977

77-51 MEMORANDUM OPINION FOR THE ASSOCIATE DEPUTY ATTORNEY GENERAL

Law Enforcement at San Onofre Nuclear Generation Plant

This memorandum is in response to your request that we examine the legal aspects of the U.S. Marine Corps (USMC) providing police protection for the San Onofre nuclear power plant located on the Camp Pendleton Marine Corps Reservation, San Diego County, Calif. The matter has arisen because under Nuclear Regulatory Commission (NRC) regulations, Southern California Edison (SCE), the owner of the plant, must establish documented liaison with the local law enforcement authority to insure police response as part of its plan to protect the power plant against assault.[1] The Commander of Camp Pendleton has declined to enter such an agreement with SCE on the ground that the Marine Corps' law enforcement activity is restricted to military personnel by the Uniform Code of Military Justice, 10 U.S.C. § 801 *et seq.*, and the Posse Comitatus Act, 18 U.S.C. § 1385. Civilian law enforcement, he suggested, is the responsibility of the United States Marshals Service. SCE has requested that the Attorney General clarify the respective law enforcement responsibilities of the Marine Corps and the Marshals Service.

1. Background

Camp Pendleton was acquired by the United States in 1942 through condemnation. Jurisdiction over the land was ceded by the State of California and accepted by the Secretary of the Navy on behalf of the

[1] On August 6, 1977, the Special Operations Group of the U.S. Marshals Service provided security support to SCE's guard force during a demonstration at San Onofre by an antinuclear power organization. However, it had 4 days' advance notice of the demonstration, which was completely without incident. We understand that the Marshals Service requires at least 24-hour notice to assemble a Special Operations Group. We also understand that it has neither the manpower nor facilities to provide protection against a major armed assault on the plant. As NRC regulations call for such protection, *see* 10 CFR § 73.50(a)(1), the Marine Corps would be the only practical Federal alternative to a local law enforcement agency.

United States. Thus, Camp Pendleton is within the exclusive territorial jurisdiction of the United States, and the State has no power to punish crimes committed on it. *See, Johnson* v. *Yellow Cab Co.,* 321 U.S. 383, 386 (1944); *Collins* v. *Yosemite Park Co.,* 304 U.S. 518, 528–30 (1938).

The San Onofre power plant is located within the reservation on a 60-year easement granted by the Navy Department in 1964 pursuant to Pub. L. 88–82, 77 Stat. 115. The plant is located on the coast, and the site is bounded on the inland side by U.S. Highway 101. Immediately across the highway is part of Camp Pendleton. The coastline on both sides of the plant was reconveyed to the State of California for park purposes in 1972, and the United States retroceded jurisdiction over those parcels.

In 1967, when the first unit of the San Onofre plant began functioning, SCE received a letter from the Assistant Chief of Staff, G–4 of Camp Pendleton, which stated in pertinent part:

> Since civil jurisdiction at Camp Pendleton is vested in the United States Government, the matter of police protection is somewhat different here from that in civilian communities. General security within the Station is of course initially the responsibility of the Grantees who have the right to protect their personnel and property by any lawful means. Any emergency situation requiring outside police assistance should be reported to the Camp Pendleton Military Police, who will respond as soon as possible. Any criminal act committed by a member of the United States Armed Forces is under the jurisdiction of the Camp Pendleton Military Police. Most criminal acts committed by civilians would be under the jurisdiction of the Federal Bureau of Investigation. However, in most cases, and especially in emergency situations, it is advisable to contact the Military Police, who can, in turn notify the Federal Bureau of Investigation, if required, and resolve the matter of jurisdiction when the time is propitious.

In February 1977, NRC published the present version of 10 CFR 73.50, which requires, *inter alia,* documented liaison with local law enforcement authorities as a precondition to obtaining a nuclear operating license. On April 27, 1977, SCE requested from the Marine Corps a reaffirmation of its letter and a description of its response capabilities. The Staff Judge Advocate of the base responded on May 11 that the Marine Corps lacked jurisdiction over unlawful civilian activity on the reservation.

2. Enforcement Authority of the Base Commander

There is no question that the San Onofre plant is within the exclusive jurisdiction of the United States, because it is within the boundaries of Camp Pendleton. The only legal issue presented is whether the military

police may apprehend civilians who violate Federal law [2] on Camp Pendleton in order to turn them over the Federal civilian law enforcement authorities for prosecution and trial.

For practical purposes, the military police constitutes the only force that provides police patrol and emergency services on a large military reservation. Arrests of civilian violators on military reservations by the military police are not uncommon.[3] While the power of military authorities to make searches that could not be made by civilian police has been often litigated,[4] civilian defendants have usually not contended that the military police lacked powers to search or arrest that civilian police would have in the same circumstances.[5]

Only *United States* v. *Banks*, 539 F. 2d 14 (9th Cir. 1976), directly addresses the question whether military authorities may arrest, on a military reservation, a civilian who has committed an offense on the reservation. In that case, the defendant was arrested by the Air Force police on an air base for possession of drugs in violation of 21 U.S.C. § 841(a). Although there was probable cause for the arrest, he contended that the Posse Comitatus Act, 18 U.S.C. § 1385,[6] completely prohibits military authorities from apprehending civilians. The Ninth Circuit rejected this argument on two grounds. First, it held that the Posse Comitatus Act "does not prohibit military personnel from acting upon base violations committed by civilians." *Id.* at 16. Second, it held that 18 U.S.C. § 1382 [7] and 10 U.S.C. § 809(a) [8] empower military authorities

---

[2] NRC regulations define "industrial sabotage" to include an armed attack on a nuclear power plant, 10 CFR § 73.2(g), § 73.50(a)(1), or sabotage by an insider. *See* 18 U.S.C. §§ 2151, 2155. In addition, various California statutes could be violated, and 18 U.S.C. § 13 makes such action a Federal offense. Finally, as stated, it is a separate offense to enter a military reservation with intent to violate any law or lawful regulation, 18 U.S.C. § 1382.

[3] *See, e.g., United States* v. *Colclough*, 549 F. 2d 937 (4th Cir. 1977) (armed robbery); *United States* v. *Ellis*, 547 F. 2d 863 (5th Cir. 1977) (drugs); *United States* v. *Banks*, 539 F. 2d 14 (9th Cir. 1976) (drugs); *United States* v. *Matthews*, 431 F. Supp. 70 (D. Okl. 1976) (drugs); *United States* v. *Holmes*, 414 F. Supp. 831 (D. Md. 1976) (unlawfully entering reservation).

[4] *See, e.g., United States* v. *Ellis*, 547 F. 2d 863 (5th Cir. 1977); *United States* v. *Vaughan*, 475 F. 2d 1262 (10th Cir. 1973). Those cases turn on the question of whether upon entering the base there is an implied consent to search in the absence of probable cause.

[5] *See, e.g., United States* v. *Colclough*, *supra*.

[6] "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."

[7] "Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or

"Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or any person in command or charge thereof—

"Shall be fined not more than $500 or imprisoned not more than six months, or both."

[8] "Nothing in this article limits the authority of persons authorized to apprehend offenders to secure the custody of an alleged offender until proper authority may be notified."

to make such apprehensions in order to deliver the violator to the civilian authorities. We believe that these conclusions are correct.

It is well settled that the commanding officer of a military base has the power to admit or exclude civilians "as he may prescribe in the interest of good order and military discipline." *Cafeteria Workers Union* v. *McElroy,* 367 U.S. 886, 892–93 (1961).[9] The Court characterized this power as "unquestioned . . . throughout our history," citing with approval a line of opinions of the Attorney General going back to 1837.

Because the commander has the power to exclude for the purpose of maintaining order, he has the implicit power to condition entry on lawful behavior. Thus, the Attorney General, in the earliest of the opinions cited by the Court in *Cafeteria Workers,* stated the authority of the Superintendent of West Point to be as follows:

> . . . I am of the opinion that the superintendent of the academy, as commandant of this military post, has a general authority to prevent any person within its limits from interrupting its discipline, or obstructing in any way the performance of the duties assigned by law to the officers and cadets. All such persons *are allowed to come within the bounds of the post, under an implied engagement on their parts to respect the military authority legally established there, and to abstain from any act which may interfere with the purposes and regulations of the post. If this engagement be violated, they must be considered as wrongdoers; and the commandant will have a right to take such measures as may be necessary to protect the interests of the establishment.* It is obvious that, when persons in civil life, who may be allowed to reside at or to resort to the post, obstruct the professors or their officers in the performance of their appropriate duties; or interfere with the studies or discipline of the academy; or encourage the cadets in acts of insubordination; or enter into correspondence with them, contrary to the regulation, their further presence at the post will become, according to the nature of the circumstances and the degree of aggravation, more or less injurious to the institution; and that in flagrant cases of this sort, the prompt removal of the offenders may be indispensable. As they will not be amenable to a court martial, there is no other way in which the ill consequences which might otherwise result from such misconduct can be prevented. *In the exercise of a sound discretion, the commandant of the post may, therefore, order from it any person not attached to it by law, whose presence is, in his judgment, injurious to the interests of the academy. And, in case any person so ordered shall refuse to depart, after reasonable notice, and within a reasonable time, having regard to the circumstances of the case, I think the superin-*

[9] This power of exclusion is limited to some extent by the First Amendment. *Compare, Greer* v. *Spock,* 424 U.S. 828 (1976), *with, Flower* v. *United States,* 407 U.S. 197 (1972). That limitation is not relevant here, for the law enforcement assistance that the Marine Corps is asked to furnish deals with violent, and hence unprotected, conduct.

tendent may lawfully remove him by force. 3 Op. Atty. Gen., at 272 (1837). [Emphasis added.]

Any violation of the civilian criminal laws on the post would appear to endanger its good order and thus justify the military authorities in apprehending the violator and excluding him.

This authority is reinforced by 18 U.S.C. § 1382, which, in part, makes it an offense to enter a military reservation "for any purpose prohibited by law or lawful regulation." Its legislative history recognized the commander's power of expulsion, but found it to be an insufficient deterrent to illegal behavior by civilians on military reservations.[10] Because the military already had the power to expel, Congress evidently anticipated that the military authorities would augment the power by apprehending civilian violators for delivery to the civil authorities. As the cases in note 3, *supra,* show, this is the normal practice.

In sum, the commander of a military reservation has a historically recognized authority to maintain order and discipline on the reservation and physically to expel disorderly civilians. In aid of that authority, Congress has made it a crime for a civilian to enter a military reservation with intent to violate the law. If the commander can expel, for the benefit of the installation, civilians who violate the law, it follows that he may turn them over to civilian law enforcement authorities and that they may be apprehended for that purpose.

Emergency response by the military police to actual or attempted sabotage of the nuclear power plant would, we believe, be for the purpose of maintaining order on the reservation. In the light of the SCE security forces and physical safeguards required by NRC, any industrial sabotage would probably require violent action. Protection of civilian property lawfully within the bounds of the reservation from attack and suppression of violent crime serve to maintain order within the whole of Camp Pendleton. Moreover, any act of industrial sabotage at the plant would create a risk of nuclear accident and release of radiation threatening the safety and well-being of the entire base. It is plainly within the commander's authority to maintain order to provide the emergency military police assistance on the reservation necessary to prevent such an incident.[11]

The Posse Comitatus Act is not to the contrary.[12] It is well known that the Posse Comitatus Act was enacted during the Reconstruction era to prohibit use of Federal troops to support the enforcement of

---

[10] *See* Act of March 4, 1909, § 45, 35 Stat. 1097; S. Rep. 10, 60th Cong., 1st Sess., at 16.

[11] This is particularly true because there is no other police patrol agency with Federal jurisdiction on Camp Pendleton.

[12] On its face, the Posse Comitatus Act applies only to the Army and Air Force, not to the Navy or Marine Corps. However, the Secretary of the Navy has provided by regulation that the Navy and Marine Corps shall be bound by the Posse Comitatus Act unless specifically instructed to the contrary by the Secretary. Sec. Nav. Inst. 5820.7 (May 15, 1974). This regulation has force of law. *See* 5 U.S.C. § 5031; *Ex parte Reed,* 100 U.S. 13 (1873). For practical purposes, therefore, the Marine Corps is subject to the Posse Comitatus Act unless the Secretary makes an exception.

State or Federal laws in the civilian community. *See, generally, Chandler* v. *United States,* 171 F. 2d 921, 936 (1st Cir. 1948); *Gillars* v. *United States,* 182 F. 2d 962 (D.C. Cir. 1950); *United States* v. *Red Feather,* 392 F. Supp. 916, 920-26 (D.S.D. 1975); 16 Op. Atty. Gen. 162-164 (1878); 7 Cong. Rec. 3579-86, 3846-49, 45th Cong., 2d Sess. (1878). The Act, accordingly, has been held not to forbid the use of the military to enforce the law against civilians in territories under military control where the Armed Forces are lawfully responsible for the maintenance of order. *Gillars* v. *United States, supra,* at 973. This principle should apply equally to a military reservation. Moreover, limiting the effect of the Posse Comitatus Act to the civilian community avoids any inconsistency between it and the subsequently enacted 18 U.S.C. § 1382. We therefore conclude that the Posse Comitatus Act does not restrict the use of military police on a military reservation to maintain order by apprehending civilians who commit crimes on the reservation.

MARY C. LAWTON
Deputy Assistant Attorney General
Office of Legal Counsel

September 23, 1977

77-52 MEMORANDUM OPINION FOR THE GENERAL COUNSEL OF THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Rehabilitation Act of 1973—Nondiscrimination Provision

You have requested our opinion whether the term "Federal financial assistance," as used in section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 (Supp. V 1975) (Act), includes Federal programs of guarantee or insurance. Section 504 provides:

> No otherwise qualified handicapped individual in the United States, as defined in section 7(6) of this Act [29 U.S.C. § 706(6)], shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

While it is clear that the term "Federal financial assistance" encompasses direct Federal aid by way of grants and loans, it is unclear whether this term also includes indirect or contingent Federal financial support through programs of insurance or guarantee, such as that provided by the Federal Housing Administration.

The legislative history of § 504 sheds some light on the question. The language that became § 504 first appeared as § 503 of S. 3987, 92d Congress, 2d Session, the Vocational Rehabilitation Act of 1972 (pocket-vetoed by President Nixon). The Senate Report accompanying this bill twice described the provision relating to nondiscrimination against the handicapped as requiring nondiscrimination by Federal *grantees* and elsewhere it used the statutory term "Federal financial assistance." Sen. Rep. 92-1135, 92d Sess. 9, 49 (1972). In one instance, the term "grants" was used in the heading and the text therein spoke in terms of "Federal financial assistance." *Id.* 49. While far from conclusive, this usage in the Senate report intimates that Congress equated direct aid with the term "Federal financial assistance," thus excluding indirect aid through programs of insurance or guarantee.

The nondiscrimination provision in the vetoed 1972 bill was carried forward verbatim in § 705 of H.R. 17, 93d Congress, 1st Session, also vetoed. The provision was then included in the revised bill, which eventually became the Act. The legislative reports and debates on these bills shed no new light on the question.

The Act was amended in 1974. Although § 504 was not itself amended, the definition of handicapped individual in § 7(6) was amended and made more expansive. The Senate report on the 1974 amendments, which is the only legislative report, states that § 504 "was patterned after and is almost identical to the antidiscrimination language of" Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d–2000d-6 (1970 ed.) ("Title VI"), and Title IX of the Education Act Amendments of 1972, 20 U.S.C. §§ 1681-1686 (1975 Supp.) ("Title IX"). S. Rep. 93-1297, 93d Cong., 2d Sess. 39 (1974). Here again, the report speaks of "grants" and of "Federal financial assistance" interchangeably, thus indicating that § 504 was directed at programs receiving direct Federal aid. *Id.* 40. Additionally, in explaining why the 1974 amendments changed the definition of "handicapped," the Senate report provides examples of kinds of handicapped persons who may inadvertently have been excluded from the prior definition and examples of the kinds of programs receiving Federal financial assistance that might continue to discriminate against these handicapped in the absence of the amendments. It is noteworthy that all of the programs enumerated receive direct Federal aid; none receive Federal support in the form of insurance or guarantees. *Id.* 38. This subsequent legislation and related legislative report, declaring the intent of the previous statute, is entitled to great weight. *See, e.g., Red Lion Broadcasting Co., Inc.* v. *FCC*, 395 U.S. 367, 380–81 (1969).

Neither Title VI nor Title IX, the two models for § 504, prohibit discrimination in programs receiving Federal aid through insurance or guarantee. Indeed, each expressly excludes such programs, albeit in an elliptical way. Section 601 of Title VI, 42 U.S.C. § 2000d (1970 ed.), prohibits discrimination on the basis of race, color, and national origin in the same words as § 504 prohibits such discrimination with respect to a handicap. Section 602 of Title VI, 42 U.S.C. § 2000d-1 (1970 ed.), provides for the enforcement of the policy of § 601 by "each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan or contract other than contracts of insurance or guarantee . . . ." Title IX, which forbids sex discrimination in federally assisted education programs, follows precisely the pattern of Title VI, including the express exclusion in its enforcement section for programs of guarantee and insurance. 20 U.S.C. § 1682 (1975 Supp.).

The Senate report, *supra*, stating that § 504 was modeled on Titles VI and IX, might be used to argue the question either way. One could take the view that because Congress in enacting those laws saw a need

expressly to exclude insurance and guarantees, it believed those programs were otherwise within the meaning of "Federal financial assistance." [1] However, one could also hold that in modeling § 504 on Titles VI and IX, Congress intended the reach of § 504 to be coextensive with that of those titles, thus excluding programs of guarantee and insurance. In our opinion, the second line of reasoning is to be preferred, and the first is historically inaccurate. Indeed, a careful analysis of the legislative history of Title VI supports the conclusion that "Federal financial assistance" excludes programs of insurance and guarantee.

Title VI of the Civil Rights Act of 1964 (1964 Act) was the first Federal statute to prohibit discrimination in programs receiving "Federal financial assistance." Section 602 of the 1964 Act, as reported out of committee, provided for the enforcement of the policy of § 601 by "each Federal department and agency which is to extend Federal financial assistance to any program or activity, by way of grant, contract or loan." H.R. Rep. 88–914, 88th Cong., 1st Sess. 8 (1963).

Opponents of the 1964 Act asserted that the term "contract" was sufficiently broad to bring federally insured or guaranteed programs within the prohibition on discrimination. *See, e.g.,* H.R. Rep. 88–914, *supra,* 70 (minority report). In order to alleviate this fear § 602 was amended on the floor of the House to exclude specifically contracts of guarantee and insurance from that section. When that amendment was being considered, Representative Celler, the floor manager of the bill and the Chairman of the House Judiciary Committee, stated that the bill did not include programs of guarantee and insurance and that the express exclusion was being added solely to put to rest any erroneous suggestions to the contrary. 110 Cong. Rec. 2490, 2500 (1964).

Senator Humphrey, the manager of the bill on the Senate side, asserted that § 601, which does not expressly exclude guarantees and insurance from the term "Federal financial assistance," did not, in any event, include them. 110 Cong. Rec. 7410–7420 (1964). Several Senators who opposed the bill took the contrary position.

Giving the appropriate weight to the floor statements by the managers of the bill in each House, *see, United States* v. *American Trucking Ass'n., Inc.,* 310 U.S. 534, 546–548 (1940), and disregarding the contrary views expressed by opponents of the bill in the Senate, *see, Holtzman* v.

[1] It could also be argued that the failure to include an exclusionary provision in the Act reflected a congressional intent to include programs of guarantee and insurance. This argument, however, assumes too much in an obscure area.

The usual pattern of antidiscrimination legislation has been to model such legislation upon the Title VI of the 1964 Act and to include in the enforcement provisions an express exemption for programs of insurance and guarantee. *See,* in addition to Titles VI and IX, 42 U.S.C. §§ 6101–07 (Supp. V 1975) (age discrimination); 20 U.S.C. § 1684 (blindness). Because no enforcement provisions were included in the 1973 Act, no express exemption was included. Thus, giving any weight at all to the failure to include an enforcement provision (and its customary attendant: an exclusion for insurance and guarantees), must also lead to the conclusion that Congress did not intend to authorize and direct the Federal agencies concerned to enforce § 504. Were such to be the case, this inquiry would be moot.

Schlesinger, 414 U.S. 1304, 1312–13 n. 13 (Marshall, Circuit Justice, 1973), it appears that the better view is that the term "Federal financial assistance" as used in the 1964 Act did not include programs of guarantee and insurance. Because the same words were used in § 504, the reasonable assumption is that these words were meant to have the same meaning in both acts, thus excluding programs of guarantee and insurance from § 504.

In conclusion, it is our opinion that the term "Federal financial assistance" in § 504 does not include programs of insurance or guarantee. In addition to the analysis above, this conclusion is supported by the absence of any reason to think that Congress intended to extend the prohibition against discrimination of the handicapped beyond that of the existing antidiscrimination legislation with respect to race, color, national origin, sex, age, and blindness.

John M. Harmon
Assistant Attorney General
Office of Legal Counsel

September 26, 1977

77-53 MEMORANDUM OPINION FOR THE UNITED STATES ATTORNEY FOR THE DISTRICT OF COLUMBIA

Constitutionality of 18 U.S.C. § 1302—Lotteries

This is in response to your request for our opinion on the constitutionality of 18 U.S.C. § 1302 as applied to the publication of advertisements in *The Washington Star* by the Maryland Lottery Commission for the Maryland State Lottery. The advertisements consist of a list of winning lottery numbers and the State lottery's logo and slogan. They do not include entry blanks, mailing addresses, or other invitations to use the mails to purchase lottery tickets to be sent from Maryland. We conclude that in these circumstances the First Amendment prohibits the application of 18 U.S.C. § 1302 to the *Star.*[1]

This situation is almost identical to that involved in *Bigelow* v. *Virginia,* 421 U.S. 809 (1975). The Supreme Court held that a commercial advertisement in a Virginia newspaper for a lawful abortion referral service in New York was protected by the First Amendment although abortions were illegal in Virginia at that time. The Court stated that the citizens of a jurisdiction where a service is illegal have the right to travel to a jurisdiction where it is lawful in order to purchase it, and they have the concomitant First Amendment right to receive truthful commercial information that it is available despite the public policy of the home jurisdiction. *Bigelow,* at 821-25. Thus the *Star* would probably be protected by the First Amendment in printing advertisements intend-

[1] 18 U.S.C. § 1302 provides in pertinent part:

Whoever knowingly deposits in the mail, or sends or delivers by mail:

* * * * *

Any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance, or containing any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part of all of such prices; . . .

* * * * *

Shall be fined not more than $1,000 or imprisoned not more than two years, or both; . . .

ed to induce residents of the District of Columbia or Virginia to come to Maryland to buy lottery tickets.

We also note that one circuit court of appeals has held that the First Amendment protects the right of the news media in one State to publish the results of another State's legal lottery as an item of news interest. *New Jersey State Lottery Commission* v. *United States*, 491 F. 2d 219 (3rd Cir. 1974), *vacated as moot*, 420 U.S. 371 (1975). The advertisements in question may be considered to have news interest even though paid for by the advertiser. *Cf.*, *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 265–66 (1964). But an advertisement that invited readers to use the mails to purchase lottery tickets within a jurisdiction where this is illegal, is arguably an unprotected invitation to violate the law. *See, Bigelow, supra*, at 826–29 (1975).

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

September 27, 1977

77-54 MEMORANDUM OPINION FOR THE ASSISTANT TO THE ATTORNEY GENERAL

Transfer of Watergate Special Prosecution Force Records to the National Archives—Income Tax Information—26 U.S.C. § 6103(a)

This is in response to your request for our opinion concerning the legality of the transfer of Watergate Special Prosecution Force (WSPF) records containing income tax returns or return information to the National Archives. In light of both the stringency of the provisions pertaining to disclosure of tax records and the applicable penalties, it would be advisable to seek legislative authorization for a transfer of WSPF tax records to the Archives. The reasons for our conclusion are set forth herein.

The Tax Reform Act of 1976, Pub. L. 94-455, was designed to impose much greater restrictions on the disclosure of tax returns and return information than had previously existed.[1] Such records are now deemed to be "confidential" and are not to be disclosed in any manner "except as authorized by this title." 26 U.S.C. § 6103(a). *See also* S. Rep. No. 938 (Part I), 94th Cong., 2d Sess. 318 (1976). Even though disclosure is authorized by § 6103 with respect to a number of Federal agencies or other entities, there is no authorization to disclose tax returns or return information to the Archives.[2] The statute would thus, on its face, prohibit a transfer of tax records to the Archives.

This statute, however, is not the only one that addresses this problem. We must also consider the Archivist's authority to accept and maintain records:

---

[1] While certain tax records held by the WSPF may be exempt from the restrictions imposed by the Act, *see* Treas. Reg. § 404.6103(a)-1, it is our understanding that it is neither feasible nor desirable to segregate these records. We thus consider the question here as though all WSPF tax records are subject to the 1976 Act.

[2] It seems apparent that a transfer to the Archives would result in a "disclosure" subject to the 1976 Act. That term is defined as "the making known to any person in any manner whatever a return or return information," 26 U.S.C. § 6103(b)(8), and this definition would be fulfilled because Archives personnel are expected to examine the records pursuant to Freedom of Information requests and for archival purposes.

> The Administrator of General Services shall be responsible for the custody, use, and withdrawal of records transferred to him. When records, the use of which is subject to statutory limitations and restrictions, are so transferred, permissive and restrictive statutory provisions with respect to the examination and use of records applicable to the head of the agency from which the records were transferred or to employees of that agency are applicable to the Administrator, the Archivist of the United States, and to the employees of the General Services Administration, respectively. 44 U.S.C. § 2104.

This provision clearly indicates that materials subject to "restrictive statutory provisions" may be transferred to, and held by, the Archivist. The legislative history of the provision bears this out, for it demonstrates that the imposition of restrictions on the Archivist was designed to make a transfer of confidential records to the Archives more acceptable to the agencies generating those records. *See* H.R. Rep. No. 44, 80th Cong., 1st Sess. 2–3 (1947); S. Rep. No. 706, 80th Cong., 1st Sess. 2 (1947). Indeed, the statutory functions assigned to the Archives would be greatly hampered if it could not obtain and hold historic records subject to restrictions on disclosure.

We thus have, on the one hand, a statute allowing accession of confidential records to the Archives, and on the other hand, another statute allowing disclosure only upon an authorization that is not present here. These provisions need not necessarily be in conflict. One approach to reconcile them would be to allow a transfer to the Archives only if the statute mandating confidentiality explicitly so provided. We believe, however, that this is an unsatisfactory resolution of the relationship of these two statutes. This resolution would frustrate Congress' intent underlying 44 U.S.C. § 2104 to provide for a convenient repository of historical records subject to some form of restriction on public inspection. Because most statutes mandating some form of confidentiality are similar to 26 U.S.C. § 6103 in that they do not explicitly provide for a transfer to the Archives, a conclusion that the lack of such a provision bars such a transfer would have the practical effect of rendering Congress' efforts in enacting 44 U.S.C. § 2104 futile. We thus do not believe that Congress intended that a statute mandating confidentiality must expressly provide for a transfer to the Archives in order for such a transfer to be authorized.

By the same token, however, we do not believe that 44 U.S.C. § 2104 can be taken to override statutes mandating the confidentiality of records in every instance. While it may not often be the case, there may exist situations where Congress' purposes underlying confidentiality statutes may bar even the sort of disclosure which occurs in a transfer to the Archives. The fact that the Archives may generally receive confidential records under 44 U.S.C. § 2104 cannot, in our view, justify an approach which does not trouble to inquire into Congress' intent in

enacting a particular statute subjecting certain records to restrictions on disclosure.

The inquiry with respect to intent concerning tax returns and return information produces no clear answer. The legislative materials do not address the problem directly, and those aspects of the materials that relate in some way to this matter were issued without any thought of their applicability to this problem. However, it is our view that on balance the statute itself and its legislative history are indicative of a legislative intent that tax records are not to be transferred to the Archives.

We have already seen that the statute itself allows for disclosure only "as authorized by this title." 26 U.S.C. § 6103(a). The legislative history makes clear that Congress intended that no disclosure of tax information could be made except in the limited situations delineated in § 6103. S. Rep. No. 938 (Part I), *supra*, at 318. The amount of attention that was paid to the formulation of the exceptions would allow for an inference that no exception was intended as to the Archives.

A stronger indication of congressional intent on this matter can be derived from its enactment of provisions respecting the disposition of returns and return information. Section 6103(p)(4)(F)(ii) provides that when an agency has completed its use of tax returns or return information, it must

> (I) return to the Secretary such returns or return information (along with any copies made therefrom)
>
> (II) otherwise make such returns or return information undisclosable, or
>
> (III) to the extent not so returned or made undisclosable, ensure that the conditions of subparagraphs (A), (B), (C), (D), and (E) of this paragraph continue to be met with respect to such returns or return information . . . .

This clearly shows that Congress was concerned about the disposition of tax records upon the completion of an agency's task and decided that rigid safeguards should be imposed on their disposition.

The legislative history of this provision tells how rigid Congress meant these safeguards to be. That history states that the safeguards in general were "designed to protect the confidentiality of the returns and return information and to make certain that they are not used for purposes other than the purposes for which they were disclosed." S. Rep. No. 938 (Part I), *supra*, at 344. To ensure that this goal was accomplished, care was to be taken with respect to the disposition of tax records when they were no longer needed. In this regard the legislative history states that the statute requires "returning or destroying the information when the agency is finished with it." S. Rep. No. 938 (Part I), at 345. This requirement appears to be one of the means chosen by Congress to keep returns from being "scattered all over the landscape." Hearings on Federal Tax Return Privacy before the Sub-

committee on Administration of the Internal Revenue Code of the Senate Finance Committee, 94th Cong., 1st Sess., 100 (1975) (remarks of Senator Haskell).[3]

While we recognize that this display of legislative intent does not put the issue beyond all dispute, we believe that the legislative history suggests an intent on the part of Congress that tax records should not be transferred to the Archives. We believe, moreover, that the applicable penalties warrant a cautious interpretation of the statute, *see* 18 U.S.C. § 1905, 26 U.S.C. §§ 7213, 7217, and that any doubts here with regard to Congress' intent should thereby be resolved in favor of staying within the explicit restrictions of the statute. We therefore advise that the WSPF tax records should be transferred only upon an explicit legislative authorization.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

[3] We recognize that subparagraph (III) of § 6103(p)(4)(F)(ii) may contemplate some flexibility in dealing with tax records upon the completion of an Agency's use of them. The intent underlying this provision is somewhat confusing, particularly in light of the statement in the legislative history that returns no longer needed were to be returned or destroyed. In any event, we do not believe that this provision can be taken to authorize a transfer of tax records to an entity not expressly authorized to receive such records by the Act and one that will not use the records for the purposes for which they were originally transferred.

September 27, 1977

77-55 MEMORANDUM OPINION FOR THE SOLICITOR OF THE DEPARTMENT OF LABOR

Dues-Paying Practices of Private Clubs— Discriminatory Practices

This responds to your request for our opinion concerning the payment of fees for membership in private organizations. You request clarification of one part of the December 7, 1976, opinion letter of former Assistant Attorney General Antonin Scalia regarding this matter,[1] and you have enclosed for our review a new draft of instructions to the compliance agencies.

1. The portion of Mr. Scalia's letter that you question reads as follows:

> Or to take what is perhaps a more realistic example: In a city whose luncheon clubs include a "Professional Women's Club," a "Businessmen's Club" and a "Men's and Women's Downtown Club," it would not necessarily constitute discrimination on the part of an employer to pay dues for all three.

You interpret the quoted sentence as saying that—

> . . . all that a contractor is required to do to remedy the prohibited discrimination involved in the payment of dues to discriminating clubs is to ensure that each of its employees eligible for such fees is given an opportunity to join a club. * * *

Our interpretation of Mr. Scalia's statement differs from yours.

The example was intended to illustrate the point, stated earlier in Mr. Scalia's letter, that "a policy which affords *each* employee an opportunity to join one . . . [private] organization [emphasis in original] would [not] necessarily be discriminatory merely because some of the organizations selected were limited to members of a particular sex, a particular nationality . . . , a particular race, or a particular religion." The letter did not say that such a policy would always comply with Execu-

[1] That letter is reprinted as an appendix hereto.

tive Order 11246. The general idea suggested (with which we agree) is that there may be circumstances in which such a policy would not violate the Executive order. Similarly, the hypothetical case described by Mr. Scalia was merely an example, and in stating that such a situation would "not necessarily constitute discrimination," he did not rule out the possibility that, depending on all the circumstances, it could be discriminatory. In short, we do not read Mr. Scalia's opinion as reviving the "separate but equal doctrine."

2. The draft memorandum that you enclosed sets forth a general rule concerning payment of dues and then lists two types of exceptions. The general rule is that—

> . . . payment by a contractor of dues to an organization which limits its membership based on race, color, religion, sex, or national origin is a discriminatory practice proscribed by Executive Order 11246 and the implementing regulations.

One of the exceptions is that a contractor may pay fees to—

> . . . organizations in which membership does not confer a business or professional advantage and whose primary purpose is charitable, religious, or community service.

The other exception permits payment of fees to "organizations whose primary purpose is to improve the employment positions of minorities and women."

We have certain reservations concerning the approach taken in the draft. Apart from these two exceptions, the draft does not provide for any means whereby an employer may demonstrate that its dues-payment practices (involving some discriminatory organizations) have not resulted in a business or professional advantage having a discriminatory impact upon its hiring, promotion, commissions, bonuses, or other benefits. Because of the absence of some mechanism for an employer to attempt to prove the nondiscriminatory effect of its policy, we question whether this approach is sufficiently flexible.

For example, a particular employer might have a dues-paying policy applicable to all managers. Some covered by that policy select discriminatory organizations, such as a country club or a downtown club. Assume that, for many years, the employer has had an effective affirmative action program. Its present (and past) employment statistics show that significant numbers of women and members of minority groups are managers and that women and minority-group managers have compensation and authority comparable to that of other managers who are their contemporaries. Promotions are and have been made on a nondiscriminatory basis. In these circumstances, it seems doubtful to us that, because of its dues-paying policy alone, the employer would be in violation of Executive Order 11246. Perhaps, such situations are not likely, but, because they are possible, we suggest that you consider a different approach.

Our recommendation is that you consider stating in the instructions to compliance agencies that there is a rebuttable presumption that a contractor's payment of dues to a discriminatory organization violates the Executive order.[2] Under this approach, the contractor would have the opportunity to show that its policy and the effects of its policy (on hiring, promotions, sales, commissions, bonuses, or other compensation, etc.) are nondiscriminatory. This is the essential point made in Mr. Scalia's letter. A dues-payment policy that results in employer payments to clubs that discriminate will not always and invariably constitute employment discrimination, and the employer should be allowed to demonstrate that its dues policy has had no such discriminatory consequence. While this may be a formidable evidentiary task for the employer, we believe that the employer may not be foreclosed from endeavoring to make that showing. In our view, it would be difficult, as a matter of law, to justify an interpretation of the Executive order denying employers the opportunity to rebut the presumption. The order, by its terms, is aimed at assuring that Government contractors will not discriminate. Unless the employer can be found to be maintaining a dues-payment policy that does have the effect of discrimination with respect to employment matters, we do not think that policy may be challenged simply because it allows payments to private clubs that are discriminatory.

The Civil Rights Division concurs in the views expressed in this letter.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

[2] The instructions could still set forth certain general exceptions. The present draft's exception for organizations, which is intended to improve the employment situation of minorities and women, seems proper. Regarding the other exception included in the present draft, we question whether it should be limited to groups whose primary purpose is charitable, religious, or community service. There may be some organizations that are purely social but do not "confer a business or professional advantage." If so, it would seem that such organizations could appropriately be included within the exception.

APPENDIX

December 7, 1976

MEMORANDUM FOR THE SOLICITOR DEPARTMENT OF LABOR

Dues-Paying Practices of Private Clubs

This responds to your request for our opinion regarding the proposed memorandum of your Office of Federal Contract Compliance Programs (OFCCP) concerning payment of fees for membership in private organizations. The basic position expressed in the memorandum is that any payment by a Government contractor of membership fees for employees in organizations whose membership practices involve "discrimination" on the basis of race, color, religion, sex or national origin would violate Executive Order 11246 and OFCCP's implementing regulations.

Our conclusions on the issues raised may be summarized as follows: Title VII's exemption for the employment practices of certain private membership clubs does not govern the present matter. Nor does the public accommodations law's exemption for private clubs. Neither those statutes nor the Constitution would bar the Government from prohibiting payment of dues by a contractor in a case where such a prohibition is needed to remedy discrimination in regard to promotions, compensation, or other aspects of employment. However, in our view, the OFCCP memorandum's basic position is too broad. In some circumstances, the payment of dues to private groups which limit membership on the basis of race, color, religion, sex, or national origin may violate the Executive order or the regulations; in other circumstances, however, such payment may be entirely proper and not result in any proscribed discrimination.

1. One question raised in your request is whether OFCCP must be guided by the exemption of certain *bona fide* private membership clubs from the coverage of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b)(2) (1975 Supp.). That exemption, contained in the definition of "employer," means that the employment practices of such clubs are not subject to Title VII. We do not believe that that exemp-

tion affects the authority of OFCCP to apply the proposed ruling to the employment practices of contractors covered by the Executive order. That involves no attempt to regulate the employment practices of clubs—which is all that the exemption prohibits.[1]

2. We reach the same conclusion regarding the relevance of the exemption of private clubs from the coverage of the public accommodations law, Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a(e). The present matter does not involve any challenge to the membership practices of the clubs; they may continue unchanged.[2] Here, the relationship of Federal contractors to clubs with discriminatory memberships is involved; no exemption of the clubs themselves from direct regulation affects that issue. 42 U.S.C. § 2000a(e) clearly acknowledges the distinction between regulating the clubs and regulating the relations of other entities to the clubs—since it excludes from the exemption club facilities made available to a covered establishment.

3. We do not believe that the Constitution bars OFCCP or agencies from affecting the payment of dues by Federal contractors to private organizations where such payment would result in discriminatory employment. It is well established that the right of association, however broad its sweep, does not prohibit the Federal Government from insisting upon the application of equal protection standards in many fields, including that of Federal contracting. *Cf., Oklahoma* v. *Civil Service Commission,* 330 U.S. 127, 143 (1947); *Contractors' Association* v. *Schultz,* 442 F. 2d 159, 170 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971); *Bob Jones University* v. *Johnson,* 396 F. Supp. 597, 606 (D. S.C. 1974), *aff'd per curiam,* 529 F. 2d 514 (1975).

Whether the current Executive order is based on the President's power under the Constitution or statutory provisions or both, it is unquestionable that the order is valid. *See, e.g., Farmer* v. *Philadelphia Electric Co.,* 329 F. 2d 3, 8 (3d Cir. 1964); *Contractors' Association* v. *Schultz, supra,* at 170. If a dues-paying arrangement results in denial of equal employment opportunity, then the Order would afford a basis for remedial action. This conclusion, in our opinion, is not altered by the decision in *Washington* v. *Davis,* 426 U.S. 229 (1976), which speaks to the conduct which the Constitution proscribes rather than to the conduct which the Government may take into account in its contracting regulations.

4. Your letter states that one of the main premises for the proposed ruling of OFCCP is

[1] Of course, in the rare event that a club is also a Government contractor, the club's employment practices would be subject to Executive Order 11246. This is clearly not the situation to which the present inquiry is addressed; and, in any case, there is, in our opinion, no reason to read into the Executive order the Title VII exemption of the employment practices of private membership clubs.

[2] We do not here reach the question of the validity of any Congressional attempt to change the *Cf., Cornelius* v. *B.P.O.E.,* 382 F. Supp. 1182, 1201 (D. Conn., 1974); *Runyon* v. *McCrary,* 427 U.S. 160 (1976).

"that an employer's policy of paying membership dues to its employees has a disparate impact on protected groups in that it segregates employees on the basis of their race, color, sex, religion or national origin as to the places where they may transact business and thereby affects their promotion and advancement potential."

Without questioning the proper application of this thesis to certain factual situations, it does not seem to be of such uniform validity to warrant the categorical prohibition which provides the basis for the memorandum. Although some clubs are used substantially for the transaction of business or for making business contacts, we see no grounds for assuming that this is universally so. It is our understanding, for example, that many community-service clubs (some of which are fraternal organizations) are not organizations in which any significant amount of business is transacted or acquired; and the practice of a company to pay for membership in such an organization may be prompted—if by any commercial motive at all—only by the desire to have the company appear as a "good citizen" of the community through participation of many of its employees in good works, without any care or attention to which particular employees are responsible for this reputation.

Moreover, even if it were established that all private club membership appreciably affects promotion potential, or even if such effect were not considered necessary in order to constitute a violation, on the theory that the payment of membership fees is a special emolument available only to certain employees, it is not apparent why a policy which affords *each* employee an opportunity to join one such organization would necessarily be discriminatory merely because some of the organizations selected were limited to members of a particular sex, nationality, race, or religion. If, for example, a firm were to offer to pay, for each of its employees at a certain level, membership dues in one "worthwhile community organization," which it interprets to include, among others, the YMCA, the YWCA, the Jewish Community Center, the Knights of Columbus, the German-American Club, the Hibernian Society, and the National Council of Negro Women, it is far from self-evident that any discrimination prohibited by Executive Order 11246 or the implementing regulations could be found. Or to take what is perhaps a more realistic example: In a city whose luncheon clubs include a "Professional Women's Club," a "Businessmen's Club," and a "Men's and Women's Downtown Club," it would not necessarily constitute discrimination on the part of an employer to pay dues for all three.

We now turn to the specific provisions of existing regulations upon which the memorandum relies for its categorical exclusion: Two provisions of Revised Order No. 4, which prescribes the contents of affirmative action programs refer to the administration of all "company sponsored . . . programs" without discrimination, and to the need to assure the participation of minorities and women in "company sponsored ac-

tivities or programs." 41 CFR § 60–2.20(a)(4) and § 60–2.23(b)(9). The OFCCP memorandum regards these descriptions as disapproving contractors' payment of all club membership fees of the type here at issue. We do not believe this generalization is justified. It is possible to view an employer's over-all scheme of paying membership dues as a "company sponsored program"; and any improper discrimination as to whose dues will be paid (*e.g.*, the payment of men's dues only) would be a violation. Assuming, however, that the dues-paying program is nondiscriminatory, the fact that some employees choose to join men's or women's clubs would place the employer in violation of the provisions only if the clubs themselves could be considered "company sponsored activities or programs." We do not interpret the OFCCP memorandum as adopting this position—and it would seem to us an unreasonable reading of the regulations, except perhaps in the case of a club supported so substantially by one particular firm as to constitute a sort of "company club." Thus, no general conclusion of violation of these provisions seems possible, and analysis of the specific circumstances is necessary.

Another provision cited in the memorandum is 41 CFR § 60–20.3(c), which states that an employer "must not make any distinction based upon sex in employment opportunities. . . ." The conclusion that all payment of memberships in clubs limited to men or women violates this provision assumes (1) that the club in question does provide significant business opportunities, and (2) that the employer does not pay for membership in another club, which includes the other sex and which provides equivalent business opportunities. As discussed above, neither of these assumptions is self-evidently correct. Once again, analysis of the specific circumstances is necessary.

Finally, the memorandum refers to the guidelines regarding discrimination based on religion or national origin, 41 CFR §§ 60–50.1, and 50.2. Our views here are similar to those just expressed with respect to sex discrimination. It does not necessarily constitute a violation of these provisions to pay dues in organizations composed of persons of a particular religion or national origin, so long as other employees are given the opportunity of joining, at company expense, other clubs which provide equivalent benefits. The injunction against discrimination does not mean particular religious and ethnic groups cannot be accorded special treatment, so long as over-all benefits are accorded on a nondiscriminatory basis. This is evident from several provisions within § 60–50 itself: § 60–50.2(6) encourages "establishment of meaningful contracts with religious and ethnic organizations and leaders . . . "; § 60–50.2(8) encourages "use of the religious and ethnic media for institutional and employment advertising"; and § 60.50.3 states that "an employer must accommodate to the religious observances and practices of an employee." It is positively consistent with these provisions for an

employer to subsidize membership in various religious and ethnic organizations.

5. In conclusion, our main difficulty is the generality of the approach and its apparent failure to take into consideration the various types of circumstances which may arise. Please let me know if we can be of any further assistance regarding this matter.

ANTONIN SCALIA
Assistant Attorney General
Office of Legal Counsel

September 29, 1977

77-56 MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

Role of the Solicitor General

The purpose of this memorandum opinion is to discuss (1) the institutional relationship between the Attorney General and the Solicitor General, and (2) the role that each should play in formulating and presenting the Government's position in litigation before the Supreme Court.

I

The Judiciary Act of 1789 created the Office of the Attorney General and provided that the Attorney General would prosecute and conduct all suits in the Supreme Court in which the United States was "concerned." Act of September 24, 1789, ch. XX, § 35, 1 Stat. 73. The Office of the Solicitor General was created in 1870. Act of June 22, 1870, ch. CL, § 2, 16 Stat. 162. The statute provided that there should be in the Department of Justice "an officer learned in the law, to assist the Attorney General in the performance of his duties, to be called the Solicitor General . . ."; and it provided further that the Attorney General could direct the Solicitor General to argue any case in which the Government had an interest. *See* Fahy, "The Office of the Solicitor General," 28 A.B.A.J. 20 (1942).

The statute was enacted at the behest of Attorney General Henry Stanbery. Mr. Stanbery had argued that his work load was great and that he needed assistance in preparing opinions and arguing cases before the Supreme Court. He suggested that a new office be created for the purpose of discharging these functions. Congress, perceiving that the measure would make it possible to discontinue the expensive practice of retaining special counsel to represent the Government in cases argued before the Supreme Court, acceded to his request. *Id.*

In 1878 the language of the statute was partially revised. The language of the revision has survived to the present day. The modern statute, codified at 28 U.S.C. § 518, provides in pertinent part:

(a) Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suits in the Court of Claims in which the United States is interested.

(b) When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested, or he may direct the Solicitor General or any officer of the Department of Justice to do so.

The Department's own regulations provide that the Solicitor General performs his duties "subject to the general supervision and direction" of the Attorney General. 28 CFR § 0.20. The same language is used to describe the relationship between the Attorney General and the offices that report directly to him, such as the Office of Legal Counsel. The Assistant Attorneys General in charge of the various divisions perform their duties subject to the Attorney General's supervision, but under the direction of the Associate or Deputy Attorney General. From a legal standpoint, the relationship between the Attorney General and the Solicitor General would thus appear to be substantially the same as that existing between the Attorney General and the Assistant Attorneys General.

II

We think it plain from the language and history of the relevant statutes that the Office of the Solicitor General was not created for the purpose of relieving the Attorney General of the responsibility for formulating or presenting the Government's case in litigation before the Supreme Court. Congress simply intended to provide the Attorney General with a learned helper who would perform these functions at the Attorney General's direction. We note in passing that at least one Solicitor General has adopted this view publicly. *See, Fahy, supra,* at 21. We know of no public utterance by a Solicitor General to the contrary. *See, generally,* Cox, "The Government in the Supreme Court," 44 Chi. B. Record 221 (1963), Sobeloff, "The Law Business of the United States," 34 Ore. L. Rev. 145 (1955); Stern, "Inconsistency in Government Litigation," 64 Harv. L. Rev. 759 (1951). The short of the matter is that under law the Attorney General has the power and the right to "conduct and argue" the Government's case in any court of the United States. 28 U.S.C. § 518(b).

III

Traditionally, however, the Attorney General has given the Solicitor General the primary resonsibility for presenting the Government's views to the Supreme Court, and in the discharge of that function the Solicitor General has enjoyed a marked degree of independence.

Indeed, his independence has been so great that one Solicitor General, Francis Biddle, was led to remark:

> He [the Solicitor General] determines what cases to appeal, and the client has no say in the matter, he does what his lawyer tells him, the lawyer stands in his client's shoes, for the client is but an abstraction. He is responsible neither to the man who appointed him nor to this immediate superior in the hierarchy of administration. The total responsiblity is his, and his guide is only the ethic of his law profession framed in the ambience of his experience and judgment. (F. Biddle, In Brief Authority 97 (1962).)

Because the question of the "independence" of the Solicitor General has a direct and important bearing upon the general question to which this memorandum is addressed, we shall consider it in some detail.

Mr. Biddle's statement suggests that the Solicitor General has enjoyed two kinds of independence. First, he has enjoyed independence within the Department of Justice. It is he, of all the officers in the Department, who has been given the task of deciding what the Government's position should be in cases presented to the Supreme Court. The views of subordinate officers within the divisions of the Department are not binding upon him, and the Attorney General has made it a practice not to interfere. With respect to his relation to the Attorney General, we feel constrained to add, however, at the risk of repetition, that the Solicitor General's independent role has resulted from a convenient and necessary division of labor, not from a separation of powers required by law. Moreover, Francis Biddle may have overstated the case to some degree. Under the relevant statutes, as noted, the Attorney General retains the right to assume the Solicitor General's function himself, if he conceives it to be in the public interest to do so.

Secondly, the Solicitor General has enjoyed independence within the executive branch as a whole. He is not bound by the views of his "clients." He may confess error when he believes they are in error. He may rewrite their briefs. He may refuse to approve their requests to petition the Court for writs of *certiorari.* He may oppose (in whole or in part) the arguments that they may present to the Court in those instances where they have independent litigating authority.

The reasons for this independence are, for the most part, familiar: First, it has been thought to be desirable, generally, for the Government to adopt a single, coherent position with respect to legal questions that are presented to the Supreme Court. Because it is not uncommon for there to be conflicting views among the various offices and agencies within the executive branch, the Solicitor General, having the responsibility for presenting the views of the Government to the Court, must have power to reconcile differences among his clients, to accept the views of some and to reject others, and, in proper cases, to formulate views of his own.

Second, as an officer of the Court and as an officer of Government, the Solicitor General has a special duty to protect the Court in the discharge of its constitutional function. He protects the Court's docket by screening the Government's cases and relieving the Court of the burden of reviewing unmeritorious claims. He prepares accurate and balanced summaries of the records in the cases that are presented for review; and within the limits of proper advocacy, he provides the Court with an accurate and expert statement of the legal principles that bear upon the questions to be decided.

Third, as an officer who plays an important role in the development of the law, he has a duty to protect the law from disorderly growth. He is called upon to decide questions of "ripeness" in the most general sense: on a case-by-case basis he must determine whether *this* is the appropriate time for presenting *this* issue to the Supreme Court on *this* record. *See* Cox, *supra,* at 226. In order to discharge that function, he must have, among other things, the power to refuse requests for petitions for *certiorari* and the power to decline to present the Government's views, as *amicus,* in cases in which the Government might otherwise have an interest.

Finally, and most importantly, the Solicitor General has assumed an independent status because of the prevalent belief that such independence is necessary to prevent narrow or improper considerations (political or otherwise) from intruding upon the presentation of the Government's case in the Nation's highest Court. It was a Solicitor General, Frederick W. Lehmann, who wrote that "the United States wins its point whenever justice is done its citizens in the courts"; and the burden of history is that justice is done most often when the law is administered with an independent and impartial hand. The Nation values the Solicitor General's independence for the same reason that it values an independent judiciary. The Solicitor General has been permitted his independence largely because of the belief, as Mr. Biddle put it, that "the ethic of his law profession framed in the ambience of his judgment and experience" should be his only guide.

IV

In what circumstances should the Attorney General exercise his right to "conduct" litigation before the Supreme Court? To the extent that the Solicitor General's traditional role reflects a simple division of labor within the Department, it is plain that the Attorney General may exercise his prerogative whenever it is administratively convenient for him to do so. The real question is to what extent he can intervene, in individual cases, without doing violence to the important principles or functions that have justified the Solicitor General's independence within the Government at large.

We have identified four such principles or functions: the Solicitor General must coordinate conflicting views within the executive branch;

he must protect the Court by presenting meritorious claims in a straightforward and professional manner and by screening out unmeritorious ones; he must assist in the orderly development of decisional law; and he must "do justice"—that is, he must discharge his office in accordance with law and ensure that improper concerns do not influence the presentation of the Government's case in the Supreme Court.

In our opinion, there is no institutional reason why the Attorney General could not, in individual cases, discharge all four of these functions as well as the Solicitor General. However, in practice the Attorney General could never be sure that he was exercising the independent judgment essential to the proper performance of those functions if he acted alone without the advice of an independent legal adviser, *i.e.,* the Solicitor General.

The Attorney General is responsible for the objective and evenhanded administration of justice independent of political considerations or pressures. However, he is also a member of the President's Cabinet and responsible for advising the President on many of the most important policy decisions that are made in the executive branch. He is necessarily exposed repeatedly to nonlegal arguments and opinions from other Cabinet members. His is the difficult task of separating the different factors that might properly be considered in his role as a policy adviser from those relevant to his duties as the chief legal officer of the Government.

The Constitution requires the President, and thus the Attorney General, to execute the laws faithfully. It requires them to follow the law, even if that course conflicts with policy. For this reason alone, in our view, the tradition of the "independent" Solicitor General is a wise tradition. It has arisen because it serves a useful constitutional purpose. Very simply, an independent Solicitor General assists the President and the Attorney General in the discharge of their constitutional duty: concerned as they are with matters of policy, they are well served by a subordinate officer who is permitted to exercise independent and expert legal judgment essentially free from extensive involvement in policy matters that might, on occasion, cloud a clear vision of what the law requires. While it is doubtful whether either the President or the Attorney General could "delegate" to the Solicitor General the ultimate responsibility for determining the Government's position on questions of law presented to the Supreme Court, as a matter of practice, in the discharge of their offices, they can allow themselves the benefit of his independent judgment, and they can permit his judgment to be dispositive in the normal course.

The dual nature of the Attorney General's role as a policy and legal adviser to the President strengthens, in our view, the necessity for an independent Solicitor General. To the extent the Solicitor General can be shielded from political and policy pressures—without being unaware of their existence—his ability to serve the Attorney General, and the

President, as "an officer learned in the law" is accordingly enhanced. For this reason we believe the Solicitor General should not be subjected to undue influence from executive branch officials outside the Department of Justice. The Solicitor General should not be viewed as having final, essentially unreviewable authority in controversial cases, because such a role would inevitably subject him to those policy pressures that can obscure legal insights. The Attorney General, we believe, reinforces the independence of the Solicitor General by allowing himself to act as the final legal authority in those small number of cases with highly controversial policy ramifications. As such, the Attorney General and not the Solicitor General will be the focus of policy pressures from both within and outside the executive branch.

We do not believe that the Attorney General's power to direct the prosecution of cases in the Supreme Court should never be exercised, but we do believe that the tradition of the independent Solicitor General is one that should be preserved. We think that the Attorney General can participate in the formulation of the Government's position before the Court in certain circumstances without doing violence to that tradition; but, because of the value of the Solicitor General's independence, there are procedural and substantive considerations that should guide and temper the exercise of that power.

V

Procedural Considerations. Undoubtedly, the working relationship between the Attorney General and the Solicitor General is one that will vary from Administration to Administration in accordance with the personalities of the individuals who hold these offices; but as we have said, the traditional pattern is one of noninterference. From this tradition we derive a rule of procedure: in our opinion, with respect to any pending case, the Solicitor General should be given the opportunity to consider the questions involved and to formulate his own initial views with respect to them without interference from the Attorney General or any other officer in the Administration.

There are at least two reasons for following a procedure of this kind. First, the procedure ensures that the Attorney General (and the President) will enjoy the benefit of the Solicitor General's independent judgment in every case. That independence would be compromised if the Solicitor General were subjected to frequent advice or suggestions from the President or the Attorney General before he is allowed to formulate his own position. Second, this procedure helps to ensure that the Attorney General will not exercise his supervisory powers gratuitously. No one can say what the Solicitor General's position will be before he has taken it.

This brings us to a related point. The Solicitor General should be allowed to formulate a position with respect to pending cases, and he should be allowed to act independently in the discharge of that func-

tion, but he should not be required to make his decision in an informational vacuum. He is not omniscient, and he should be free to consult the various offices and agencies in the executive branch that may have views on the questions presented by the case at hand. In fact, this is the traditional practice. The Solicitor General does consult and is consulted by other officers of Government. Far from detracting from his independent function, this practice enhances its value. It ensures that the Solicitor General's judgment will be informed judgment.

Substantive Considerations. Once the Solicitor General has taken a position with respect to a pending case, that position will, in most cases, become the Government's position as a matter of course. However, in some cases the Attorney General may need to determine whether or not the Government should adopt that position. Plainly, the Attorney General, as well as the President, have the power to decline to adopt it, but to exercise that power is to reject the Solicitor General's independent and expert legal counsel in favor of other legal advice or policy considerations.

We should make one observation at this point. We have said that an independent Solicitor General assists the Attorney General and the President in the discharge of their constitutional duty to put law before policy. It is our opinion that if the Solicitor General is to be of real value in that regard, his judgment must be permitted to be dispositive in the ordinary course. The Government's position should be changed by the Attorney General only in rare instances.

How does one identify the "rare instances" in which intervention by the Attorney General may be justifiable? We can offer no litmus test, but we wish to make several observations that bear upon the question.

First, in our opinion, the mere fact that the Attorney General may disagree with the Solicitor General over a question of law is not ordinarily a sufficient reason for intervention in a given case. If the Solicitor General has fallen into error, the Supreme Court will have an opportunity to correct the error, and the Government's ultimate interest in a just result will be vindicated. If the Court upholds his position, then all the better, for his legal judgment and not that of his superiors, was correct. In either case, for all of the reasons given above, the potential benefit of intervention is usually outweighed, in our view, by the mischief inherent in it.

There may be a case in which the Attorney General is convinced that the Solicitor General has erred so far in the legal analysis that intervention is required. We believe such cases will be quite rare, but when they arise the Attorney General must follow the rule of law himself and be guided by his own experience and judgment.

There is another category of questions that may be involved in cases presented to the Supreme Court with respect to which the Attorney General's or the President's judgment may be essential. Our analysis

turns upon the uncertain but traditional distinction between questions of law and questions of policy.

All of the cases that are decided by the appellate courts can be said to involve "questions of law" in a technical sense. The outcome in each case must be justified by reference to rules or principles that are prescribed in the Constitution, statutes, regulations, ordinances, or in the previous decisions of the courts. In some cases, however, questions of "policy" are integrally intertwined with questions of law. In other cases the major decision may be a discretionary one such as filing of an *amicus* brief when there has been no request from the Court for the views of the Government.

The Solicitor General can and should enjoy independence in matters of legal judgment. He should be free to decide what the law is and what it requires. But if "law" does not provide a clear answer to the question presented by the case before him, we think there is no reason to suppose that he, of all the officers in the executive branch, should have the final responsibility for deciding what, as a matter of policy, the interests of the Government, the parties, or the Nation may require. To our knowledge, no Solicitor General has adopted a contrary view.

The short of the matter is that cases may arise in which questions of policy are so important to the correct resolution of the case that the principles that normally justify the Solicitor General's independent and dispositive function may give way to the greater need for the Solicitor General to seek guidance on the policy question. Questions of policy are questions that can be effectively addressed by the Attorney General, a Cabinet officer who participates directly in policy formation and who can go to the President for policy guidance when the case demands.

But the Attorney General and the President should trust the judgment of the Solicitor General not only in determining questions of law but also in distinguishing between questions of law and questions of policy. If the independent legal advice of the Solicitor General is to be preserved, it should normally be the Solicitor General who decides when to seek the advice of the Attorney General or the President in a given case.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

October 5, 1977

77-57 MEMORANDUM OPINION FOR THE ASSOCIATE ATTORNEY GENERAL

Impact of Panama Canal Zone Treaty on the Filling of the Vacancy in the Office of the District Judge for the United States District Court for the District of the Canal Zone

I am replying to your inquiry whether and how the current vacancy in the Office of the District Judge for the United States District Court for the District of the Canal Zone should be filled in the light of the proposed Canal Zone Treaty.

The District Judge for the United States District Court for the Canal Zone is appointed for a term of 8 years and serves until his successor is appointed unless the judge is sooner removed by the President for cause. 3 Canal Zone Code, § 5. Under the proposed Panama Canal Treaty, Article XI, 1, 5, the courts of the United States in the Canal Zone will be abolished after the expiration of a period of 30 months following the entry into force of the Treaty.[1] Hence, it is likely that the U.S. District Court for the Canal Zone will be abolished prior to the expiration of his statutory term.[2] In our opinion, the abolition of the district court will automatically terminate the tenure of the judge ap-

[1] During that transition period, the jurisdiction of the courts will be diminished because they will be unable to take any new cases of a private civil nature; they will, however, retain full jurisdiction to dispose of cases instituted and pending prior to the entry into force of the Treaty. Article XI, 6. It also appears that the jurisdiction of the United States courts in the Canal Zone in criminal cases during the transitional period will be narrower than it is now. Article XI, 2.

[2] Article X, 7, of the Treaty contains certain provisions designed to protect persons who are displaced as the result of the discontinuance of United States activities in the Canal Zone. None of these, however, appears to be applicable. Reemployment by the United States is limited to persons employed by the Panama Canal Company or the Canal Zone Government. The district judge does not come within either category. The Treaty also provides that persons previously employed in activities for which the Republic of Panama assumes responsibility as the result of this Treaty "will be continued in their employment to the *maximum extent feasible* by the Republic of Panama." [Emphasis added.] It is safe to assume that the Republic of Panama will not consider it "feasible" to continue the United States district judge in office when it becomes fully responsible for the judicial system in the Canal Zone.

pointed to that court. We believe, however, that it would be preferable for legislation implementing the Treaty to provide, as in the Alaska and Hawaii Statehood Acts,[3] that the tenure of the district judge shall terminate upon the abolition of his court.[4]

The question whether the tenure of a judge outlasts the existence of his court is not new. It first became prominent in 1802 at the time of the repeal of the Circuit Court Act passed toward the end of the Adams Administration. At that time Congress took the position that the abolition of the circuit courts terminated the tenures of the circuit judges even though they held commissions during good behavior. The constitutionality of that action, however, was never judicially tested because at that time the United States had not waived its immunity from suit in such cases. *See* Frankfurter and Landis, "The Business of the Supreme Court," pp. 26–28, fn. 75. Congress apparently was aware of the vulnerability of its position. Thereafter courts whose judges had lifetime tenure were as a rule abolished only while the offices were vacant.

The effect of the abolition of a court on the tenure of its judges arose regularly when a territory became admitted as a State, because the admission had the effect of abolishing the territorial courts even if the Act of admission did not expressly so provide. *Benner* v. *Porter,* 50 U.S. (9 How.) 235 (1850). As far as we have been able to determine, only the Acts admitting Alaska and Hawaii dealt specifically with the problem here at hand. Those statutes provided expressly for the term of the territorial courts and that the tenure of the territorial judges should simultaneously come to an end. We have been informed by the Administrative Office of United States Courts that the territorial judges in those two States did not receive any compensation following the abolition of the territorial courts, other than their retirement benefits, if any, which had been specifically preserved by the Acts of admission.[5]

The earlier Statehood Acts appear to have been silent on both issues, *i.e.,* the abolition of territorial courts and the termination of the tenure of the territorial judges.[6] We have not been able to discover the actual practice that prevailed in those situations. The last admissions antedating those of Alaska and Hawaii occurred in 1912 (Arizona and New Mexico), and the Administrative Office of United States Courts, established only in 1939, has no pertinent records.

We suspect, but cannot establish definitively, that when, upon the admission of a new State, the territorial courts located in it were

[3] Section 18 of the Alaska Statehood Act and § 9(a) of the Hawaii Statehood Act.

[4] An appointment of the judge for a period to terminate 30 months after the entry into force of the Panama Canal Treaty would not solve the problem because the effect of an officer's appointment is governed by the statute under which he is appointed and not by the language of the nomination or of the commission. *Quackenbush* v. *United States,* 177 U.S. 20, 27 (1900); 2 Op. Att'y. Gen. 410, 412 (1831); 16 Op. Att'y. Gen. 656 (1880).

[5] Alaska Statehood Act, § 12; Hawaii Statehood Act, § 14.

[6] The Acts of admission of New Mexico, Oklahoma, and Wyoming contained virtually identical standard clauses, which were silent on this issue.

abolished, the territorial judges simultaneously lost their judicial commissions and their right to compensation. Any claim of a territorial judge for his compensation after the termination of his court presumably would have resulted in his removal.[7]

There are several grounds for rationalizing the limited tenure of territorial judges. They are, however, inconclusive on the point here involved. *Glidden* v. *Zdanok*, 370 U.S. 530, 545–547 (1962), explains that the territorial courts were staffed with judges who did not have life tenure, because, in view of the temporary nature of the territorial status, it would have been impractical to invest the judges of those transitional courts with a tenure "which Congress could not put to use and that the exigencies of the territories did not require" (at 547). This passage is equivocal on the issue here involved. It might merely mean that by giving the territorial judges limited tenure, Congress could reduce the Government's financial burden by having to pay the judges after the admission of the State only for the duration of their unexpired terms—until recently usually 4 years—rather than for life.

Moore's Federal Practice Vol. I, § 0.4[1], points out (63–64) that legislative courts such as territorial courts are exempt from the requirements of Article III, § 1, of the Constitution that judges shall hold their offices during good behavior and that their compensation cannot be diminished while in office. This passage also is silent as to whether the abolition of a territorial court results in the termination of the judge's tenure and of his right to compensation in the absence of a specific statutory provision to that effect. It does, however, support the constitutionality of legislation, similar to the Alaska and Hawaii Statehood Acts, which provide expressly that upon the abolition of the court the judge's tenure should come to an end even if his statutory term had not expired at that time.

We therefore conclude that the tenure of a Canal Zone judge terminates when his court is abolished even if his statutory term has not expired at that time. In order, however, to eliminate any possible doubt on this issue and to obviate any future dispute or litigation on the issue, we recommend that a provision to that effect be included in legislation implementing the Treaty.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

[7] *McAllister* v. *United States*, 141 U.S. 174 (1891), confirmed the President's unlimited power to remove territorial judges. That power was questioned only in 1926 (*Myers* v. *United States*, 272 U.S. 52, 157–158), and denied in *Humphrey's Executor* v. *United States*, 295 U.S. 602, 626–627, 629 (1935).

October 14, 1977

77-58 MEMORANDUM OPINION FOR THE GENERAL COUNSEL, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

Personal Tort Liability of Regional Fishery Management Council Members and Staff

The Deputy General Counsel of the Department of Commerce has requested this Department's review of your memorandum to determine whether we concur with its conclusions. The memorandum addresses the subject whether members of Regional Fishery Management Councils may be personally liable in tort as a result of their official participation in the Councils. We have reviewed the memorandum and the applicable case law, and believe its conclusions reached are sound.

Regional Fishery Management Councils were created by the Fishery Conservation and Management Act of 1976.[1] They were created to prepare, monitor, and revise regional management plans for the various fisheries falling within their respective jurisdictions. The precise question is whether a federally created and maintained entity whose purpose is to assist in implementation of a national program is an "independent establishment of the United States . . . ," and thereby a "Federal Agency" under the umbrella of the Federal Tort Claims Act.[2] A body of law has developed concerning the question whether an entity is a "Federal Agency." It stresses the source of funding for the entity and the functions of the entity as two important factors. The funding factor was substantially deflated in importance by the recent Supreme Court decision in *United States* v. *Orleans.*[3] In *Orleans* the Court held that a "community action agency," although subject to numerous Office of Economic Opportunity rules and regulations and funded largely by Federal funds, was not an entity that could properly be viewed as a "Federal Agency" for the purpose of the Federal Tort Claims Act. Although legal analysis in that case is interesting, it does not relate directly to the problem of Regional Fishery Council members and their

[1] 16 U.S.C. § 1801, *et seq.*

[2] 28 U.S.C. § 2671.

[3] 425 U.S. 807, (1976).

staff, because the Councils were established to execute a Federal function while utilizing "national standards." [4] Their function is to assist the Secretary of Commerce in his official endeavors.[5]

The community action agency discussed in *Orleans* was a nonprofit private corporation and as such was held by the Court to have the status of a "contractor." [6] In the present matter we do not think the traditional distinction between "government agency" and "contractor" applies.[7] Rather, the Councils come within the concept of an entity which is an "integral part" of a Federal agency. If being an integral part of a "Federal Agency" means facilitating the accomplishment of an agency's mission, then the Councils are indeed "Federal Agencies" under the Federal Tort Claims Act. They are indispenable elements in the statutory scheme of the 1976 Act, and are an integral part of the Department of Commerce's statutory mission under that Act.[8]

In *United States* v. *Holcombe,*[9] where property was allegedly damaged through the negligence of a civilian employee of the commissioned .officers' mess, the Sixth Circuit held that the mess was an "integral part" of the military establishment and thus an Agency of the Government under the Federal Tort Claims Act. This ruling was issued despite the fact that the mess was a "nonappropriated fund instrumentality," *i.e.,* an entity not supported by appropriations out of the National Treasury. The Councils were created by Federal statute and vested with a statutory delineation of their functions. We think this militates toward a finding that they are "Federal Agencies" under the Federal Tort Claims Act and are protected by that degree of immunity the Constitution and Federal statutes provide Federal agencies.[10]

Finally, the issue of State employees serving as Council members is no more complex than the threshold issue whether the Councils are Federal Agencies. It has been recognized that an employee of a local government may be "loaned" by that government to the Federal Government so as to become a Federal employee for purposes of the

---

[4] *See, e.g.,* 16 U.S.C. §§ 1801(a)(6)–(7) and 1853(a)(1)(c).

[5] In *Orleans,* the Court focused, *inter alia,* on the local nature of the community action agency. *See* 16 U.S.C. § 1852(h).

[6] "A critical element in distinguishing an agency from a contractor is the power of the Federal Government 'to control the detailed physical performance of the contractor.' " *Orleans,* 425 U.S. at 814 quoting from *Logue* v. *United States,* 412 U.S. 521, 528 (1973).

[7] This distinction seems to apply where the entity whose status is in issue is engaged in an undertaking which has private as opposed to governmental overtones. *Cf., Strangi* v. *United States,* 211 F. 2d 305 (5th Cir. 1954), and *Hopson* v. *United States,* 136 F. Supp. 804 (D. Ark. 1956).

[8] *Standard Oil Co. of California* v. *Johnson,* 316 U.S. 481 (1942), was one of the first cases that adopted the "integral part" test. There a U.S. Army Post Exchange (PX) was the entity involved and, the Court held:

> We conclude that post exchanges as now operated are arms of the Government deemed by it essential for the performance of Governmental functions. They are integral parts of the War Department, share in fulfilling the duties entrusted to it, and partake of whatever immunities it may have under the Constitution and federal statutes. *Id.* at 485.

[9] 277 F. 2d 143 (4th Cir. 1960).

[10] *See* note 2, *supra.*

Federal Tort Claims Act.[11] The fact that his salary comes from a source other than the Federal Government does not alter his Federal status.[12]

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

---

[11] *See, Fries* v. *United States,* 170 F. 2d 726, 731 (6th Cir. 1948).

[12] *See, United States* v. *Holcombe,* 277 F. 2d at 144–146, *supra,* note 9, and *Martalano* v. *United States,* 231 F. Supp. 805 (D. Nev. 1964).

October 18, 1977

77-59 MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

Members of Congress Holding Reserve Commissions

This responds to your request for our opinion respecting the matter of Members of Congress holding commissions as officers in the Armed Forces Reserves. The matter originated in a letter from a Member of Congress to the President. That letter requests the President to stop the practice of allowing Members of Congress who hold reserve commissions to receive pay, earn retirement credit, or advance in rank while serving. The letter alluded to the implicit pressure on the Armed Forces to promote these officers as a source of impropriety, and stated that the "provision of the Constitution preventing Congressmen from holding any other office" has not yet been brought to bear on the problem.

We have been informed that your principal concern is whether this constitutional provision, the Incompatibility Clause,[1] requires the President to take action with respect to the reserve commissions currently held by Members of Congress. It is our opinion that the exclusive responsibility for interpreting and enforcing the Incompatibility Clause rests with Congress.

Background

We are informed by the Department of Defense that 25 Members of Congress now hold commissions in the reserves: one in the Ready Reserve, 11 in the Standby Reserve in active status, and 13 in the Standby Reserve in inactive status.

(a) Reserve officers below the rank of lieutenant colonel or commander are appointed by the President alone; those above, with the Senate's advice and consent. All serve at the President's pleasure.[2]

(b) Members of the Ready Reserve are required to attend a minimum amount of annual training, for which they receive pay and retirement

[1] Art. I, § 6, Cl. 2, quoted *infra*.
[2] 10 U.S.C. § 593(a)-(b).

credits.[3] They may be called to active duty for up to 24 months during a national emergency declared by the President.[4]

(c) Members of the Standby Reserve on active status are not required to attend training but may voluntarily do so for promotion and retirement credits.[5] They may be called to active duty in time of war or national emergency declared by Congress if the Selective Service System determines that they are available.[6] Members on inactive status do not train, do not receive either pay or pension credits, and are ineligible for promotion.[7]

(d) In addition to their other active duty obligations, members of the Ready and Standby Reserves in active status may be ordered to active duty for up to 15 days per year at any time.[8]

Current Department of Defense regulations require Members of Congress in the Ready Reserve to be transferred to the Standby Reserve.[9] Once transferred, they may volunteer for active status in the Standby Reserve.[10] Members who were on inactive status when they entered Congress apparently remain there. Thus, at least 12 Members of Congress are eligible to earn promotion and retirement credits by voluntary participation in military training. The others who hold commissions derive no formal benefits from them.

One attempt was made to end this practice by litigation. In *Reservists Committee to Stop the War* v. *Laird,* 323 F. Supp. 833 (D. D.C., 1971), *aff'd without opinion,* 495 F. 2d 1075 (D.C. Cir. 1974), the District Court held that a reserve commission was an office under the United States within the meaning of the Incompatibility Clause and entered a declaratory judgment that a Member of Congress was ineligible to hold a commission during his continuance in office. The Supreme Court reversed on the ground that plaintiffs, as members of the general public, lacked standing to sue. It did not reach the merits. *Schlesinger* v. *Reservists Committee to Stop the War,* 418 U.S. 208, 216–27 (1975).

The Constitutional Provisions Involved

Article I, § 6, Cl. 2, of the Constitution provides:

> No Senator or Representative shall, during the time for which he was elected, be appointed to any Civil Office under the Authority of the United States, which shall have been created, or the Emolu-

[3] *See* 10 U.S.C. §§ 1331–32; 37 U.S.C. §§ 204(a)(2), 206(a).

[4] 10 U.S.C. §§ 673(a), 674(a). Members of the Ready Reserve may also be called to active duty for the duration of any war or national emergency declared by Congress. 10 U.S.C. § 672(a).

[5] 10 U.S.C. § 273(a); 32 CFR § 102.3(c); DOD Dir. 1215.6, para. V. C. 2.a.(4).

[6] 10 U.S.C. §§ 672(a), 674(a).

[7] *See* 10 U.S.C. § 273(c); 32 CFR § 136.3(b)(1); DOD Dir. 1215.6, para. V.C. 2.b.

[8] 10 U.S.C. § 672(b). The statue does not apply to reserves on inactive status, but Department of Defense regulations allow an inactive reservist to be restored to active status and called up. *See* 32 CFR § 136.3(b)(3).

[9] 32 CFR § 125.4(c)(2).

[10] 32 CFR § 102.3(f).

> ments whereof shall have been increased during such time; and no Person holding any Office under the United States shall be a Member of either House during his Continuance in Office.

Article I, § 5, Cl. 1, provides:

> Each House shall be the Judge of the Elections, Returns and Qualifications of its own members.

Article II, § 2, Cl. 2, provides:

> He [the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Discussion

It should be noted that the first portion of Article I, § 6, Cl. 2, restricts the President's power to appoint Members of Congress to civil offices, while the second portion of the clause declares that no person who holds any office shall be a Member of Congress while he or she retains that office. It has long been settled within the executive branch that the President, in exercising his powers of appointment under Article II, § 2, Cl. 2, will not make an appointment in violation of the first portion of the clause. *See, e.g.*, 42 Op. Atty. Gen. No. 36; 17 Op. Atty. Gen. 365 (1882). On the other hand, as far as we know, the President has never undertaken to enforce the second portion of the clause, which disqualifies individuals who have already been appointed from assuming or retaining seats in Congress.[11]

In his brief to the Supreme Court in the *Reservists Committee Case*, the Solicitor General argued that "[b]y its terms, history, and long Congressional construction, the clause constitutes a qualification for membership in Congress—no one occupying such an office may serve as a Senator or Representative. . . ." And, he continued, the determination of whether the clause is violated is "a determination which under Article I, § 5, clause 1 of the Constitution, only the Congress can make." [12]

[11] In 40 Op. Atty. Gen. 301 (1943), Attorney General Biddle advised President Roosevelt that the power to enforce Art. I, § 6, Cl. 2, rested with Congress and that the House of Representatives had in the past disqualified Members who accepted military commissions for active service. He concluded that it would be a "sound and reasonable policy" for the President to avoid any possible conflict with the clause by not permitting Members of Congress to serve on active duty. We do not know what action, if any, the President took in response to the opinion.

[12] Brief for Petitioner at 8, O.T. 1973, No. 72-1188.

Moreover, we suggest that it would be undesirable for the President himself to attempt to confront the problem. If he were to inform the Congressman that in his view the holding of reserve commissions by Members of Congress did violate Article I, § 6, clause 2, that determination certainly would not bind the Congress. Conversely, if he stated that the practice was permitted by the Constitution, Congress could enforce the clause against its Members notwithstanding.[13]

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

[13] The Solicitor General argued for the executive branch at length that a commission in the Armed Forces reserves is not an "Office under the United States" within the meaning of Article I, § 6, Clause 2. The details of the argument appear at pages 31–42 of the brief. As we have pointed out above, the Supreme Court did not reach the question.

October 19, 1977

77-60 MEMORANDUM OPINION FOR THE DEPUTY ASSOCIATE ATTORNEY GENERAL

Travel and Subsistence Expenses for the Director-Designate of the Federal Bureau of Investigation

In response to your request, we have examined the question of whether Department of Justice funds are legally available to pay the airfare and per diem for the Federal Bureau of Investigation (FBI) Director-designate's travel to Washington, D.C., in connection with his confirmation hearings. We understand that he came to Washington on October 4, 1977, at the Attorney General's request and intended to remain until his Senate confirmation hearing was to begin on October 11. In the interim, he conferred with the Attorney General and other officers on Department business. We further understand that he has returned home for reasons of health and that the confirmation hearing has been indefinitely postponed. After consultation with the General Accounting Office, we conclude that Department funds may be used to pay travel and subsistence expenses arising from the October 4 trip. We also conclude that they may be used to pay travel and subsistence at such time as he returns for his confirmation hearings if he consults with the Department on official business at the same time.

With respect to travel and subsistence expenses incurred to attend Senate confirmation hearings, the Comptroller General has stated that these are normally "personal" and hence cannot be reimbursed. 53 Comp. Gen. 424, 425 (1973). The same decision holds, however, that an agency may pay these expenses:

> If official business, such as conferences with officials of your office, is also conducted by the nominee at the time he is in Washington, D.C., for his confirmation hearings, and such business is determined to be of "substantial benefit" to the [agency] . . . . *Id.* at 425.

Thus, if the Director-designate consults with the Attorney General or other Department officers on official business during his confirmation hearing, and the Attorney General or his delegate determines that the

consultation is of "substantial benefit" to the Department, under the holding the payment of his travel and subsistence expenses from Department funds is permissible. As it is our understanding that he has consulted with Department officials in order to familiarize himself with his duties as FBI Director, we conclude that the travel expenses in question may be paid.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

October 20, 1977

77-61 MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

President's Authority To Promulgate a Reorganization Plan Involving the Equal Employment Opportunity Commission

This is in response to your request for the opinion of this Office on two questions pertaining to the President's authority to promulgate a reorganization plan involving the Equal Employment Opportunity Commission (EEOC). You have asked, first, whether EEOC is an Agency in the executive branch so as to come within the President's authority under the Reorganization Act of 1977; second, whether a reorganization plan can vest in EEOC functions which are presently lodged in the Department of Labor. For the reasons that follow, we answer the first question in the affirmative; your second question may also be answered in the affirmative, provided certain other conditions of the Reorganization Act of 1977 are met.

EEOC as an Executive Branch Agency

Under the current Reorganization Act, the President may provide for the transfer of functions only for present purposes, with respect to "an Executive agency or part thereof." *See* 5 U.S.C.A. §§ 902-3 (1977). One prerequisite of a transfer of functions to EEOC is thus a determination that the agency is an "Executive agency." We believe that there is little doubt that it is such an "Executive agency."

This result can be reached by two different rationales. First, even the so-called independent regulatory agencies have been considered "Executive" agencies for purposes of the Reorganization Acts. For example, even though previous such Acts have provided that reorganization plans could pertain only to agencies "in the executive branch of the Government," *see* Reorganization Act of 1949, §7, 63 Stat. 203, reorganization plans have been proposed by the President, and allowed by Congress, which involved the independent regulatory commissions. *See* Reorganization Plan No. 3 of 1961, 75 Stat. 837 (CAB); Reorganization Plan No. 4 of 1961, 75 Stat. 838 (FTC). The fact that EEOC would

similarly come within the present Reorganization Act is demonstrated by a provision, enacted in 1972 with reference to a Reorganization Act containing provisions similar to those pertinent here, which indicated that a statutory transfer of functions to EEOC could be aborted by a reorganization plan. Equal Employment Act of 1972, Pub. L. No. 92-261, § 5, 86 Stat. 107, 42 U.S.C. (Supp. V) § 2000e-6(c).

Under this rationale, however, a reorganization plan affecting the EEOC could still be subject to certain restrictions if the EEOC were deemed to be an "independent regulatory agency." *See* 5 U.S.C.A. § 905(a)(1). We do not believe this to be the case. EEOC was created by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-4 *et seq.* Its five members are appointed by the President with the advice and consent of the Senate, to staggered 5-year terms; no provision is made for the removal of the members from office. EEOC's functions, as contemplated in the 1964 Civil Rights Act, were largely to investigate and to conciliate.[1] *See* 110 Cong. Rec. 7242 (1964) (remarks of Senator Case); *see, also, McGriff* v. *A. O. Smith Corporation,* 51 F.R.D. 479, 482-83 (D.S. Car. 1971). Congress clearly intended that EEOC should not be vested with any power to adjudicate or to issue enforcement orders. *See* 110 Cong. Rec. 6543 (1964) (remarks of Senator Humphrey); *Fekete* v. *United States Steel Corporation,* 424 F. 2d 331, 336 (3rd Cir. 1970). Moreover, while EEOC is empowered to issue guidelines, they are not regarded as regulations having the force of law. *See, General Electric Company* v. *Gilbert,* 97 S. Ct. 401, 410-11 (1976).

The lack of any quasi-adjudicatory or quasi-legislative functions vested in EEOC leads, in our view, to a conclusion that it is a part of the executive branch. As the Supreme Court indicated in *Humphrey's Executor* v. *United States,* 295 U.S. 602, 624 (1935), and *Wiener* v. *United States,* 357 U.S. 349, 353-354 (1958), the inferences to be drawn as to congressional intent on this matter rest largely on the functions that the Agency is to perform. In those cases the quasi-legislative or quasi-judicial functions lodged by Congress in the particular agencies led to a conclusion by the Court that Congress meant for the agencies to be independent; otherwise, the agencies could not perform their required duties free of Executive influence. The lack of such functions in EEOC and the consequent absence of any need to be independent of the Executive suggests that Congress meant for EEOC to be subject to Executive control.

Other considerations support this result. First, it would raise serious constitutional problems for an agency, shorn of any quasi-judicial or quasi-legislative authority, to be set apart from the Executive; it cannot be assumed that Congress would lightly intend such a result. Moreover, there is no provision in the 1964 Civil Rights Act for the removal of EEOC members for neglect of duty or malfeasance in office. Such a

[1] In 1972 Congress expanded EEOC's powers by allowing it to bring certain enforcement actions. *See* 42 U.S.C. (Supp. V) § 2000e-5.

provision has been customarily included in statutes setting up regulatory agencies intended to be independent of Executive control, *See, e.g.*, 29 U.S.C. § 153(a) (NLRB); 49 U.S.C. § 1321(a)(2)(CAB), except for those statutes passed in the interval between *Myers* v. *United States*, 272 U.S. 52 (1926), and *Humphrey, see* 15 U.S.C. 78d (SEC); 47 U.S.C. 154 (FCC). While *Wiener* v. *United States, supra,* held that the absence of a specific provision for removal for cause does not necessarily imply that the officer is subject to Executive control, the fact that such a provision is not contained in Title VII of the Civil Rights Act seriously weakens that argument when compared to the statutes creating other regulatory agencies.

The legislative history of the 1964 Civil Rights Act does not suggest a contrary result. Albeit, there are references in the history which could be taken to indicate a legislative belief that EEOC was to be an independent Agency. For example, the House committee report states that the "Commission will receive the usual salaries of members of independent regulatory agencies." H.R. Rep. No. 914, 88th Cong., 1st Sess. 28 (1963). Senator Humphrey also stated that the EEOC statute would be a "departure from the usual statutory scheme for independent regulatory agencies." 110 Cong. Rec. 6548 (1964). These limited remarks, however, do not shed any additional light on an intent that EEOC was to be an independent Agency. If Congress had intended this result, it presumably would have so indicated more clearly and explicitly, particularly since it must have been aware that the "most reliable factor" for drawing inferences as to independence—that of the agency's functions—would lead to a contrary conclusion. *Wiener* v. *United States, supra,* at 353. In addition, it is not without significance that those opposed to the Civil Rights Act referred, without rebuttal, to EEOC as part of the executive branch. *See* 110 Cong. Rec. 7561, 7776, 8442 (1964) (remarks of Senators Thurmond, Tower, and Hill).

We thus conclude that EEOC is an Agency within the executive branch. This conclusion is consistent with earlier opinions of this Office as to the status of EEOC.

Transfer of Functions from the Department of Labor

The conclusion that EEOC is subject to the President's authority under the Reorganization Act of 1977 is not the only condition for a transfer of functions from the Department of Labor to EEOC. One other prerequisite is that the Department of Labor must be an Executive agency—which, of course, it is. Two other general substantive limitations must also be met before a transfer of functions can be accomplished. First, the President must find that changes in the organization of agencies are necessary to carry out the policies set forth in 5 U.S.C. § 901(a); this is not so much a legal determination as it is a practical one. Second, a reorganization plan may not transgress the limitations set forth in 5 U.S.C. § 905. While some legal issues may be

presented here, they can properly be analyzed only in light of the particular changes which are proposed. If you desire further advice on this matter, we will be happy to evaluate any plan's conformance to the provisions in 5 U.S.C. § 905.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

November 3, 1977

77-62 MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

Richard Helms' Eligibility Under 5 U.S.C. § 8314 To Receive an Annuity or Retired Pay

This memorandum opinion is to confirm our oral opinion that Richard Helms, former Director of the Central Intelligence Agency (CIA) and an ambassador, will not be barred by 5 U.S.C. § 8314 from receiving an annuity or retired pay on the basis of his Federal service by virtue of his plea of *nolo contendere* to two counts of violating 2 U.S.C. § 192 in connection with appearances before the Senate Foreign Relations Committee on February 7 and March 6, 1973.

Based on staff discussions and our reading of the relevant transcripts, our understanding of the circumstances surrounding Mr. Helms' testimony is as follows:

He appeared before the committee in open session on February 5, 1973, in connection with the committee's consideration of his nomination as Ambassador to Iran. He was then requested to appear in executive session on February 7 so that the committee could question him in three areas: recently published allegations that the CIA had provided training to local police forces; CIA involvement with the Watergate affair;, and CIA relations with multinational corporations, particularly regarding the International Telephone & Telegraph Corporation (ITT) and the 1970 election that brought Salvador Allende to power in Chile.

At the February 7 hearing, Mr. Helms was asked questions relating, *inter alia*, to domestic activities of the CIA, the relationship of Watergate defendants to the CIA, the Agency's Domestic Contact Service, and the CIA's relationship to other Government agencies. However, the charge of a violation of 2 U.S.C. § 192 in connection wih the February 7 hearing stems from Mr. Helms' refusal to answer questions relating to his knowledge of the CIA's attempts in September and October of 1970 to foment a coup in Chile, his knowledge of the CIA's financing of groups working against Allende's accession to the Presidency of Chile, and his knowledge of the CIA's efforts to influence the

actions of certain U.S. multinational corporations to create economic pressures in order to decrease the likelihood of Allende's accession.

The March 6 hearing was held in large part for the benefit of the committee's Subcommittee on Multinational Corporations, which was studying the relationship of multinational corporations to the foreign policy of the United States, although Chairman Fulbright indicated that much of the questioning would be of interest to members of the full committee as well. Mr. Helms' testimony related primarily to CIA activities in connection with the 1970 Chilean election, including: contacts between CIA and ITT officials; the nature of U.S. policy in 1970 regarding the election; whether fomenting a coup or applying economic pressures through private companies would have been consistent with U.S. policy relating to Chile; whether the Forty Committee had authorized certain activities to influence the outcome of the election; and generally whether the CIA had taken measures to prevent Allende's election.[1] Mr. Helms is charged with failing accurately and fully to answer (and thereby refusing to answer) questions relating to his knowledge of these matters.

Section 8314(a) of Title 5, United States Code, provides that a Federal annuity or retired pay may not be paid to an individual (or his survivor or beneficiary) who:

> refused or refuses, or knowingly and willfully failed or fails, to appear, testify, or produce a book, paper, record, or other document, relating to his service as an employee, before a Federal grand jury, court of the United States, court-martial, or congressional committee, in a proceeding concerning—
>
> (1) his past or present relationship with a foreign government; or
>
> (2) a matter involving or relating to an interference with or endangerment of, or involving or relating to a plan or attempt to interfere with or endanger, the national security or defense of the United States.

In our opinion, the ineligibility imposed by this section is inapplicable to Mr. Helms' refusal to testify at the 1973 hearings.

I

Although its language is a bit ambiguous, we believe that § 8314 is on its face inapplicable in the present situation. Neither committee hearing could reasonably be characterized as a proceeding concerning Mr. Helms' "past or present relationship with a foreign government." Fairly read, the quoted phrase seemingly refers to disloyal or subversive relationships with foreign governments, not contacts that may arise in the course of the individual's official duties. *See* Part II and III, *infra*. We are unaware of any suggestions that a purpose of either the Febru-

[1] There were also several questions relating to Cuba and certain other CIA operations, but the Chilean election was the major topic of discussion at the March 6 hearing.

ary 7 or the March 6 hearing was to examine Mr. Helms' loyalty to the United States or any subversive relationships he may have had with foreign governments.

The second type of proceeding mentioned in § 8314 is that concerning an "interference with or endangerment of . . . the national security or defense of the United States." Read broadly, the quoted phrase could conceivably be read to cover the present situation. The questioning of Mr. Helms did relate to the national security and defense of the United States in a general way; intelligence and other operations of the CIA inevitably pertain to national security and defense. Moreover, the primary focus of the questioning, especially during the March 6 hearing, concerned an important element of U.S. foreign policy, *i.e.*, the Nation's interest and involvement in the Chilean election, and the participation of ITT and other U.S. corporations in the formulation and implementation of that policy. In other contexts, the phrase "national security" has been interpreted to encompass ordinary foreign policy considerations as well as the national defense. *See, e.g.,* Executive Order 11652, § 1 (classification Executive order). Finally, the committee's overall concern with the effect of multinational corporations on U.S. foreign policy could be thought to relate to adverse effects on national security or defense in a broad sense, if such corporations were found to have an overall weakening effect on the Nation's position. Thus, it could be argued that the hearings related to a possible "interference with . . . the national security" to the extent that the committee sought to determine whether ITT unduly altered U.S. policy in Chile from what it might otherwise have been or whether the CIA ignored or transgressed and thereby "interfered" with U.S. policy regarding Chile.

However, we believe that this would be a strained reading of § 8314 in the present setting. When the term "interference" is read in conjunction with the word "endangerment," it would seem that § 8314(a)(2), like § 8314(a)(1), should be read to refer to activities of a disloyal or subversive nature, and ones that may have a relatively imminent and readily discernible adverse impact on officially established policy. Accordingly, those provisions effectively complement one another. The first refers to proceedings in which the individual's *own* loyalty is in question, and the second refers to actions or plans involving *other* people (and perhaps the individual as well) or of which the individual has knowledge.

Thus, subsection (a)(2) would not on its face appear to apply to the two hearings at which Mr. Helms testified, which involved an inquiry into the nature and implementation of U.S. foreign policy in a given instance and the influence of private persons in formulating the policy, without any apparent suggestion of disloyalty on the part of Mr. Helms or others or of possible attempts to subvert U.S. policy.

II

This somewhat limited interpretation of 5 U.S.C. § 8314 is reinforced by reference to other sections of the entire subchapter of Title 5, of which § 8314 is a part. Under 5 U.S.C. § 8312, an individual is ineligible to receive a pension or annuity if he has been convicted of certain enumerated offenses. The listed offenses all pertain to espionage, sabotage, treason, subversion, or disloyalty.[2]

In addition, pension and retirement disability is also imposed if the individual is convicted of perjury in falsely denying the commission of any of the offenses just mentioned or in falsely testifying with respect to his service as a Government officer or employee in connection with a matter involving "an interference with or endangerment of, or involving or relating to a plan or attempt to interfere with or endanger, the national security or defense of the United States." 5 U.S.C. § 8312(b)(3).[3] The existence of these two provisions in the perjury subsection strongly suggests that false testimony regarding "interference" or "endangerment" involving others must also pertain to activities or plans that are tinged with disloyalty or subversion. This reading of the perjury provisions is entirely consistent with our interpretation of the comparable refusal-to-testify provisions in § 8314.

Finally, § 8313 imposes pension and annuity ineligibility if the individual is under indictment for any of the offenses named in § 8312, and, with knowledge of the indictment, remains outside of the United States for more than 1 year.

As can be seen, 5 U.S.C. §§ 8312–8314 reflect a comprehensive effort to deny a pension or annuity to a Federal official who commits acts or offenses that endanger the national security or hinder the Government's ability to learn about such acts or offenses committed by the individual or by others. In view of Congress' careful specification in § 8312 of only those criminal offenses that involve espionage, sabotage, treason, subversion, or disloyalty, we believe that the sanctions in § 8314 for refusals to testify must apply only where the proceedings involved relate to activities of a similar nature engaged in by the individual himself or by others. As mentioned above, neither of Mr. Helms' appearances involved an inquiry into such activities.

III

Whatever remaining doubt there may be as to the proper scope of § 8314 is, in our view, dispelled by reference to the legislative history of the section. The predecessor to the present § 8314 was first enacted

[2] The offenses include gathering and transmitting defense information to injure the United States or to aid a foreign nation; sabotage; treason; advocating overthrow of the Government; activities affecting the morale, loyalty, or operation of the armed services; service against the United States; violations of the Atomic Energy Act with intent to injure the United States or to aid a foreign nation; and communication of classified information. § 8314(b) (1)–(2).

[3] The quoted phrase is identical to that in § 8314(a)(2).

as § 2(a) of P.L. 83-769, 68 Stat. 1142, popularly known as the "Hiss Act." The principal purpose of the Act was to prevent Alger Hiss from receiving retirement benefits when he reached age 62. *Hiss* v. *Hampton*, 338 F. Supp. 1141, 1149-53 (D.D.C. 1972) (three-judge court). In 1954, Mr. Hiss was about to be released from confinement following his conviction for perjury in connection with a grand jury investigation of his possible violation of espionage and other laws arising from his alleged transmission of confidential State Department documents to a Communist agent. The documents involved were "of such a nature that even at the comparatively late day of their disclosure some could not for security reasons safely be made public . . . ." *Id.* at 1147, quoting *United States* v. *Hiss*, 185 F. 2d 822, 828 (2d Cir. 1950). There was widespread public outcry at the possibility that Mr. Hiss might receive an annuity and Congress responded by passing P.L. 83-769.[4] Thus, it is clear that the predecessor of the present § 8314 was part of an Act the primary purpose of which was to bar the payment of an annuity to a person convicted of perjury in connection with an inquiry into alleged activities of a distinctly disloyal nature. Our intepretation of the language of § 8314 is therefore consistent with Congress' original purpose.

However, Public Law 83-769, as enacted in 1954, swept more broadly than was necessary to accomplish this relatively limited purpose. The original Act also provided for the denial of annuities to persons who committed any other offense related to the performance of their official duties. This resulted in the denial of valuable benefits to persons convicted of relatively minor offenses, such as petty theft. *See, e.g.*, H.R. Rep. No. 541, 87th Cong., 1st Sess., 1 (1959); S. Rep. No. 862, 87th Cong., 1st Sess., 1-3. To correct this perceived injustice, Congress in 1961 greatly restricted the coverage of Public Law 83-769 to eliminate the additional ineligibility sanction imposed on those who had committed offenses that had no bearing on loyalty or national security. P.L. 87-299, 75 Stat. 646. *See, Hiss* v. *Hampton*, 338 F. Supp., at 1152. It was at that time that Congress limited the specific offenses that give rise to ineligibility under § 8312 to those involving espionage, sabotage, subversion, disloyalty, and the like, as discussed earlier in this memorandum. These changes were specifically designed to limit the application of the overall Act to situations within the original primary purpose of the Act, *i.e.*, to reach Alger Hiss and those in a comparable position. *Hiss* v. *Hampton, supra*, at 1151-53. *See, generally* S. Rep. No. 862, 87th Cong., 1st Sess., 1-3, 11 (1961); H.R. Rep. No. 541, 87th Cong., 1st Sess., 1-2 (1961); S. Rep. No. 1544, 86th Cong., 2d Sess., 1-2 (1960); S. Rep. No. 144, 86th Cong., 1st Sess., 2, 7 (1959); H.R. Rep. No. 258, 86th Cong., 1st Sess., 3 (1959); Hearings on H.R. 4601 and Related Bills

[4] Congress' purpose of denying an annuity to Mr. Hiss was ultimately thwarted. The court held in *Hiss* v. *Hampton* that the denial of an annuity was intended as a penalty and that the law was therefore unconstitutional *ex post facto* legislation as applied to Mr. Hiss.

before the House Committee on Post Office and Civil Service, 86th Cong., 1st Sess. 2 (1959); 105 Cong. Rec. 5831-33 (1959).

This clear expression of congressional intent, and the specific criminal offenses identified by Congress in narrowing the Act in order to be consistent with its original intent, lend strong support to our interpretation that § 8314 reaches only refusals to testify in proceedings relating to the employee's loyalty or immediate threats to the national security of a subversive nature. Indeed, the relevant committee reports describe the present § 8314(a) as prohibiting annuities or retired pay:

> to persons refusing, on grounds of self-incrimination, to testify or produce documents, in proceedings relating to loyalty, or with respect to their relations with foreign governments. *This continues present law, except as to offenses not involving loyalty.* S. Rep. No. 862, at 7; H.R. Rep. No. 541, at 5. [Emphasis added.] [5]

See, also H.R. Rep. No. 541, at 2–3; *Hiss* v. *Hampton, supra,* at 1153 (referring to the 1961 Act as restoring benefits to those who committed "non-treasonous" offenses); *Garrott* v. *United States,* 340 F. 2d 615, 620 (Ct. Cl. 1965) (referring to § 2 of the 1961 Act, which included the present § 8314, as covering "subversive acts and associations").

In our view, the legislative history clearly confirms that § 8314 is intended to apply only where the proceeding in which the individual refuses to testify concerns the individual's own loyalty or his knowledge of activities or plans that pose a serious threat to national security—and principally a breach of security, such as that involved in the *Hiss* case. As such, it is inapplicable in the present situation involving Mr. Helms.

Finally, it should be noted that § 8314 is penal in nature, *Hiss* v. *Hampton, supra,* at 1153, and penal statutes are traditionally construed narrowly. The Comptroller General applied this principle of narrow construction to the original Hiss Act, concluding that there is no reason why the Act should be interpreted to apply where it does not expressly do so. 41 Comp. Gen. 62, 65 (1961); 35 Comp. Gen. 302, 303 (1955). Thus, there is no reason in the present situation to extend § 8314 beyond its evident primary purpose in order to reach the present case.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

[5] These committee reports provide some basis for arguing that § 8314 applies only where the refusal to testify is based on Fifth Amendment grounds, as was true with § 2(a) of the 1954 act. In view of our conclusion here, there is no need to address this issue.

November 3, 1977

77-63 MEMORANDUM OPINION FOR THE JUDGE ADVOCATE OF THE NAVY

Immigration Status of Persons Employed by Nonappropriated Fund Instrumentalities of the United States

This responds to your request for our opinion on a question involving the status of certain persons who are or have been employees of "nonappropriated fund instrumentalities" (NAFI) of the United States abroad. The question is whether they are eligible for classification as "special immigrants" under § 1101(a)(27)(G) of the Immigration and Nationality Act, as amended (the Act), 8 U.S.C. § 1101(a)(27)(E).

Section 101(a)(27)(G), as amended, defines "special immigrant" as an immigrant who is an "employee, or an honorably retired former employee, of the United States Government abroad" if recommended by an appropriate Foreign Service officer, with the approval of the Secretary of State and provided that he or she (the immigrant) has completed "fifteen years of faithful service." A "special immigrant" is entitled to special consideration in connection with his application for admission to this country.

The answer to your question turns upon the meaning of the phrase "employee . . . of the United States." If an employee of a nonappropriated fund instrumentality is an "employee . . . of the United States" within the meaning of the Act, then, upon the completion of 15 years of service, he is eligible for classification as a special immigrant upon the recommendation and with the approval of the appropriate officers.

The Act does not define the phrase "employee . . . of the United States," and does not refer to nonappropriated fund instrumentalities. The legislative history is scant. The relevant committee reports state simply that the decision to extend "special immigrant" status to certain Federal employees was "a result of representations made by the Department of State that there are exceptional cases of aliens who have served faithfully in the employment of this Government abroad over long periods of time and that it is desirable in the interest of this Government to facilitate their entry into the United States." S. Rep.

No. 1137, 82d Cong., 2d Sess., 18; H. Rep. No. 1365, 82d Cong., 2d Sess., 42.

In the absence of definitive legislative guidance, we must attempt to answer your question by relying upon general principles and upon judicial decisions that have discussed and defined the status of NAFI employees in other contexts. The point of departure is *Standard Oil* v. *Johnson,* 316 U.S. 481 (1942). In that case, in connection with a dispute over State tax liability, the Supreme Court examined the relationship between a nonappropriated fund instrumentality (an Army post exchange) and the Government of the United States. In an opinion by Mr. Justice Black, the Court held that the post exchange was an "arm" of the War Department and that it was therefore possessed of whatever immunity the War Department enjoyed under the Constitution and Federal statutes.

The Court had no occasion to discuss the nature of the status of employees of post exchanges, but in later years the teaching of the case—that post exchanges are "arms" of the Government—provided a basis for a number of decisions, in the lower courts, holding that NAFI employees are employees of the United States. *See,* e.g., *United States* v. *Forfari,* 268 F. 2d 29 (9th Cir. 1959).

The Supreme Court's decision also evoked a response in Congress. In 1952 Congress enacted a statute providing that certain employees paid from nonappropriated funds should *not* be deemed to be employees of the United States for certain purposes, to wit: (1) for purposes of laws administered by the Civil Service Commission, and (2) for purposes of laws relating to the compensation paid by the Government on account of the disability or death of Federal employees. Act of June 19, 1952, 66 Stat. 138 (1952).

The decisions and the legislative action do not compel the conclusion that NAFI employees are employees of the United States within the meaning of the Act, but they do lend substantial support to that view. The cases turned upon a general reading of the relation between NAFI's and the Government. The prevailing view was that NAFI employees were employees of the Government even though no statute expressly conferred that status upon them. The legislative action was premised upon a similar proposition. Congress assumed that in the absence of an express statutory exclusion, NAFI employees could be regarded as employees of the United States under the rationale of *Standard Oil* v. *Johnson, see* H. Rep. No. 1995, 82d Cong., 2d Sess., 2. As the legislative history of the 1952 statute indicates, it was not intended that the action taken in light of that assumption should confer new rights and privileges upon NAFI employees, but neither was it intended that the statute should take away existing rights and privileges. The fact that Congress found it necessary to remove NAFI employees from the class of Federal employees for certain purposes suggests that they may be regarded as Federal employees for other purposes. *Expres-*

sio unius est exclusio alterius.[1] Taken together, the cases and the legislative history provide support for the view that, as a general rule, NAFI employees should be regarded as employees of the United States unless a Federal statute provides otherwise.

We now turn to the Act. We find nothing in the language or history of the Act that would suggest that the phrase "employee . . . of the United States" was intended to have a restricted meaning. Congress' primary intention was to facilitate the immigration of persons who have served the Government abroad. There is no suggestion in the statute that Congress intended to withhold that privilege from a class of otherwise qualified individuals solely because their wages have been paid from nonappropriated funds. Further, we note that Congress had ample opportunity to exclude these individuals. The Act and the special statute removing NAFI employees from the class of Federal employees for certain purposes were passed during the same legislative session. If Congress had wanted to withhold the immigration privilege from NAFI employees, a means of withholding that privilege was in hand.

For these reasons, we concur in your view that NAFI employees are eligible for classification as "special immigrants" under the Act if they satisfy the statutory requirements respecting years of service, recommendation, and approval.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

[1] "Expression of one thing is the exclusion of another."

November 10, 1977

77-64 MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION

Participation of Antitrust Division Attorney in "Armored Car" Cases

This is in response to your request for the opinion of the Office of Legal Counsel on whether there would be any conflict of interest involved in the assignment of a named (Mr. G) attorney in your Division to work on several antitrust matters involving armored car companies, apparently including Wells Fargo. Two of the matters are criminal antitrust cases, one is a civil case, and the fourth is a grand jury investigation. We see no objection to Mr. G's participation.

It appears that Mr. G was formerly an associate with a law firm from September 1974 through March 1977, and that the law firm was previously general counsel for Wells Fargo, but that he "never had any occasion to work on or indeed, to be made aware of any matter in any way connected with the firm's representation of Wells Fargo." Wells Fargo took the position that in view of the law firm's prior position as a general counsel for Wells Fargo, no member of the firm could properly be involved in the representation of any company or individual called before any grand jury investigating possible violations in the armored car industry. The law firm ultimately acquiesced in this view.

However, apparently before the law firm had agreed to decline all representation of companies or individuals connected with the grand jury investigation, a member of the law firm was contacted concerning the possibility of his representing an individual who had been subpoenaed before the armored car grand jury. At the request of the member, Mr. G contacted your division to obtain information about procedural aspects of compliance with the subpoena, such as the date the grand jury was empanelled, whether evidence had been presented before a previous grand jury in the matter, the filing of letters of authority and oaths of office, where subpoena returns were filed, and whether the names of companies and individuals subpoenaed to appear could be obtained. He reported the substance of that conversation to the particu-

lar member of the law firm and had no further contact with the case. Several days later, he was told that because of the firm's prior representation of Wells Fargo, the firm could not represent the individual.

Based on these facts, it is our view that there would be no actual or apparent impropriety involved in Mr. G's participation in the armored car cases.

The applicable standards are contained in the American Bar Association (ABA) Code of Professional Responsibility, to which all Justice Department attorneys are subject. *See* 28 CFR 45.735-1(b). Canon 4 of the Code requires an attorney to preserve the confidences of a client. Although a lawyer violates this provision only if he actually breaches the confidential relationship, many courts have held that in order to protect the confidentiality of the relationship, a lawyer is disqualified from representing a party in a matter "substantially related" to the subject matter of a prior representation in which he may have obtained confidential information. *See, e.g., American Roller Co.* v. *Budinger,* 513 F. 2d 982, 984 (3d Cir. 1975); *Emle Industries, Inc.* v. *Patentex, Inc.,* 478 F. 2d 562, 570-71 (2d Cir. 1973); *American Can Co.* v. *Citrus Feed Co.,* 436 F. 2d 1125 (5th Cir. 1971). *See also* ABA Formal Opinion 342, 62 A.B.A.J. 517.

We may assume that the law firm's earlier representation of Wells Fargo was in matters "substantially related" to the armored car cases, so that attorneys who actually worked on Wells Fargo matters would be barred from all involvement in those cases. But this does not necessarily mean that Mr. G is disqualified. The courts have declined to impute all confidential information received in a law firm to all persons in the firm. Where the individual involved was merely an associate in the law firm and had no connection with the matters in question, the individual is not barred under Canon 4. *See, e.g., Gas-A-Tron* v. *Union Oil Co.,* 534 F. 2d 1322 (9th Cir. 1976); *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.,* 518 F. 2d 751, 756-57 (2d Cir. 1975).

Nor do we believe that Mr. G is barred by virtue of his limited inquiries to your Division. First, it appears that the law firm declined the requested representation; we would be reluctant to find disqualification under Canon 4 on the basis of only a fleeting association with a case that was soon declined. Second, even assuming that the firm may have received some confidential information in connection with the preliminary inquiry about its handling of the case, it does not appear that any such information was imparted to Mr. G. He states that it is his recollection that he was never told the identity of the client, and he does not now even recall the name of the New York attorney who contacted the firm. Mr. G merely obtained information from your Division about the grand jury investigation generally and relayed it to

the firm. This type of peripheral involvement does not, in our view, give rise to disqualification under Canon 4. *See, Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp., supra,* at 756–57.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

November 17, 1977

77-65 MEMORANDUM OPINION FOR THE GENERAL COUNSEL OF THE FEDERAL DEPOSIT INSURANCE CORPORATION

Acceptance of Cash Prize by a Federal Deposit Insurance Corporation Examiner

You have inquired whether, in light of the prohibitions contained in 18 U.S.C. § 213, an examiner employed by the Federal Deposit Insurance Corporation (FDIC) may accept a cash prize from a grocery store affiliated with a bank examined by that official.

We understand that all the names and telephone numbers from a town's telephone directory were placed into a drum and that each week the grocery store manager drew a name and telephoned that individual. If the individual had made a purchase during that week (as evidenced by a card stamped by a store clerk and given each customer making a purchase), he or she would win the prize. If the individual had not made a purchase, no prize was awarded and the amount of the prize plus an additional $100 would be carried over to the next week. In this case, the examiner won a prize amounting to $1,000.

Section 213 prohibits an examiner or assistant examiner from accepting a "loan or gratuity" from any bank examined by him or "from any person connected therewith." We understand that this statutory language has been interpreted by the FDIC to prohibit an FDIC examiner from accepting a loan or gratuity from any bank examined by him or from any entity affiliated with the bank through a bank holding company or otherwise. As mentioned above, the grocery store is apparently affiliated with a bank examined by the examiner.

We do not believe that the cash prize, randomly awarded, should be regarded as a "gratuity" within the meaning of § 213. Its predecessor was enacted as § 22 of the Federal Reserve Act of 1913, 38 Stat. 272. The report of the House Committee on Banking and Currency described the provision in the following terms:

> In this section it is sought to correct a bad practice, all too prevalent, of paying fees to bank examiners in order that they may

> make a favorable report upon the condition of a bank; . . . The extent of [this practice] cannot be stated, but that [it prevails] is certain; and it is equally clear that [it is] opposed to public welfare and to sound banking, besides being wholly at variance with fundamental principles of honorable personal conduct. H.R. Rep. No. 69, 63d Cong., 1st Sess., 72 (1913).

It appears from this description that Congress intended to bar payments specifically directed at bank examiners and therefore likely to have a corrupting influence. *See also, United States* v. *Bristol,* 473 F. 2d 439, 442–43 (5th Cir. 1973). A prize awarded on a random basis meets neither of these tests, and we see no reason to give the statute an expansive reading to cover a situation, such as that present here, where the principal aims of the statute would not be advanced.

Therefore, based on the facts as given to us, we see no legal objection to the bank examiner's acceptance of the cash prize.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

December 2, 1977

77-66 MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION

Reorganization of Equal Employment Enforcement Authority—Concurrent Authority

We have considered the question of whether a reorganization plan could, consistent with the Reorganization Act, grant concurrent authority to the Equal Employment Opportunity Commission (EEOC) and the Department of Justice with respect to certain types of lawsuits. In our opinion, there is no legal bar to including such a provision in a reorganization plan.

1. Pertinent Provisions of Title VII of the Civil Rights Act of 1964

Before it was amended in 1972, § 707 of Title VII, 42 U.S.C. 2000e-6 (1970), granted the Attorney General authority to bring pattern or practice suits against private employers and labor unions.

In 1972, Title VII was amended by the Equal Employment Opportunity Act, Public Law 92-261, 86 Stat. 103. As amended, § 707 provides that, after the filing of a charge of discrimination and the inability of EEOC to resolve the matter through conciliation, EEOC may bring a lawsuit against a private employer or a union.[1] 42 U.S.C. 2000e-5(f) (1975 Supp.). In addition, the 1972 Act amended § 707, 42 U.S.C. 2000e-6 (Supp. V 1975), the section authorizing pattern or practice suits.

Section 707(c) was amended to provide that, effective 2 years after enactment of the 1972 Act, "the functions of the Attorney General under this section shall be transferred to . . . [EEOC], unless the President submits, and neither House of Congress vetoes, a reorganization plan . . . inconsistent with the provisions of this subsection."[2] In

[1] The litigation authority of EEOC does not extend to suits against State or local governments; such matters are to be referred by EEOC to the Attorney General.

[2] Presumably, this provision refers to a reorganization plan sent to Congress before March 24, 1974.

March 1974, the transfer of functions took effect. During the interim period, from March 1972 to March 1974, the Attorney General and EEOC had concurrent authority to bring pattern or practice litigation against private firms and labor unions. *See* § 707(e), Pub. L. No. 92-61, 86 Stat. 107, 42 U.S.C. 2000e-5(f), 2000e-6(e) (Supp. V 1975).

In connection with the current project to reorganize enforcement of Title VII and other laws prohibiting employment discrimination, the Civil Rights Division has raised the question whether the Reorganization Act would permit a plan providing, in part, for transfer to the Attorney General of concurrent authority to bring suits against private employers and unions under § 707 of Title VII.

2. The Reorganization Act of 1977

Under the Act, 5 U.S.C. § 903(a), the President may prepare and transmit to Congress a reorganization plan when he determines that organizational changes "are necessary to carry out any policy set forth in section 901(a) . . . ." The policies stated in the Act, 5 U.S.C. § 901(a), are as follows:

> (1) to promote the better execution of the laws, the more effective management of the executive branch and of its agencies and functions, and the expeditious administration of the public business;
>
> (2) to reduce expenditures and promote economy to the fullest extent consistent with the efficient operation of the Government;
>
> (3) to increase the efficiency of the operations of the Government to the fullest extent practicable;
>
> (4) to group, coordinate, and consolidate agencies and functions of the Government, as nearly as may be, according to major purposes;
>
> (5) to reduce the number of agencies by consolidating those having similar functions under a single head, and to abolish such agencies or functions thereof as may not be necessary for the efficient conduct of the Government; and
>
> (6) to eliminate overlapping and duplication of effort.

Clearly, as a general matter, it would be contrary to policy numbered (6)—elimination of "overlapping and duplication of effort"—to grant concurrent jurisdiction to two agencies. Section 903(a) is not to be read, however, to require that a reorganization plan, or particular provisions of a plan, promote all of the policies of § 901(a). It is sufficient that a plan further any one of those policies. The present question of concurrent authority must be considered in context. The overall effect of the proposed plan might be a significant reduction in duplication of Federal efforts to remedy employment discrimination. Moreover, it is likely that the proposed plan would assign significant new responsibilities to EEOC, and this might justify supplementing EEOC's enforcement of § 707 with enforcement by the Attorney General. Thus, shared jurisdiction over § 707 might mean more effective

enforcement. Finally, coordination between EEOC and the Attorney General would be entirely feasible. Presumably, before a suit could be brought by the Attorney General, the procedures of § 706 (that is, a conciliation proceeding before EEOC) would have to be followed.

The transfer of concurrent jurisdiction to the Attorney General could be regarded as the transfer of "part of . . . [an agency's] functions," within the meaning of 5 U.S.C.A. § 903(a)(1). We are not aware of close precedents under the prior reorganization statute, but some support for our conclusion is provided by the 1972 amendment to § 707(c). As noted above, under that provision, the transfer of the Attorney General's authority to EEOC would not have taken place if an inconsistent reorganization plan had gone into effect before March 1974. There was no such plan, but the terms of § 707(c) would have permitted, as one possibility, a plan preserving the Attorney General's authority and also the concurrent authority of EEOC.

Limits upon the nature or scope of reorganization plans are prescribed in 5 U.S.C.A. 905, but none of those limits is pertinent to the present matter.

3. Conclusion

In conclusion, no provision of the Reorganization Act would forbid including in a plan a provision transferring to the Attorney General concurrent jurisdiction over § 707 suits against private employees and unions. Therefore, the question whether to include such a provision is essentially a question of policy.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

December 7, 1977

77-67 MEMORANDUM OPINION FOR THE GENERAL COUNSEL OF THE DEPARTMENT OF COMMERCE

The Disclosure of Documents to the House Committee on Government Operations—Boycotts—Export Administration Act

This is in response to your request for the opinion of this Office on the legal basis for your Department's refusal to provide to a subcommittee of the House Committee on Government Operations certain documents relating to the antiboycott amendments to the Export Administration Act. It is our understanding that, while your Department has provided the subcommittee with much of the information requested, it felt constrained to withhold documents containing communications from foreign governments, notes of meetings with foreign government officials, and documents from other Agencies containing comments on proposed regulations implementing the Export Administration Act. You have offered, however, to provide the subcommittee with detailed summaries of all these documents, and, in addition, have offered to allow the subcommittee chairman to inspect the original documents under certain conditions. Under these circumstances, we believe that, upon a proper authorization by the President, the documents may be legally withheld from the Congress.

Our conclusion is founded on the proposition, as stated in the Supreme Court's opinion in *United States* v. *Nixon,* 418 U.S. 683 (1974), that the executive branch may, as a matter of constitutional law, decline to reveal information in certain instances where such action is necessary to the performance of the Executive's constitutional responsibilities. While the decision in *Nixon* was rendered in a context involving a grand jury subpoena, as opposed to a congressional request, the Court's rationale indicates that it would, at least in certain situations, uphold the Executive's authority to decline to disclose information to Congress. One factor the Court relied on—that of the principle of separation of powers—is certainly applicable in cases involving congressional requests; such requests, no less than a grand jury subpoena, can infringe

on the "independence of the Executive Branch within its own sphere." *Id.*, at 706. Similarly, the other factor underlying the court's decision—the need for confidentiality of communications between high Government officials and their advisers—can be undermined just as much by a congressional request as by a subpoena from the grand jury.

While the Executive's authority to decline to disclose information to Congress has not been a subject of extensive litigation, the cases decided thus far are in accord with our construction of *Nixon.* In *Senate Select Committee on Presidential Campaign Activities* v. *Nixon,* 498 F. 2d 725, 731 (D.C. Cir. 1974), the court of appeals held that a generalized claim of confidentiality operated to preclude the need to respond to a congressional subpoena, at least in the absence of a showing that the subpoenaed evidence was "demonstrably critical to the responsible fulfillment of the Committee's functions." The *A.T. & T.* case [*United States* v. *American Telephone & Telegraph Company,* 419 F. Supp. 454 (D.D.C. 1976), *remanded for further efforts at settlement,* 551 F. 2d 384 (D.C. Cir. 1976), *remanded for further efforts at accommodation,* No. 76–1712 (D.C. Cir. 1977)], further supports this proposition. While the court of appeals has not reached a final decision in favor of either the Executive or Congress, its opinion leaves no doubt that congressional subpoenas do not peremptorily override the Executive's duty to maintain the confidentiality of information the disclosure of which would be damaging to the national interest.

Of course, the fact that the Executive may at times refuse to disclose information to the congress does not necessarily mean that it may do so in this instance. Rather, the justification for withholding information here must depend on whether the particular information at issue is subject to legitimate claims of confidentiality. Another factor that the courts might consider relevant is whether Congress' need for the information might be satisfied by means other than compliance with its initial request. We believe that both these conditions are met here.

There seems little doubt that the information requested by the subcommittee is the sort generally subject to legitimate claims of confidentiality by the executive branch. The subcommittee, first, has requested communications from foreign governments and notes of meetings with representatives of foreign governments. It is our understanding that the statements made by the foreign governments were given under a pledge of confidentiality, either explicit or implicit. We also understand that some of the statements, if associated with the particular government making them, could be damaging to that government. The disclosure of these documents by our Government could thus impair our relations with the foreign governments involved, both by breaching a pledge of confidentiality and by releasing information possibly detrimental to the interests of the other governments. The documents accordingly could be properly termed "state secrets," *i.e.,* "matters the disclosure of which would endanger the nation's governmental requirements *or its*

relations of friendship and profit with other nations." 8 Wigmore on Evidence, § 2212a (McNaughton revision 1961) [emphasis added].

As such, the documents here are of the sort the Executive may protect from disclosure. The courts have long recognized the authority of the executive branch to protect "diplomatic secrets." *See, United States* v. *Nixon, supra,* at 706, 710; *United States* v. *Curtiss-Wright Export Corp.,* 299 U.S. 304, 319–21 (1936); *Republic of China* v. *National Union Fire Insurance Company,* 142 F. Supp. 551 (D. Md. 1956). Mr. Justice Stewart, in commenting on this matter in his concurrence in *New York Times Co.* v. *United States,* 403 U.S. 713, 727, 728 (1971), stated:

> . . . [I]t is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept.

Furthermore, the courts have recognized that the need for confidentiality may even require the withholding of information from Congress. In commenting on President Washington's refusal to comply with a congressional request for documents relating to negotiations with foreign countries,[1] the Supreme Court stated that it was "a refusal the wisdom of which was recognized by the House itself and has never since been doubted." *United States* v. *Curtiss-Wright Export Corp., supra,* at 320. The same result is also supported by the *A.T. & T.* case, which involves the Executive's efforts to withhold from Congress another form of "state secret."

The other documents in question are interagency communications from the Departments of State and Treasury to the Department of Commerce. We believe that the executive branch can also legitimately refuse to provide these documents to the Congress. The Supreme Court in *Nixon* recognized that there was a "valid need for protection of communications between high Government officials and those who advise and assist them." 418 U.S., at 705. The court in *Senate Select Committee on Presidential Campaign Activities* v. *Nixon, supra,* made clear that this need for confidentiality might be asserted and upheld vis-a-vis the Congress. While both of these decisions were rendered in the context of Presidential communications, in our opinion, the same principle would apply with respect to communications containing the policy deliberations of executive officials at a level below that of the President. The need to protect deliberative communications derives from the need for candor and objectivity in the policymaking decisions of the Government. *See, United States* v. *Nixon, supra,* at 705–6. This need exists not only at the Presidential level, but also at other levels in the

---

[1] The executive branch has on other occasions withheld from Congress information similar to that requested here. *See, e.g.,* instances cited in Kramer & Marcuse, "Executive Privileges—A Study of the Period 1953–1960," 29 Geo. Wash. L. Rev. 623, 667–68, 841–44 (1961).

Government. In other contexts the courts have long recognized the importance of protecting the confidentiality of lower executive officials' deliberative communications. *See, Davis* v. *Braswell Motor Freight Lines, Inc.,* 363 F. 2d 600, 603 (5th Cir. 1966); *Kaiser Aluminum & Chemical Corporation* v. *United States,* 157 F. Supp., 141 Ct. Cl. 38 (Ct. Cl. 1958) (Reed, J.), and so too has Congress. *See* 5 U.S.C. § 552(b)(5); H.R. Rep. No. 1497, 89th Cong., 2d Sess., 10 (1966). We thus believe that the constitutional principle announced in *Nixon* and *Senate Select Committee* can properly extend to lower officials' deliberative communications whose disclosure would harm the decisionmaking process of the executive branch. If the President determines that disclosure would be harmful to the effective functioning of the executive branch, the documents may legitimately be withheld from the Congress.

Of course, the fact that the documents requested may legitimately be withheld from Congress does not mean that the executive branch may refuse completely to cooperate with Congress. The recent *A.T. & T.* decision commands that with respect to requests for state secrets, the Executive must cooperate with Congress in a "concerted search for accommodation between the two branches." Slip op., at 21; *see, also* slip op., at 13. The same would appear to be true with respect to interagency policy deliberations. The executive branch's presumptive authority to protect this sort of information is a qualified one, and may be overcome by a showing that Congress' needs may not be responsibly fulfilled without disclosure. *Senate Select Committee on Presidential Campaign Activities* v. *Nixon, supra,* at 730. While no such showing has yet been made in this case, it would seem incumbent on the Executive, in order to ensure that it could protect the documents themselves, that it accommodate Congress' needs through other means, if possible.

We believe that the arrangements proposed by the Department of Commerce in its November 21, 1977, reply to the subcommittee meet the Executive's obligations in this regard. You have advised us that your Department has offered to make available to the subcommittee detailed summaries of all the documents, and that these summaries will place before the subcommittee all of the substantive information it has requested, but in such a way as not to impair our relations with foreign governments or disrupt the decisionmaking processes of the executive branch. In addition, you have offered to allow the subcommittee chairman to inspect *all* the original documents in order to verify the accuracy of the summaries. This proposal should satisfy the subcommittee's needs; it will be furnished with all the substantive information it requested, along with a check by the subcommittee chairman to make sure that nothing is omitted or misrepresented in the summaries. We would note that the court in the *A.T. & T.* case suggested a similar, and even more limited, approach. It proposed there that the executive branch furnish the pertinent subcommittee expurgated documents, and that the subcommittee staff be allowed to select only 10 unedited

memorandums for comparison with the originals.[2] While this suggestion, of course, was founded on the particular circumstances of that case, it does provide guidance as to what the court believed was a reasonable accommodation of both branches' needs.

Finally, we recognize that Congress has recently amended § 7(C) (§ 11360) of the Export Administration Act of 1969 to provide that "any information obtained under this Act . . . shall be made available upon request to any committee or subcommittee of Congress of appropriate jurisdiction." Pub. L. No. 95-52, § 113, 91 Stat. 241. We would note, initially, that it is not entirely clear whether this provision is intended to apply to the materials in question here. In any event, we do not believe that this provision can override the Executive's authority to protect information where such is necessary to the performance of its constitutional functions. For the reasons discussed above, we believe that the documents at issue here may, upon the President's authorization, be lawfully withheld from disclosure to the Congress.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

---

[2] This is out of a total of 217 documents. Another difference between the two proposals is that, in *A.T. & T.*, the court suggested a substitution procedure whereby, upon review and approval by the district court, a particularly sensitive memorandum selected at random might be replaced; no such condition has been imposed by the Department of Commerce here. One other difference is that the court in *A.T. & T.* suggested that the staff be allowed to take notes, while your Department's proposal would not allow this. However, because the notes in *A.T. & T.* are to remain with the Federal Bureau of Investigation or the district court, there is little significant difference between this proposal and your Department's approach.

December 14, 1977

77-68 MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

Conspiracy to Impede or Injure an Officer of the United States, 18 U.S.C. § 372

You have requested our opinion concerning the investigative jurisdiction of the Federal Bureau of Investigation (FBI) over threats or acts against Federal officers not covered by 18 U.S.C. §§ 111 and 114 (assaulting or killing Federal officers) or 18 U.S.C. § 351 (congressional assassination, kidnaping, and assault). Specifically, the inquiry is: (1) whether 18 U.S.C. § 372 can be considered as an independent source of the FBI's investigative jurisdiction; (2) who is to be deemed to come within the statutory language "officer of the United States" in § 372; and (3) whether authority exists to investigate individual acts not committed pursuant to a conspiracy of the sort made criminal by this provision.

1. The FBI's Investigative Jurisdiction

Conspiring to impede or injure a Federal officer is forbidden under Federal law; as a "crime against the United States," it is encompassed by the FBI's investigative jurisdiction set forth in 28 U.S.C. § 533(1). *See, also* 28 CFR § 0.85(a)(1976).

Although under § 372 conspiracy has, in the past, generally been charged only in prosecutions also encompassing a substantive offense such as assault, *see, Murphy* v. *United States,* 481 F. 2d 57 (8th Cir. 1973), *United States* v. *Barber,* 429 F. 2d 1394 (3d Cir. 1970), *United States* v. *Burgos,* 328 F. 2d 109 (2d Cir. 1964), § 372 demands no such limitation. Conspiracy is a distinct and independent crime whose elements differ from those of the underlying offense.

United States v. *Callanan,* 365 U.S. 587, 593 (1961). The commission of a completed substantive offense is not required to support a conspiracy charge. *United States* v. *Jasso,* 442 F. 2d 1054 (5th Cir.) *cert. denied,* 404 U.S. 845 (1971). The legislative history of § 372, discussed below, in no way suggests that prosecution for this form of conspiracy need vary from the general rule.

Investigative jurisdiction will therefore be sustained so long as a violation of § 372 has clearly occurred or is reasonably suspected, even without the existence of some other Federal offense arising out of the same facts.

2. The Meaning of "Officer"

Section 372 provides as follows:

> If two or more persons in any State, Territory, Possession or District conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof, or to induce by like means any officer of the United States to leave the place where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder or impede him in the discharge of his official duties, each of such persons shall be fined not more than $5,000 or imprisoned not more than six years, or both.

Although this provision is more than 100 years old, it has been infrequently used. Most reported cases have involved internal revenue agents whose efforts to track down tax-evading operators of illegal stills met with resistance, *see, e.g., United States* v. *Hall,* 342 F. 2d 849 (4th Cir.) *cert. denied,* 382 U.S. 812 (1965); *United States* v. *Barber,* 303 F. Supp. 807 (D. Del. 1969), *aff'd,* 442 F. 2d 517 (3d Cir. 1971), *cert. denied,* 404 U.S. 846 (1971). Nor have there been any significant interpretations of 42 U.S.C. § 1985(1), § 372's civil counterpart, which contains comparable language.

However, the term "office" has been repeatedly defined with regard to its use in Article I, § 9 and Article II, §§ 2 and 3 of the Constitution. The Supreme Court in *United States* v. *Hartwell,* 6 Wall. 385, 393 (1867), provided the following definition: "An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties." At other times, the term has been quite narrowly confined to the constitutional context, and a distinction has been drawn between an "officer" and an "employee." *See, Burnap* v. *United States,* 252 U.S. 512 (1920). Although these interpretations provide a starting point for analysis, they are not to be narrowly applied when a statutory scheme evidences the intent of Congress that a broader meaning was intended. *Steele* v. *United States,* 267 U.S. 505, 507 (1925). In that case, for example, the term "officer" was held to include deputy marshals and deputy collectors of customs. *See also* 40 Op. Att'y Gen. 294, 299 (1943).

Although the § 372 formulation, "any office, trust, or place of confidence," bears a strong resemblance to that found in Article I, § 9 ("any

office of Profit or Trust"), a review of the legislative history of the section indicates that a reading broader than that demanded by the constitutional usage must prevail. When first enacted in 1861, the provision relating to officers had a somewhat abbreviated form ("if two or more persons . . . shall conspire together . . . by force, or intimidation, or threat, to prevent any person from accepting or holding any office, or trust, or place of confidence, under the United States . . . [they] shall be guilty of a high crime . . .)." Objection to the multifaceted conspiracy bill, of which this provision was a part, centered on its application to conspiracies to overthrow the Government of the United States; to wit, opponents saw the measure as circumventing the constitutional strictures on treason prosecutions. Senator Trumbull, in defending the bill, stressed that its purpose was "to punish persons who conspire together to commit offenses against the United States," and cited interference with a land agent, a postmaster, and railroad route agents to show the need for the legislation, 56 Cong. Globe, 37th Cong., 1st Sess. 277 (1861). The provision was reenacted in a more expanded form as part of the 1871 post-Civil War effort to enforce the Fourteenth Amendment and to end Ku Klux Klan terrorism. Introduced as an amendment in much its final form after criticism of an initial formulation that sought to bring prosecution of most State crimes within Federal jurisdiction, the measure was designed to protect Federal officers by providing for Federal prosecution whenever they were injured because of or in the course of their duties. Unlike the more general conspiracy provision, 18 U.S.C. § 371, that was enacted in much its present form in 1867, § 372 did not even contain a requirement that an overt act be done in furtherance of the conspiracy before the conspiratorial conduct would become actionable. The broad purpose of protecting the Federal presence as fully as possible therefore supports a broad, rather than narrow, reading of the word "office."

Giving effect to this intention, it is our opinion that the term "officer" appearing in 18 U.S.C. § 372 includes both permanent and temporary, full- and part-time officers and employees of the United States. Ambassador A *a fortiori* comes within this definition, for Article II, § 2 of the Constitution requires the President to appoint, with the advice and consent of the Senate, "Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all *other* Officers of the United States . . . ." [Emphasis added.]

3. Individual Acts Not Committed Pursuant to a Conspiracy

The assault on a Federal officer statute, 18 U.S.C. § 111, and the related homicide provision, 18 U.S.C. § 114, make criminal under Federal law attacks on only certain classes of Federal employees. Although a broader provision protecting "any civil official, inspector, agent or other officer or employee of the United States" was proposed by the Attorney General and passed by the Senate in 1934, the current patch-

work pattern of coverage was deliberately retained following conference deliberations and the provision was instead amended so that it would apply to additional classes of personnel (customs and internal revenue officers, immigration inspectors, and immigration patrol inspectors). *See* H.R. Rep. No. 1593, 73d Cong., 2d Sess. (1934). In view of this clear refusal to broaden the coverage of the assault provision, application of § 111 to individual action against unenumerated classes of Federal officers cannot be justified. We are unaware of any other statutory authorization for investigative jurisdiction unless some other Federal offense also is involved. Within the context of your inquiry, we note that the most likely such offense would be violation of 18 U.S.C. § 245(b)(1).

John M. Harmon
Assistant Attorney General
Office of Legal Counsel

December 14, 1977

77-69 MEMORANDUM OPINION FOR THE DIRECTOR OF THE NAVAL PETROLEUM AND OIL SHALE RESERVES, DEPARTMENT OF ENERGY

Presidential Approval of Naval Petroleum Reserve Contract NOd 4219-2664

This is in response to your request that this Office reconsider the Attorney General's statement, drafted by this Office, that Presidential approval of Naval Petroleum Reserve Contract NOd 4219-2664 was required by 10 U.S.C. § 7431(a) (Supp. 1976). That statement reads as follows:

> [w]e are of the opinion that the Secretary of the Navy is authorized to enter into Contract NOd 4219-2664, subject to consultation with Congress and the approval of the President, as required by 10 U.S.C. § 7431(a) (Supp. 1976).

You have evidently understood this to mean that the statute required Presidential approval of the contract in question.

Section 7431(a) enumerates a number of types of contracts that require the approval of the President after consultation with Congress. The common element of these transactions is that they involve the possible diminution of the rights of the United States with respect to ownership of the reserves, production, or sale of petroleum from the reserves, or receipt of moneys due to the United States on account of the reserves. Contract NOd 4219-2664 gives the consent of the United States to the transfer of certain rights and liabilities under previous contracts with Standard Oil Company of California ("Socal") to a wholly owned subsidiary. Socal guarantees the payment of all future liabilities of the subisidiary, the subsidiary assumes all of the existing liabilities of Socal, and both agree that the United States is not liable for any new costs, taxes, or expenses arising from the agreement. Accordingly, the contract does not fall within the categories enumerated by § 7431(a).

The statement meant the contract was authorized by law but that Congress should be consulted and Presidential approval obtained to the extent required by 10 U.S.C. § 7431(a) (Supp. 1976). Because this contract is not within § 7431(a), the reference to action required by that statute should be disregarded.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

December 14, 1977

77-70 MEMORANDUM OPINION FOR THE GENERAL COUNSEL OF THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Effect of Agency Interpretation of Regulations—Confidentiality of Alcohol and Drug Abuse Patient Records

Your letter states that your Office has provided the Civil Service Commission with authoritative advice on the applicability and effect of certain provisions of your Department's regulations, 42 CFR § 2.1, *et seq.*, governing the confidentiality of alcohol and drug abuse patient records. In addition, you point out that the statutes authorizing these regulations provide that any disclosure of records in violation of the regulations is subject to a criminal penalty. *See* 21 U.S.C. § 1175(f); 42 U.S.C. § 4582(b).[1] The question posed is whether your official opinions construing the regulations "have any binding precedential effect" in a prosecution for violation of the regulations.

There are actually two issues: (1) whether your official interpretation can make conduct a violation of the regulations that would not otherwise be so, and (2) whether your official interpretation that conduct does not violate the regulations would serve as a defense to an otherwise valid prosecution.

With respect to the first issue, the basic law is to be found in *M. Kraus and Brothers* v. *United States*, 327 U.S. 614, 621-22 (1946). Briefly, that case holds that where a criminal penalty is provided for violating a regulation, the regulation is to be construed strictly in the same manner as a criminal statute. While publicly made administrative interpretations may aid a court in construing a regulation, it cannot fill gaps

[1] We concur that the statutes provide criminal and not civil penalties. The use of the term "fine" rather than "penalty" in the body of the statute indicates that Congress intended a criminal sanction. *See* 18 U.S.C. § 1. This is confirmed by the strong emphasis that the legislative history of 21 U.S.C. § 1175(f) places on maintaining the confidentiality of patient records. *See* H.R. Rep. 92-920, 92d Cong., 2d Sess., at 33. *See, generally, Kennedy* v. *Mendoza Martinez*, 372 U.S. 144 (1963); *Helvering* v. *Mitchell*, 303 U.S. 391, 399-406 (1938).

in the regulation or make vague language certain. The text of the regulation controls. The principle laid down in *Kraus* has never been questioned or modified by the Supreme Court. We agree that your administrative interpretation that certain conduct is prohibited by the regulation would not bind a court in a prosecution unless the interpretation were duly promulgated as part of the regulation.

With respect to the second issue, the Supreme Court has held that good faith reliance upon an authorized official construction of a criminal statute is a valid defense to a prosecution for violating it. *United States* v. *Pennsylvania Chemical Co.,* 411 U.S. 655, 674 (1973); *United States* v. *Laub,* 385 U.S. 475, 487 (1967); *Cox* v. *Louisiana,* 379 U.S. 559, 571 (1965); *Raley* v. *Ohio,* 360 U.S. 423, 437–38 (1959). As expressed in *United States* v. *Laub, supra,* 385 U.S., at 488, the principle is that:

> Ordinarily, citizens may not be punished for actions undertaken in good faith reliance upon authoritative assurances that punishment will not attach.

The defense is akin to entrapment and is based on consideratons of due process. *Cox* v. *Louisiana, supra; Raley* v. *Ohio, supra,* 360 U.S., at 438.

The question whether a particular statement is an "authoritative assurance" may be one of fact. However, the Court has ruled that interpretative regulations published by the Agency primarily responsible for enforcement are such assurances. *United States* v. *Pennsylvania Chemical Co.,* 411 U.S., at 673–75. Moreover, in *United States* v. *Laub* (at 485–486), the Court held that the Government was bound by a construction expressed by the responsible enforcement Agency in press releases, congressional testimony, and other official albeit informal public statements.

On the basis of these cases, we believe that a treatment program official who released patient records in good faith reliance upon one of your interpretations could not be successfully prosecuted. To that extent, they would have a binding effect upon the Government.

Because your official constructions of the regulations may have an exculpatory effect, we believe that it would be desirable to coordinate the issuance of these constructions with the Narcotics and Dangerous Drugs Section of the Criminal Division, which supervises prosecutions in this area. In addition, such coordination would provide authoritative guidance to United States Attorneys with respect to the effect of the regulations on the conduct of drug cases. While the Office of Legal Counsel does not have any responsibility for criminal law enforcement, we would be happy to arrange for a meeting between your office and the Narcotics and Dangerous Drugs Section to discuss an arrangement suitable to both divisions.

MARY C. LAWTON
Deputy Assistant Attorney General
Office of Legal Counsel

December 16, 1977

77-71 MEMORANDUM OPINION FOR THE GENERAL COUNSEL OF THE DEPARTMENT OF THE TREASURY

Termination of Federal Financial Assistance Under the Civil Rights Act of 1964

This responds to your inquiry concerning the requirement in Title VI of the Civil Rights Act of 1964 that action terminating Federal financial assistance shall not take effect until the agency head has sent a report to the pertinent congressional committees and 30 days have elapsed after the filing of the report. Specifically, your question is whether such a report may be made at the start of an administrative proceeding or only at a later stage.

You have concluded that the earliest action that could trigger the requirement of a report to Congress is the issuance of the initial decision of the administrative law judge, but it appears that the Office of Revenue Sharing favors an interpretation permitting a report to Congress to be made immediately after service of the administrative complaint. For reasons discussed below, our opinion is that under Title VI the action that gives a basis for and necessitates a report to Congress is a final administrative decision terminating assistance. The same interpretation should apply to the nondiscrimination provision of the 1972 revenue sharing statute.

1. Title VI of the Civil Rights Act of 1964 prohibits discrimination on the grounds of race, color, or national origin in programs receiving Federal financial assistance. Section 601, 42 U.S.C. 2000d. Under § 602, 42 U.S.C. 2000d-1, Federal agencies were directed to issue regulations implementing the requirement of nondiscrimination. Section 602 provides that one means of enforcing the requirements of the regulations is "the termination of or refusal to grant or continue assistance . . . to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with any such requirement. . . ." Section 602 provides further that:

> In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

In our opinion, the language of the statute indicates that the report requirement pertains to a final administrative decision. The requirement applies "In the case of any action terminating, or refusing to grant or continue, assistance. . . ." As indicated above, under another provision of § 602, there may be no such action until the recipient has been granted the opportunity for a hearing and a finding of noncompliance has been made. Clearly, the commencement of an administrative proceeding does not constitute such action; at that point, it is uncertain whether the proceeding will result in the termination of financial assistance.

Similar reasoning supports our view that the report requirement is not triggered by an initial (or intermediate) administrative decision. The statute refers to action "terminating" assistance, and mere issuance of an initial decision does not have that effect. Under the essentially uniform agency regulations implementing Title VI, there can be no termination until the administrative process has run its course. *See, e.g.*, the regulation of this Department, 28 CFR §§ 42.108(c) and 42.110(e), and the Department of Health, Education, and Welfare regulation, 45 CFR §§ 80.8(c) and 80.10(e). These regulations, which have the force of law, make clear that there is to be no report to Congress for purposes of § 602, unless and until there is a final administrative decision terminating assistance.

The administrative construction of the report requirement is supported by the legislative history. *See, e.g.*, 110 Cong. Rec. 2498 (1964) (Representative Willis); 110 Cong. Rec. 13700 (1964) (Senator Pastore). This requirement is intended, as is the provision on judicial review, § 603, 42 U.S.C. 2000d-2, to provide a safeguard against arbitrary action by an agency. Until the agency itself has reached a final decision, there is no real need for notification of the congressional committees.

2. The nondiscrimination provision of the State and Local Fiscal Assistance Act of 1972 incorporated the procedural provisions of Title

VI, *see* § 122 of the 1972 Act, 31 U.S.C. 1242(b) (1975 Supp.),[1] and the November 1975 implementing regulation of the Office of Revenue Sharing provides, *inter alia,* for submission of reports to Congress with respect to monetary sanctions, *see* 31 CFR 51.59(b) (1976).

In our opinion, the above conclusion regarding the report requirement of Title VI is also applicable to an administrative proceeding to enforce the nondiscrimination provision of the 1972 Act. When Congress adopted that provision, it was aware of the manner in which the agencies had construed and carried out the report requirement of § 602 of Title VI.

The pertinent provisions of the November 1975 regulation of the Office of Revenue Sharing are not entirely clear, but do permit an interpretation consistent with our reading of Title VI. The subpart on nondiscrimination contained in the November 1975 regulation, Subpart E, incorporates the provisions of Subpart G, which deals generally with administrative hearings under the 1972 Act. *See* 31 CFR §§ 51.60 and 51.80 (1976). Subpart G distinguishes between (1) an initial decision of an administrative law judge, including an order for the withholding of funds, and (2) a final decision. *See* 31 CFR §§ 51.98, 51.101, 51.102 and 51.103 (1976). If, within a prescribed period after issuance of an initial decision, there is neither an appeal to the Secretary by one of the parties nor review by the Secretary on his own motion, then the initial decision becomes final. In the event of review by the Secretary, however, the final decision may differ from the initial one. Accordingly, read in context and in light of § 602 of Title VI, the report requirement of § 51.59(b) of the November 1975 regulation contemplates a report concerning a final administrative decision—that is, a decision that, upon completion of the 30-day period, actually has the effect of withholding payments.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

[1] The State and Local Fiscal Assistance Amendments of 1976, Pub. L. No. 94-488, 90 Stat. 2341, replaced § 122 of the 1972 Act with a substantially different provision, one that does not incorporate the procedures of Title VI. *See* 31 U.S.C. § 1242.

Your letter expresses the view that the nondiscrimination provision of the 1972 Act continues to apply to cases that arose before January 1, 1977, the effective date of the 1976 Amendments. We have not considered this issue, and we express no opinion regarding it.

December 21, 1977

77-72 MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL CRIMINAL DIVISION

Conflict of Interest—Former United States Attorney

This is in response to your inquiry regarding whether a former Assistant United States Attorney, Mr. A, may represent a potential defendant, Mr. X, in connection with a criminal investigation of one Mr. Z. We understand that the investigation involves Mr. Z's alleged diversion of insurance premiums from union contracts, much of which were skimmed off in commissions and expenses through a self-controlled insurance agency fronted by Mr. X. According to the Attorney-in-Charge of the Los Angeles Strike Force, Mr. A did not participate personally and substantially in the second investigation within the meaning of 18 U.S.C. § 207(a), and that investigation was not under his official responsibility for the purpose of 18 U.S.C. § 207(b).

The Attorney-in-Charge of the Strike Force states that Mr. Z was convicted under 18 U.S.C. § 1954 in March, 1977. He states that Mr. X was collaterally involved in the original "Z" investigation but was not indicted or called as a witness. Mr. A apparently had access to reports on the first investigation and recommended against prosecution of a related tax case against a union official bribed by Mr. Z.

In a conversation with this Office, the Attorney-in-Charge stated that the current investigation of Mr. Z, in which Mr. X is a potential defendant, is entirely separate in time and circumstances from the earlier case with which Mr. A had some connection. As we understand it, there are no informants or transactions common to the two. It therefore appears that the investigation in which Mr. A has been asked to appear is not the same "particular matter" as the earlier investigation and that Mr. A is not prohibited by 18 U.S.C. § 207 from representing Mr. X. For the same reason, we do not believe that DR 9-101(B) of the

American Bar Association Code of Professional Responsibility poses a bar here.[1]

Canon 4 of the Code of Professional Responsibility requires an attorney to preserve the confidences and secrets of a client. In order to prevent an attorney from being in a position where confidences and secrets may have to be revealed, courts have held that a lawyer is barred from representing a client in a matter that is "substantially related" to the subject of an earlier representation in which he may have acquired confidential information. *See, e.g., Gas-A-Tron* v. *Union Oil Co.,* 534 F. 2d 1322 (9th Cir. 1976). As explained above, the two investigations here do not appear to be "substantially related," and the Attorney-in-Charge has informed us he has no reason to believe that Mr. A may have previously acquired any confidential information that may be useful in the present investigation. Based on this understanding, Canon 4 poses no obstacle to the contemplated representation either.

We do not believe that this conclusion is altered by the fact that Mr. A will affiliate himself with a defense counsel who still represents Mr. Z in an appeal from his conviction growing out of the earlier investigation, in which Mr. A would be barred. Nor do we attach much significance to the suggestion that the public may be skeptical that Mr. A, as head of the Special Prosecution Unit, did not have knowledge of the new investigation of Mr. X and Mr. Z. As we understand it, Mr. A did not in fact have any such knowledge, which is the essential point for present purposes.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

---

[1] DR 9-101(B) provides that an attorney may not accept private employment in a matter in which he had substantial responsibility as a Government employee.

December 22, 1977

77-73 MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

Status of the Acting Director, Office of Management and Budget

This responds to your request for our opinion concerning the legality of Mr. A's continuing to serve as Acting Director of the Office of Management and Budget (OMB).

Our views may be summarized as follows: The provisions of the "Vacancy Act," including the 30-day limit on the tenure of persons serving in an acting capacity, do not apply to OMB. Under 31 U.S.C. § 16 (Supp. V 1975), when there is a vacancy in the office of Director of OMB, the Deputy Director becomes Acting Director. While there is no express statutory limit on the length of such tenure as Acting Director, it may not continue indefinitely. Within a reasonable time after the occurrence of a vacancy in the office of Director, the President should submit a nomination to the Senate. The circumstances here are such that the duration of Mr. A's service as Acting Director seems reasonable.

Discussion

1. Provisions derived from the Vacancy Act of 1868 are codified in 5 U.S.C. §§ 3345–49. Section 3345 provides that, unless the President directs otherwise, when the head of an executive department or military department resigns, his first assistant shall perform the duties of the office until a successor is appointed. Under 5 U.S.C. 3348, however, a person filling a vacancy by virtue of § 3345 may not do so for more than 30 days.

Even assuming for the sake of argument that the Vacancy Act was intended to cover all agencies in the executive branch, that would not be determinative. Although derived from the 1868 Act, the current provisions, 5 U.S.C. §§ 3345–49, stand on a separate footing because they, along with the other provisions of Title 5, were enacted into

positive law in 1966.[1] The applicable definition of "Executive department" is set forth in 5 U.S.C. § 101; that definition is restricted to the Cabinet departments and does not include OMB.[2]

It follows that 5 U.S.C. § 3348, which imposes a 30-day limit on the time that a "first assistant" may on the basis of § 3345 act as department head, does not apply to OMB.

2. Article II, § 2, Cl. 2 of the Constitution provides that the President is to nominate and, with the advice and consent of the Senate, appoint ambassadors, Supreme Court Justices "and all other officers of the United States, whose appointments are not herein otherwise provided for. . . ." This clause also provides that "the Congress may by law vest the appointment of such inferior officers . . . in the President alone, in the courts of law, or in the heads of departments."

For more than 50 years, the President had sole responsibility for appointing the Director of OMB or its predecessor Agency, the Bureau of the Budget. *See* § 207 of the Budget and Accounting Act, 1921, 31 U.S.C. § 16 (1970). Then, in 1974, the requirement of Senate confirmation of the Director and Deputy Director of OMB was enacted. *See* Pub. L. No. 93–250, § 1, 88 Stat. 11, 31 U.S.C. § 16 (Supp. V 1975).

Our examination of the legislative history of the 1974 statute, as well as that of similar legislation passed by Congress in 1975 but vetoed by President Nixon,[3] reveals no discussion of the question of the length of time that a Deputy Director of OMB may serve as Acting Director.[4] In fact, the provision regarding the filling of a vacancy by the Deputy Director was not added by the 1974 statute. That provision dates back to the 1921 Budget and Accounting Act, as amended by Reorganization Plan No. 2 of 1970.[5] As noted previously, under the 1921 Act, the positions of Director and Deputy Director were not subject to Senate confirmation.

3. In *Williams* v. *Phillips,* 360 F. Supp. 1363 (D.D.C., 1973), the district court held invalid President Nixon's naming of an Acting Director of the Office of Economic Opportunity.[6] The court's reasoning supports our view that, by virtue of 31 U.S.C. § 16 (Supp. V 1975), a Deputy Director of OMB may act as Director for a (reasonable) period

[1] *See* Pub. L. No. 89–554, 80 Stat. 378, *et seq.*

[2] Regarding the applicability of the definition contained in 5 U.S.C. § 101, *see* the explanatory note following 5 U.S.C. § 3345.

[3] *See, e.g.,* S. Rep. 93–7, 93d Cong., 1st Sess. (1973); 119 Cong. Rec. 3348 (1973); H.R. Rep. No. 93–109, 93d Cong., 1st Sess. (1973).

The bill passed in 1973 would have required Senate confirmation of the incumbent Director and Deputy Director as well as persons named to those positions in the future. The Senate voted to override the veto, 119 Cong. Rec. 16503 (1973), but the House failed to do so, 119 Cong. Rec. 16764 (1973).

[4] *See, e.g.,* S. Rep. No. 93–237, 93d Cong., 1st Sess. (1973); H.R. Rep. No. 93–697 (1973); 120 Cong. Rec. 2781 (1974).

[5] The reorganization plan replaced the Bureau of the Budget with OMB.

[6] The court of appeals denied the Government's motion for a stay pending appeal. *Williams* v. *Phillips,* 482 F. 2d 669 (D.C. Cir. 1973). Later, the case became moot and, on January 21, 1974, the appeal was dismissed.

in excess of 30 days. The court referred to similar statutes applicable to other agencies (*e.g.*, the Veterans Administration) and stressed the fact that, with regard to OEO, there was no statute providing for an Acting Director. 360 F. Supp. at 1370–71. The court's conclusion was as follows:

> "Thus the failure of the Congress to provide legislation for an acting director must be regarded as intentional. The Court holds that in the absence of such legislation or legislation vesting a temporary power of appointment in the President, the constitutional process of nomination and confirmation must be followed. Therefore, the Court finds that the defendant Phillips was not appointed lawfully to his post as Acting Director of OEO. An injunction will issue to restrain him from taking any actions as Acting Director of OEO." 360 F. Supp. 1371 [footnote omitted].

The clear implication is that, had there been an OMB-type statute and had Phillips been the Deputy Director of OEO, the court would have reached a different result.

Moreover, in *United States* v. *Halmo*, 386 F. Supp. 593 (D. Wis., 1974), a criminal prosecution, Solicitor General Bork had become the Acting Attorney General pursuant to 28 U.S.C. § 508(b) by reason of a vacancy in the offices of Attorney General and Deputy Attorney General. The defendants contended that because of the 30-day limitation in the Vacancy Act, Mr. Bork's order authorizing an application for a wiretap order was invalid. The court rejected the contention, stating: "There is no time limitation imposed on those who acquire office through § 508(b), 386 F. Supp. at 595."

4. 31 U.S.C. § 16 (Supp. V 1975) provides that, in the event of a vacancy in the office of Director of OMB, the Deputy Director shall act as Director. There is no *Phillips*-type problem of avoidance of Senate confirmation.[7] Since 1974, the Deputy Director of OMB, as well as the Director, is appointed with the advice and consent of the Senate. It seems reasonable to assume that, when the Senate considers a nominee for the position of Deputy Director, it does so with the realization that he may possibly become Acting Director.

On the other hand, Congress has created two positions, Director and Deputy Director, and has required that each be filled by a person whose nomination is confirmed by the Senate.[8] In our view, it is implicit in 31 U.S.C. § 16 (Supp. V 1975), that a Deputy Director may not properly serve indefinitely as Acting Director. There is no specific limit, 30 days or otherwise, but the tenure of an Acting Director should

[7] Congress was aware of the decision in *Williams* v. *Phillips*. The plaintiffs were Senators. The decision was brought to the attention of the House, 119 Cong. Rec. 19316 (1973) (Congressman Rangel), and was inserted into the Congressional Record by Senator Williams, 119 Cong. Rec. 19595 (1973).

[8] We do not deal with the question of the current status of the position of Deputy Director of OMB. *See* § 102(f) of Reorganization Plan No. 2 of 1970.

not continue beyond a reasonable time. What period is reasonable depends upon the particular circumstances.

Pertinent considerations include the specific functions being performed by the Acting Director; the manner in which the vacancy was created (death, long-planned resignation, etc.); the time when the vacancy was created (*e.g.*, whether near the beginning or the end of a session of the Senate);[9] whether the President has sent a nomination to the Senate; and particular factors affecting the President's choice (*e.g.*, a desire to appraise the work of an Acting Director) or the President's ability to devote attention to the matter.

5. Mr. A has served as Acting Director for 3 months. In our opinion, given the circumstances, that period is reasonable. Significant in this regard are Mr. A's involvement in the budget process and the deadlines imposed by the Congressional Budget Act of 1974, *see* 31 U.S.C. § 1321 (Supp. V 1975).

In addition it is noteworthy that the Senate adjourned on December 15 and will not reconvene until January 19. A recess appointment could be made but, in view of the salary restrictions of 5 U.S.C. 5503, it would clearly be reasonable for the President to wait until the Senate reconvenes.

In conclusion, we believe Mr. A's tenure as Acting Director of OMB is lawful. Regarding the time to make a nomination, the President has discretion, but is required to do so within a reasonable period.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

---

[9] Regarding recess appointments, *see* Art. II, § 2, Cl. 3 of the Constitution and 5 U.S.C. § 5503, the latter dealing with the payment of salaries of persons receiving such appointments. In the circumstances present here a recess appointee could not under 5 U.S.C. § 5503 be paid.

INDEX

Agency for International Development
Reprogramming of funds to next fiscal year, requirement to report to Congress: 77-34
Agricultural Act of 1949
Authority of Department of Agriculture to implement price support program for sugar producers: 77-47
Airport and Airway Revenue Act of 1970
Computation of Federal tax owed by Postal Service: 77-22
Alaska Statehood Act
See Panama Canal Zone Treaty.
Aliens
Exclusion, entry for activities prejudicial to public interest: 77-20
Exclusion of: 77-14
Exclusion of subversive aliens: 77-20
Seeking readmittance as permanent resident: 77-14
Status of employees of nonappropriated fund instrumentalities of the U.S. abroad for classification as special immigrants: 77-63
American Bar Association Code of Professional Responsibility
Interchange of Assistant Federal Public Defender and Assistant U.S. Attorney: 77-27
Loan of services of Department of Justice lawyer to Congressional Committee revising Federal Criminal Code: 77-26
Participation of Department of Justice attorney in antitrust case involving client of attorney's former law firm: 77-64
Representation by former Government attorney of potential defendant, where investigation took place while attorney worked for the Government: 77-72
Representation of corporation by law firm where member of firm, as former U.S. Attorney, had official responsibility for the case: 77-1
Representation of litigant by attorney who, as former Department of Justice attorney, had official responsibility for the case: 77-5
Armed Forces
Authority of Marine Corps to provide police protection for privately owned nuclear power plant on military reservation: 77-51
Members of Congress holding reserve commissions as officers: 77-59

Military installations, rental fees for trailer parks to be based on reasonable value: 77-35
Atomic Energy Act
Cost of claims for damage from nuclear incident: 77-40
Attorney General
Removal from political influence: 77-21
Role in relation to President: 77-21
Role of and relationship to Solicitor General: 77-56
Audits and investigations
See Inspector General.
Autopsies
Authority of Bureau of Prisons medical doctors to perform: 77-16
Banks
Acceptance by bank examiner of cash prize from grocery affiliated with bank examined by the examiner: 77-65
Loan by federally insured State bank to spouse of bank examiner: 77-39
Loan by federally insured State bank to State bank examiner after State revoked his authority to examine that bank: 77-39
President's power to designate acting member of Federal Home Loan Bank Board: 77-38
Bureau of Prisons
Autopsies, authority of medical doctors to perform: 77-16
Central Intelligence Agency
Applicability of Freedom of Information Act to: 77-48
Disclosure to subject of investigation of documents generated in that investigation: 77-48
Eligibility of former Director for annuity or retirement after plea of *nolo contendere* to Federal criminal charges: 77-62
Civil Aeronautics Board
Appointment of Acting Chairman of: 77-29
Civil disorders
Hostages, holding of as: 77-13
Civil rights
Federal lawyer as counsel for private plaintiff in civil rights case: 77-28
Grant by reorganization plan of concurrent authority to two Federal agencies with respect to certain equal employment opportunity enforcement lawsuits: 77-66
Hostages, holding of as violation of: 77-13
President's authority to promulgate reorganization plan involving Equal Employment Opportunity Commission: 77-61
Prohibition against payment by Government contractor of dues to discriminatory private organization: 77-55
Requirement in Civil Rights Act of 1964 that action to terminate

Civil rights—Continued
Federal financial assistance shall not take effect until 30 days after notice to Congress: 77-71
Civil Rights Act of 1964
See Civil rights.
Civil Rights Statutes
See Civil rights.
Civil Service Commission
Agency interpretation of regulations that certain conduct is violation of those regulations: 77-70
Classification of Department of Defense commissary personnel as Federal employees: 77-25
Civil Service Retirement System
Annuity for Government service for Tax Court judge: 77-41
Clean Air Act
State jurisdiction to regulate pollutant emissions of oil tankers: 77-36
Comprehensive Drug Abuse Prevention and Control Act of 1970
Authority of District of Columbia Council to enact legislation concerning narcotics and controlled substances: 77-49
Authority of Drug Enforcement Administration to control substances under: 77-24
Forfeiture of property under: 77-49
Power of Drug Enforcement Administration to fix and settle civil penalties without obtaining enforceable judgment: 77-10
Conflict of interest
Acceptance by bank examiner of cash prize from grocery affiliated with bank examined by the examiner: 77-65
Department of Justice litigation involving land owned by Department attorney: 77-3
Federal lawyer as counsel for private plaintiff in civil rights case: 77-28
Participation of Department of Justice attorney in antitrust case involving client of attorney's former law firm: 77-64
Representation by former Government attorney of potential defendant, where attorney did not participate personally and substantially (18 U.S.C. 207(a)) in, or have official responsibility (18 U.S.C. 207(b)) for, the case: 77-72
Representation of corporation by law firm where member of firm, as former U.S. Attorney, did not participate personally and substantially (18 U.S.C. 207(a)) in, but had official responsibility (18 U.S.C. 207(b)) for, the case: 77-1
Representation of litigant by attorney who, as former Department of Justice attorney, did not personally and substantially participate (18 U.S.C. 207(a)) in, but had official responsibility (18 U.S.C. 207(b)) for, the case: 77-5

Conflict of interest—Continued
Status of informal Presidential adviser as a special Government employee: 77-9
Use by public official of airplane leased for personal and official purposes: 77-4
Congress
Access to Federal tax return information: 77-23
Disclosure to House committee of Department of Commerce documents containing communications with foreign governments and notes on proposed regulations: 77-67
Executive branch, requirement to report to Congress when reprogramming funds to next fiscal year: 77-34
Legislative veto over reprogramming of funds to next fiscal year by executive branch: 77-34
Members of Congress holding reserve commissions as officers in armed forces: 77-59
Power to appoint own Members to serve on national commission: 77-32
Power to decide whether a State can rescind its ratification of a constitutional amendment: 77-7
President's power to designate acting member of independent Federal agency for reasonable period of time before submitting nomination for new member to Senate: 77-38
Requirement in Civil Rights Act of 1964 that action to terminate Federal financial assistance shall not take effect until 30 days after notice to Congress: 77-71
Requirement of consultation with by Secretary of the Navy on contract relating to naval petroleum reserve: 77-69
Requirement that President nominate new Director of Office of Management and Budget when Acting Director has served reasonable period of time: 77-73
Contractors
Prohibition against payment by Government contractor of dues to discriminatory private organization: 77-55
Controlled Substances Act
Authority of Drug Enforcement Administration to control substances under: 77-24
Council of Economic Advisers
Appointment of Deputy Executive Director of the Council on International Economic Policy: 77-12
Courts
Impact of Panama Canal Zone Treaty on filling vacancy on U.S. District Court for the District of the Canal Zone: 77-57
Department of Agriculture
Authority to implement price support program for sugar producers: 77-47

Department of Commerce
Disclosure to House committee of documents containing communications with foreign governments and notes on proposed regulations: 77-67
Legality of appointment of Assistant Secretary under Reorganization Plan No. 1 of 1977: 77-46
Department of Energy Reorganization Act
Transfer of authority of Secretary of the Navy over Navy Petroleum Reserve No. 1 to Secretary of Energy: 77-50
Department of Justice
Constitutionality of legislation to remove from political influence: 77-21
Grant by reorganization plan of concurrent authority to two Federal agencies with respect to certain equal employment opportunity enforcement lawsuits: 77-66
Department of Labor
President's authority to promulgate reorganization plan transferring functions from the Department to Equal Employment Opportunity Commission: 77-61
District of Columbia Self-Government and Reorganization Act
Authority of city Council to enact legislation concerning narcotics and controlled substances: 77-49
Domestic Council staff
Legality of Reorganization Plan No. 1 of 1977 concerning: 77-46
Drug Enforcement Administration
Authority to control production of the plant, *Papaver bracteatum:* 77-24
Disposition of property forfeited under Comprehensive Drug Abuse Prevention and Control Act of 1970: 77-49
Power to fix and settle civil penalties without obtaining enforceable judgment: 77-10
Environment
State jurisdiction to regulate pollutant emissions of oil tankers: 77-36
Equal Employment Opportunity Commission
Grant by reorganization plan of concurrent authority to two Federal agencies with respect to certain equal employment opportunity enforcement lawsuits: 77-66
President's authority to promulgate reorganization plan involving: 77-61
Equal Rights Amendment
Power of States to rescind ratification of a constitutional amendment: 77-7
Ethics
See Conflict of interest.

Evidence
See Federal Rules of Evidence.
Executive branch
Reprogramming funds to next fiscal year, requirement to notify Congress: 77-34
Executive Office of the President
See President.
Executive Order 11246
Prohibition against payment by Government contractor of dues to discriminatory private organization: 77-55
Executive privilege
President's power to authorize executive department to withhold documents from Congress: 77-67
Expert witness
Compensation of, where court-appointed: 77-42, 77-43
Compensation of, where court-appointed in condemnation case: 77-43
Compensation of, where court-appointed, in criminal cases: 77-43
Export Administration Act of 1969
Disclosure to House committee of Department of Commerce document containing communications with foreign governments and notes on proposed regulations: 77-67
Fair Labor Standards Act of 1938
Classification of Department of Defense commissary personnel as Federal employees under: 77-25
Federal Bureau of Investigation
Authority to investigate holding of hostages in the District of Columbia for violation of Federal law: 77-13
Jurisdiction to investigate conspiracy to impede or injure Federal officer: 77-68
Reimbursement of Director-designate for travel and *per diem* subsistence expenses: 77-60
Federal Deposit Insurance Corporation
Acceptance by bank examiner of cash prize from grocery affiliated with bank examined by the examiner: 77-65
Loan by uninsured bank to spouse of bank examiner: 77-39
Federal financial assistance
Inclusion of Federal programs of guarantee or insurance in definition of: 77-52
Requirement in Civil Rights Act of 1964 that action to terminate shall not take effect until 30 days after notice to Congress: 77-71
Federal Home Loan Bank Board
President's power to designate acting member: 77-38
Federal jurisdiction
FBI jurisdiction to investigate conspiracy to impede or injure Federal officer: 77-68

Hostages, basis for jurisdiction to prosecute persons for holding hostages in the District of Columbia: 77-13
Powers of police patrol on military reservation: 77-51
Regulation of pollutant emissions of oil tankers: 77-36
Federal National Mortgage Association
Applicability of Freedom of Information Act to: 77-33
Increase in size of Board of Directors of: 77-33
Federal Public Defender Office
Interchange of Assistant Public Defender and Assistant U.S. Attorney: 77-27
Federal Tort Claims Act
Liability of members and staff of federally created and maintained Regional Fishery Management Councils: 77-58
Federal Travel Regulations
Use by public official of airplane leased for personal and official purposes: 77-4
Federal Register Act
Provisions for formal filing of regulations required to be published, noting of time and date of filing: 77-6
Federal regulations
Agency interpretation that certain conduct is violation of regulations: 77-70
Confidentiality of Federal alcohol and drug abuse patients' records: 77-70
Provisions for formal filing of regulations required to be published in the Federal Register, noting of time and date of filing: 77-6
Federal Rules of Evidence
Rule 706, compensation of court-appointed expert witness: 77-42
Rule 706, compensation of court-appointed expert witness: 77-43
Firearms
Interstate transportation of by mental defective: 77-13
First Amendment
Constitutionality of Federal law prohibiting use of mails to advertise lottery: 77-53
Fishery Conservation and Management Act of 1976
Tort liability of members and staff of federally created and maintained Regional Fishery Management Councils: 77-58
Fourteenth Amendment
Power of States to rescind ratification of Equal Rights constitutional amendment: 77-7
Freedom of Information Act
Applicability to Central Intelligence Agency: 77-48
Applicability to Federal National Mortgage Association: 77-33
General Services Administration
Authority to take possession of memorabilia abandoned in Old

Executive Office Building by President Nixon: 77–44
Grandfather clause (18 U.S.C. 709)
Use of word "Federal" in insurance company name: 77–19
Grants
See Federal financial assistance.
Great Scarlet Poppy
See, Papaver bracteatum.
Handicapped persons
Nondiscrimination provisions concerning, inclusion of Federal programs of guarantee or insurance under: 77–52
Hatch Act
Application to employees of Executive Office of the President: 77–18
Application to U.S. Attorney for the Virgin Islands: 77–31
Application to Vice President's staff: 77–18
Executive Office Appropriations Act of 1977, application to employees paid under: 77–18
Hawaii Statehood Act
See Panama Canal Zone Treaty.
Immigration and Nationality Act
Status of employees of nonappropriated fund instrumentalities of the U.S. abroad for classification as special immigrants: 77–63
Inspector General
Constitutionality of proposal to establish in executive departments the Office of Inspector General, which would report to Congress: 77–8
Internal Revenue Service
Appearance of Federal employee (U.S. Attorney) on behalf of his daughter in an IRS office audit: 77–37
Congressional access to Federal tax return information: 77–23
Justiciability of dispute with Postal Service over taxes owed: 77–22
Investigations
See Inspector General.
Justiciability
Tax dispute between Internal Revenue Service and Postal Service: 77–22
Labor Management Relations Act
Composition of multiemployer pension fund board of trustees: 77–2
Law Enforcement Assistance Administration
Requirement that the Agency promulgate regulations on processing civil rights complaints: 77–6
Library of Congress
Challenge by Library's critique to legality of Reorganization Plan No. 1 of 1977: 77–46

Lottery
Constitutionality of Federal law prohibiting use of mails to advertise lottery: 77-53
Mail
Constitutionality of Federal prohibiting use of to advertise lottery: 77-53
Media
Constitutionality of Federal law prohibiting use of mails to advertise lottery: 77-53
Military installations
Authority of Marine Corps to provide police protection for privately owned nuclear power plant on military reservation: 77-51
Rental fees for trailer parks to be based on reasonable value: 77-35
Mobile home
Rental fees for military trailer parks to be based on reasonable value: 77-35
National Archives
Disclosure of tax information in records of Watergate Special Prosecution Force: 77-54
National Commission on Neighborhoods
Restriction on President appointing more than one-half of commission members from same political party: 77-45
Service by State official as constituting holding office under authority of U.S.: 77-32
National Neighborhood Policy Act
Meaning of phrase "members of the same political party" as pertains to members of National Commission on Neighborhoods: 77-45
Naval petroleum reserve
Requirement for Presidential approval of contract relating to: 77-69
Navy Petroleum Reserve No. 1
Transfer of authority over from Secretary of the Navy to Secretary of Energy: 77-50
Newspapers
Constitutionality of Federal law prohibiting use of mails to advertise lottery: 77-53
Nonappropriated fund instrumentalities
Status of employees of abroad for classification as special immigrants: 77-63
Nuclear incident
Cost of damage claims under the Atomic Energy Act: 77-40
Nuclear Regulatory Commission
Cost of claims for damage from nuclear incident: 77-40
Regulations requiring nuclear power plant licensee to establish liaison with local law enforcement: 77-51

Office of Management and Budget
President's authority to allow Acting Director to continue in office more than 30 days: 77–73
Office of Revenue Sharing
Requirement in Civil Rights Act of 1964 that action to terminate Federal financial assistance shall not take effect until 30 days after notice to Congress: 77–71
Officers and employees
Acceptance by bank examiner of cash prize from grocery affiliated with bank examined by the examiner: 77–65
Agency interpretation of regulations that certain conduct is violation of those regulations: 77–70
Appearance of Federal employee (U.S. Attorney) on behalf of his daughter in an Internal Revenue Service office audit: 77–37
Application of Hatch Act to employees of the Executive Office of the President: 77–18
Application of Hatch Act to U.S Attorney for the Virgin Islands: 77–31
Appointment of Acting Chairman of Civil Aeronautics Board: 77–29
Appointment of Deputy Executive Director of the Council on International Economic Policy: 77–12
Appointment of members of the Renegotiation Board: 77–30
Classification of Department of Defense commissary personnel as Federal employees: 77–25
Commencement of service of appointed officers: 77–30
Confidentiality of Federal alcohol and drug abuse patients' records: 77–70
Constitutionality of proposal to establish in executive departments the Office of Inspector General, which would report to Congress: 77–8
Definition of "office" in constitutional sense: 77–32
Department of Justice litigation involving land owned by Department attorney: 77–3
Dual compensation: 77–12
Eligibility of former Government employee for annuity or retirement after plea of *nolo contendere* to Federal criminal charges: 77–62
Federal lawyer as counsel for private plaintiff in civil rights case: 77–28
Gift from foreign government or its agent of more than minimal value, accepted on behalf of U.S., becomes property of U.S.: 77–44
Government-furnished transportation, protection, and other assistance for former Presidents and Vice Presidents: 77–11

Officers and employees—Continued
Interchange of Assistant Federal Public Defender and Assistant U.S. Attorney: 77-27
Loan by federally insured bank to spouse of Federal bank examiner: 77-39
Loan of services of Department of Justice lawyer to Congressional committee revising Federal Criminal Code: 77-26
Members of Congress holding reserve commissions as officers in armed forces: 77-59
Officer of the U.S. defined, relating to FBI jurisdiction to investigate conspiracy to impede or injure such officer: 77-68
Outside practice, service of Government attorney as reporter for American Law Institute as: 77-17
Participation of Department of Justice attorney in antitrust case involving client of attorney's former law firm: 77-64
Persons holding two offices: 77-12
President's power to appoint and remove certain executive officers: 77-21
President's power to designate acting member of Federal Home Loan Bank Board: 77-38
Reimbursement of FBI Director-designate for travel and *per diem* subsistence expenses: 77-60
Removal of Attorney General from political influence: 77-21
Representation by former Government attorney of potential defendant, where attorney did not participate personally and substantially (18 U.S.C. 207(a)) in, or have official responsibility (18 U.S.C. 207(b)) for, the case: 77-72
Representation of corporation by law firm where member of firm, as former U.S. Attorney, did not participate personally and substantially (18 U.S.C. 207(a)) in, but had official responsibility (18 U.S.C. 207(b)) for, the case: 77-1
Representation of litigant by attorney who, as former Department of Justice attorney, did not personally and substantially participate (18 U.S.C. 207(a)) in, but had official responsibility (18 U.S.C. 207(b)) for, the case: 77-5
Requirement that President nominate new Director of Office of Management and Budget when Acting Director has served reasonable period of time: 77-73
Resignation of Presidential appointees during transition between Presidents: 77-12
Retirement benefits of Tax Court judges: 77-41
Service by State official on national commission as holding Federal office: 77-32
Status of employees of nonappropriated fund instrumentalities of the U.S. abroad for classification as special immigrants: 77-63
Status of informal Presidential adviser as a special Government employee: 77-9

Officers and employees—Continued
Use by public official of airplane leased for personal and official purposes: 77-4
Tort liability of members and staff of federally created and maintained Regional Fishery Management Councils: 77-58
Omnibus Crime Control and Safe Streets Act of 1968
Requirement that Law Enforcement Assistance Administration promulgate regulations on processing civil rights complaints: 77-6
Opium Poppy
See, Papaver bracteatum.
Panama Canal Zone Treaty
Impact on filling vacancy on U.S. District Court for the District of the Canal Zone: 77-57
Papaver bracteatum
Authority of Drug Enforcement Administration to control: 77-24
Pardon
Effect on aliens who left country to avoid military service: 77-14
Effect on persons violating Military Selective Service Act: 77-14
Pension
Eligibility of former Government employee for annuity or retirement after plea of *nolo contendere* to Federal criminal charges: 77-62
Fund, composition of multiemployer pension fund board of trustees: 77-2
Petroleum
Transfer of authority over Navy Petroleum Reserve No. 1 from Secretary of the Navy to Secretary of Energy: 77-50
Political party
Defined, for purposes of determining status of persons appointed to national commission, where no more than one-half of members can be from same political party: 77-45
Ports and Waterways Safety Act
State jurisdiction to regulate pollutant emissions of oil tankers: 77-36
Posse Comitatus Act
Authority of Marine Corps to provide police protection for privately owned nuclear power plant on military reservation: 77-51
Authority of military to arrest civilian on military reservation: 77-51
Postal Service
Federal tax assessment against: 77-22
See also Mail.
President
Application of Hatch Act to the Executive Office of the President and to the Vice President's staff: 77-18

President—Continued

Appointment of Members of Congress to reserve commissions as officers in armed forces: 77-59

Authority to allow Acting Director of Office of Management and Budget to continue in office more than 30 days: 77-73

Authority to promulgate reorganization plan involving Equal Employment Opportunity Commission: 77-61

Constitutional restriction on power to appoint Members of Congress to civil office: 77-59

Disposition of memorabilia abandoned in Old Executive Office Building by President Nixon: 77-44

Executive privilege, power to authorize executive department to withhold documents from Congress: 77-67

Gift from foreign government or its agent of more than minimal value, accepted on behalf of U.S., becomes property of U.S.: 77-44

Government-furnished transportation, protection, and other assistance for former Presidents and Vice Presidents: 77-11

Power to appoint and remove certain executive officers: 77-21

Power to appoint State official as member of national commission: 77-32

Power to decide whether a State can rescind its ratification of a constitutional amendment: 77-7

Power to designate acting member of Federal Home Loan Bank Board: 77-38

Removal of Attorney General from political influence: 77-21

Requirement to approve contract relating to naval petroleum reserve: 77-69

Restriction on appointing more than one-half of national commission members from same political party: 77-45

Role in relation to Attorney General: 77-21

Separation of powers, challenged by proposal to establish in executive departments the Office of Inspector General, which would report to Congress: 77-8

Status of informal Presidential adviser as a special Government employee: 77-9

Presidential Assistance Act of 1976

Government-furnished transportation, protection, and other assistance for former Presidents and Vice Presidents: 77-11

Presidential Recordings and Materials Preservation Act

Disposition of White House documents prepared by President Nixon and abandoned in Old Executive Office Building: 77-44

President's Reorganization Plan

See Reorganization Plan.

Press

See Media.

Price-Anderson Act
See Atomic Energy Act.
Professional ethics
See Conflict of interest.
Public defender
Interchange of Assistant Federal Public Defender and Assistant U.S. Attorney: 77-27
Regional Fishery Management Council
Tort liability of members and staff: 77-58
Rehabilitation Act of 1973
Nondiscrimination provision, inclusion of Federal programs of guarantee or insurance under: 77-52
Renegotiation Board
Appointment of members to: 77-30
Reorganization Act of 1977
Equal Employment Opportunity Commission as agency subject to the Act: 77-61
Grant by reorganization plan of concurrent authority to two Federal agencies with respect to certain equal employment opportunity enforcement lawsuits: 77-66
President's authority to promulgate a reorganization plan involving Equal Employment Opportunity Commission: 77-61
Reorganization Plan No. 1 of 1977
Challenge to legality of, by Library of Congress critique: 77-46
Revenue sharing
See Office of Revenue Sharing.
Riot Statute
Hostages, holding of as violation of: 77-13
Secret Service
Protection of former Presidents and Vice Presidents: 77-11
Solicitor General
Role of and relationship to Attorney General: 77-56
Standards of Conduct
Federal lawyer as counsel for private plaintiff in civil rights case: 77-28
Interchange of Assistant Federal Public Defender and Assistant U.S. Attorney: 77-27
Outside practice, service of Government attorney as reporter for American Law Institute as: 77-17
Use by public official of airplane leased for personal and official purposes: 77-4
State
Power to rescind ratification of a constitutional amendment: 77-7
State and Local Fiscal Assistance Act of 1972
Incorporation of procedural provisions of Title VI of Civil Rights Act of 1964: 77-71

State jurisdiction
Regulation of pollutant emissions of oil tankers: 77-36
Statehood Acts
See Panama Canal Zone Treaty.
Sugar Producers
Authority of Department of Agriculture to implement price support program for: 77-47
Taxation
Appearance of Federal employee (U.S. Attorney) on behalf of his daughter in an Internal Revenue Service office audit: 77-37
Assessment of Federal tax against Postal Service: 77-22
Congressional access to Federal tax return information: 77-23
Disclosure of tax information in records of Watergate Special Prosecution Force: 77-54
Tax Court
Retirement benefits of judges: 77-41
Tax Reform Act of 1976
Applicability to disclosure of tax information in records of Watergate Special Prosecution Force: 77-54
Congressional access to Federal tax return information: 77-23
Thebaine
See, Papaver bracteatum.
Trustees
Composition of multiemployer pension fund board of trustees: 77-2
Uniform Code of Military Justice
Authority of Marine Corps to provide police protection for privately owned nuclear power plant on military reservation: 77-51
Authority of military to arrest civilian on military reservation: 77-51
Vacancy Act of 1868
President's authority to allow Acting Director of Office of Management and Budget to continue in office more than 30 days: 77-73
Tenure of acting officer for reasonable period: 77-12
Veterans
Discharge Review Program, Government liability for retroactive veterans' benefits where discharge is upgraded: 77-15
Vice President
See President.
Virgin Islands
Application of Hatch Act to U.S. Attorney for: 77-31
Watergate Special Prosecution Force
Disclosure of tax information in records of Watergate Special Prosecution Force: 77-54
White House Gift Unit
Disposition of memorabilia abandoned in Old Executive Office Building by President Nixon: 77-44