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TITLE 5

GOVERNMENT ORGANIZATION AND EMPLOYEES

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1ST CASE of Level 1 printed in FULL format.

OPINION OF THE OFFICE OF LEGAL COUNSEL

AUTHORITY OF THE SPECIAL COUNSEL OF THE MERIT SYSTEMS
PROTECTION BOARD TO LITIGATE AND SUBMIT LEGISLATION TO
CONGRESS

See
6,7

1984 OLC LEXIS 32; 8 Op. O.L.C. 39

February 22, 1984

NOTICE: THIS OPINION IS A PRELIMINARY VERSION AND HAS NOT
BEEN RELEASED FOR PUBLICATION IN THE PERMANENT VOLUME.

SYLLABUS:

[*1]

Congress may constitutionally authorize the Special Counsel of the Merit Systems Protection Board to conduct any litigation in which he is interested, except litigation in which the Special Counsel's position would be adverse to that taken by the United States in the same litigation. Such opposition would place the President in the untenable position of speaking with conflicting voices in the same lawsuit. In addition, because the Special Counsel is an Executive Branch officer subject to the supervision and control of the President, a grant by Congress to the Special Counsel of authority to submit legislative proposals directly to Congress without prior review by the President would raise serious separation of powers concerns.

ADDRESSEE:

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGISLATIVE AFFAIRS

OPINIONBY: SIMMS

OPINION:

This responds to your request for our views regarding the legislative recommendations of the Special Counsel of the Merit Systems Protection Board to permit the Special Counsel to "litigate before the courts on its behalf on any matter in which the Special Counsel has previously been involved," and empowering the Special Counsel to "submit directly to Congress any legislative [*2] recommendations that the Special Counsel deems necessary to further enhance the ability of the office to perform its duties under law." You indicated in your submission that your Office and the Civil Division are preparing a letter opposing such a grant of litigating authority to the Special Counsel. With respect to the Special Counsel's desire to submit legislative recommendations directly to Congress, you indicated that although you have been advised that the Office of Management and Budget (OMB) has secured the agreement of the Special Counsel to conform to the OMB legislative clearance process, you seek our advice on the question whether Congress constitutionally may authorize the Special Counsel to submit legislation to Congress directly, without first securing the approval of OMB, the legislative clearance office for the Executive Branch.

As discussed further below, we conclude that, as a legal matter, Congress constitutionally may authorize the Special Counsel to conduct, or otherwise participate in, any litigation in which he is interested except litigation in

which he would be taking a position that is adverse to that taken by the United States in the same litigation; although, [*3] as you point out, there are numerous policy reasons for opposing such a grant of authority. In addition, we conclude that, because the Special Counsel is an Executive Branch officer subject to the supervision and control of the President, Congress may not grant him the authority to submit legislative proposals directly to Congress without prior review and clearance by the President, or other appropriate authority, without raising serious separation of powers concerns.

I. Special Counsel as an Executive Officer

We will preface our responses to the specific questions raised in your memorandum by first reviewing the history of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, as it relates to the Special Counsel's status as an Executive Branch officer, including the concerns raised by the Department of Justice at the time of the Act's enactment.

The Civil Service Reform Act of 1978 was enacted to update, overhaul and make more efficient the federal civil service system by: (1) codifying merit system principles and subjecting employees who commit prohibited personnel practices to disciplinary action; (2) providing new protections for employees who disclose illegal [*4] or improper Government conduct; (3) establishing a new performance appraisal system and a new standard for dismissal based on unacceptable performance; (4) streamlining the processes for dismissing and disciplining federal employees; and (5) abolishing the Civil Service Commission and establishing in its stead the Office of Personnel Management within the Executive Branch, and an "independent Merit Systems Protection Board and Special Counsel to adjudicate employee appeals and protect the merit system." S. Rep. No. 969, 95th Cong., 2d Sess. 2 (1978). See also H.R. Rep. No. 1717, 95th Cong., 2d Sess. 1 (1978).

The Act established the Merit Systems Protection Board as a bipartisan body of three members, to be appointed by the President with the consent of the Senate, and removable "only for inefficiency, of duty, or malfeasance in office." 5 U.S.C. §§ 1201, 1202. The Board is authorized to hear and adjudicate all matters within its jurisdiction, to enforce its orders against any federal agency or employee, to stay certain agency personnel actions, and to conduct special studies relating to the civil service and other merit systems within the Executive Branch and to issue reports [*5] thereon to the President and the Congress. Id. § 1205(a). In addition, the Act provided for a Special Counsel to the Board, to be appointed by the President, with the consent of the Senate, for a term of five years, and removable by the President "only for inefficiency, neglect of duty, or malfeasance in office." Id. § 1204. The Special Counsel's primary duties under the Act are to receive and investigate allegations of prohibited personnel practices, to participate in proceedings before the Board when such participation is warranted, and to submit an annual report to Congress on his activities, including "whatever recommendations for legislation or other action by Congress the Special Counsel may deem appropriate." Id. § 1206.

Although the legislative history of the Act suggests that Congress intended both the MSPB and the Special Counsel to be independent of Presidential supervision and control, n1 this Department advised both Congress and the President that the bill which ultimately was enacted contained several provisions which raised very serious constitutional concerns. Those concerns focused primarily on the Act's attempt to limit the President's power of

removal [*6] over the Special Counsel, whom, in view of his primarily prosecutive functions, this Office determined to be an Executive officer. Similarly, in the Department's comments to OMB on the enrolled bill, we advised that Congress could not constitutionally limit the grounds for removal of the Special Counsel by the President. Thus, this Department has consistently taken the position, and we believe correctly, that although the Board may function as a quasi-adjudicative independent body, the Special Counsel is an Executive officer and as such is subject to the President's supervision and control. See also "Presidential Appointees -- Removal Power," 2 Op. O.L.C. 120 (1978).

n1 See, e.g., S. Rep. No. 969, 95th Cong., 2d Sess. 28-29 (1978).

II. Litigation Authority of the Special Counsel

Under current law, the Special Counsel's litigating authority is limited to "interven[ing as a matter of right] or otherwise participating in any proceeding before the Merit Systems Protection Board." 5 U.S.C. @ 1206(i). We understand from your memorandum that the Special Counsel now seeks to expand this authority to permit him to "appear as counsel on behalf of any party in any civil action [*7] brought in connection with any function carried out by the Special Counsel pursuant to this title or any other provision of law and to initiate and prosecute on behalf of any party in any such case an appeal of the decision of any district court of the United States or the United States Claims Court in such case." n2 As you have indicated, this proposal would permit the Special Counsel to seek judicial review of final orders or decisions of the Merit Systems Protection Board, as well as to prosecute appeals of federal court decisions, arguably even in instances in which he was not a party to the proceedings before the Board.

n2 This language is taken from the text of S. 1662, a bill reported by the Senate Committee on Government Affairs on July 21, 1983, to "amend title 5, United States Code, with respect to the authority of the Special Counsel of the Merit Systems Protection Board." Although you have advised us that the Special Counsel has submitted to the Committee an alternative to S. 1662, we believe that the comments in this memorandum will be equally applicable to the Special Counsel's alternate proposal.

As you are aware, this Administration, as a policy matter, has generally [*8] opposed any legislative proposal that would further erode the Attorney General's litigating authority under 28 U.S.C. @@ 516 & 519. This opposition, shared by previous Administrations, is grounded in the need for centralized control of all government litigation. Such control furthers a number of important policy goals, including the presentation of uniform positions on important legal issues, the selection of test cases that would produce results most favorable to governmental interests, more objective handling of cases by attorneys unaffected by an agency's narrower concerns, and the facilitation of Presidential supervision over Executive Branch policies implicated in government litigation. See generally "The Attorney General's Role as Chief Litigator for the United States," 6 Op. O.L.C. 47 (1982). Thus, there are numerous policy grounds on which to oppose a grant of litigating authority to the Special Counsel.

With respect to the legal considerations relevant to the proposed legislation, an agency's authority to litigate independently of the Attorney General in any particular circumstance generally depends on whether such

authority is vested by statute in the agency. However, [*9] when the agency asserting such authority is an Executive Branch agency, constitutional issues arise if Congress has simultaneously vested litigating authority over the case in either the Attorney General or another Executive Branch officer. Those issues involve the President's authority to exercise supervisory control over his subordinates so that he may properly discharge his constitutional obligation to "take care that the laws be faithfully executed," U.S. Const. art. II, § 3, and Congress' potential violation of the constitutional separation of powers by interfering with the President's exercise of that authority. See *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); *Myers v. United States*, 272 U.S. 52 (1926).

Although the Special Counsel's legislative proposal defines his litigating authority so broadly as to provide no clear indication of the actual circumstances in which it could be exercised, we may assume that the Special Counsel would seek to initiate, or otherwise participate in, litigation in which both independent and Executive Branch agencies would be defending themselves against allegations of prohibited employment practices. In such circumstances, [*10] the litigating authority that would be vested in the Special Counsel pursuant to his proposal could not be construed constitutionally to place the President in the untenable position of speaking with two conflicting voices by both prosecuting and defending the same lawsuit. To permit otherwise would constitute an abdication by the President of his obligation to execute the laws faithfully, and would fall short of "that unitary and uniform execution of the laws which article 2 of the Constitution evidently contemplated in vesting general executive power in the President alone." *Myers v. United States*, 272 U.S. at 125. n3 Thus, in litigation challenging the personnel practices of independent agencies, there would be no constitutional impediment to the Special Counsel's exercise of statutorily vested litigating authority so long as the Attorney General or any other duly authorized Executive Branch officer n4 has not taken a position in the litigation on behalf of the United States that would be inconsistent with what the Special Counsel seeks to present. In litigation involving Executive Branch agencies, the Special Counsel's litigating authority would necessarily be limited [*11] to the presentation of views which would not conflict with those presented on behalf of the agency.

n3 See also "Litigation Authority of the Equal Employment Opportunity Commission in Title VII Suits Against State and Local Governmental Entities," 7 Op. O.L.C. ____ (1983).

n4 Although the Attorney General is the chief legal officer for the United States, see 28 U.S.C. §§ 516 & 519, there are circumstances in which other Executive Branch officers, subject to the supervision and control of the President, are authorized by statute to represent the United States in litigation. See, e.g., 29 U.S.C. § 663 (granting the Solicitor of Labor authority to bring actions under the Occupational Safety and Health Act of 1970, "subject to the direction and control of the Attorney General"); 49 U.S.C. § 1810(b) (granting the Secretary of Transportation authority to litigate imminent hazards under the Hazardous Materials Transportation Act, or upon his request the Attorney General shall do so); 28 U.S.C. § 2348 (granting certain Executive Branch agencies the authority to appear through their own counsel in proceedings to review orders, although the Attorney General "is responsible for and has control of the interests of the Government in all court proceedings under the Act."). See generally Report of the Attorney General's Task Force on Litigating Authority (Oct. 28, 1982). [*12]

Nor may Congress authorize the Special Counsel to do otherwise. To permit Congress to do so would vest an essentially executive function, performed by a subordinate of the President, outside of the President's control, and thereby undermine the President's authority to control subordinate officers and the affairs of the Executive Branch. In short, to allow Congress to vest simultaneously litigating authority over the same case in two or more subordinates of the President would constitute an unconstitutional interference by the Legislative Branch with Executive process, a clear violation of the separation of powers. See *Humphrey's Executor v. United States*, 295 U.S. at 629; *Myers v. United States*, 272 U.S. at 164. n5

n5 An additional impediment to the Special Counsel's exercise of litigating authority in litigation involving Executive Branch agencies is @ 1-402 of Executive Order 12146, reprinted in 28 U.S.C. @ 509 note, pursuant to which the President, in the exercise of his constitutional authority over his subordinates, has required Executive agencies "whose heads serve at the pleasure of the President" and which are unable to resolve legal disputes among themselves to "submit the dispute to the Attorney General prior to proceeding in any court" (emphasis added). [*13]

III. Authority of the Special Counsel to Submit Legislative Proposals Directly to Congress

As noted in your submission, the Special Counsel has proposed legislation authorizing him to submit directly to Congress legislative recommendations that he "deems necessary to further enhance the ability of the office to perform its duties." n6 As discussed further below, we believe that such a statutory grant of authority to an Executive Branch officer, if construed to require concurrent transmittals that would preclude Presidential review of the proposed legislative recommendations prior to their submission to Congress, would constitute an unconstitutional intrusion by the Legislative Branch into the President's exclusive domain of supervisory authority over subordinate officials in the performance of their executive functions. n7

n6 The proposal outlined in S. 1662 contains a concurrent reporting requirement:

Each year, the Special Counsel shall prepare and submit to the President and, at the same time, to the appropriate committees of the Congress, a statement specifying estimates of expenditures and proposed appropriations for the Office of the Special Counsel for the fiscal year beginning on October 1 of the next succeeding calendar year after the calendar year in which the statement is submitted and the 4 fiscal years after that fiscal year.

* * *

Whenever the Special Counsel considers it appropriate to make recommendations for legislation relating to any function of the Special Counsel provided by this title in addition to the recommendations for legislation set forth in the latest annual report submitted pursuant to subsection (m) of [1206], the Special Counsel shall submit the recommendations to the President and, at the same time, to each House of Congress.

Section 1206(m) requires the Special Counsel to submit an annual report to Congress on his activities, "including the number, types, and disposition of

allegations of prohibited personnel practices filed with it, investigations conducted by it, and actions initiated by it before the Board, as well as a description of the recommendations and reports made by it to other agencies pursuant to this section and the actions taken by the agencies as a result of the reports or recommendations." In addition, the report "shall include whatever recommendations for legislation or other action by Congress the Special Counsel may deem appropriate."

Although the Department, to our knowledge, heretofore has not had occasion to construe this particular provision, we have construed similar provisions in the past to avoid impinging on the constitutional prerogatives of the Executive. See, e.g., Statement of Attorney General Elliot Richardson (June 1973) (construing 5 U.S.C. @ 2954, which requires Executive agencies to submit to the House or Senate Committees on Government Operations "any information requested of it relating to any matter within the jurisdiction of the committee," to grant to the pertinent committees access to only type of information that traditionally has been made available to Congress and that is not subject to valid claims of executive privilege); "Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress," 6 Op. O.L.C. 632 (1982) (construing @ 506(f) of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324, 677, which requires the Administrator to transmit certain budget information and legislative recommendations directly to Congress concurrently with their transmission to the Secretary of Transportation, the President or OMB, to require that only "final" budget information and legislative recommendations be sent, i.e., information that has been reviewed and approved by appropriate senior officials).

Thus, we would construe the Special Counsel's existing authority pursuant to @ 1206(m) to require him to submit only such information and legislative recommendations as have been cleared for transmittal by OMB, or other appropriate reviewing authorities. [*14]

n7 Of course, if such legislation were enacted, we would avoid the constitutional issue if possible, see *United States v. Rumely*, 345 U.S. 41, 45 (1956), by construing it as we do @ 1206(m), to authorize the Special Counsel to submit only "final" recommendations to Congress, i.e., those recommendations which have been reviewed and approved by appropriate senior officials in the Executive Branch. See also 6 Op. O.L.C. 632, *supra*.

The separation of powers principle is rooted in the Constitution's division of the Government into three separate Branches and the assignment of specific functions thereto. Article II vests the whole of the executive power in the President, charging him, *inter alia*, to "take Care that the Laws be faithfully executed." U.S. Const. art. II, @ 3. This means that the President must possess "exclusive and illimitable power" over his subordinates as they assist him in discharging his constitutional obligation to execute the laws faithfully, unencumbered by interference from the coordinate Branches:

The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive [*15] influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential co-equality. The sound application of a principle that makes one master in his own house precludes him from imposing

his control in the House of another who is master there.

Humphrey's Executor v. United States, 295 U.S. at 629-30. Although the rigid separation of powers standard first articulated in Humphrey's Executor has been viewed as more flexible in subsequent decisions by the Court, in each subsequent articulation remains the core concern that the President retain effective control over all matters within the Executive Branch in order to discharge properly his constitutional obligation faithfully to execute the laws. In Buckley v. Valeo, 424 U.S. 1 (1976), the Court recognized that "a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively," but it emphasized that there was a [*16] "common ground in the recognition of the intent of the Framers that the powers of the three great branches of the National Government be largely separate from one another." 424 U.S. at 120-21. The Court further declared that it "has not hesitated to enforce the principle of separation of powers embodied in the Constitution when its application has proved necessary for the decision of cases or controversies properly before it." Id. at 123. Most recently, the Court stated in Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977), that congressional enactments may not interfere with the Executive process unless such interference is "justified by an overriding need to promote objectives within the constitutional authority of Congress." See generally 6 Op. O.L.C. 632, supra.

Under the above standards, we believe that to permit Congress to authorize or require an Executive Branch officer to submit budget information and legislative recommendations directly to Congress, prior to their being reviewed and cleared by the President or another appropriate reviewing official, would constitute precisely the kind of interference in the affairs of one Branch by a [*17] coordinate Branch which the separation of powers is intended to prevent.

The Special Counsel's proposal would severely impair the President's ability to perform his constitutional obligation to "recommend to [Congress] Consideration such Measures as he shall judge necessary and expedient." U.S. Const. art. II, @ 3. As the President's subordinate, the Special Counsel is obligated to make his recommendations to the President, so that the President, on behalf of the Executive Branch, may judge which are "necessary and expedient," and thus should not interdict the process by making individual recommendations directly to Congress. For Congress to require the Special Counsel to report to it directly without such review would constitute a grave interference with the President's performance of his constitutional obligation, as well as "irreparably damage, if not destroy, the normal exchange of views between agency heads and the President (through OMB) before budget submissions and legislative recommendations are finally approved." 6 Op. O.L.C. at 641. n8

n8 In addition, such an interdiction regarding budget information would violate the process through which the President exercises his constitutional authority to supervise the affairs of the Executive Branch in the performance of his statutory obligation under 31 U.S.C. @@ 1104 et seq. to transmit an annual budget to Congress. The President has required all budget submissions to be reviewed by OMB, and OMB Circular No. A-10 requires that

the confidential nature of agency submissions, requests, recommendations, supporting materials and similar communications should be maintained, because these documents are an integral part of the decisionmaking process by which the President resolves budget issues and develops recommendations to the Congress

. . . . Budgetary materials should not be disclosed in any form prior to transmittal by the President of the material to which it pertains. The head of each agency is responsible for preventing premature disclosures of this budgetary information.

[*18]

By contrast, the Special Counsel has not articulated an "overriding need [of Congress] to promote objectives within the constitutional authority of Congress," to justify such a significant intrusion into the Executive process and the President's ability to supervise and control his subordinates. *Nixon v. Administrator of General Services*, 433 U.S. at 443. Presumably, the "need" is a strong desire on the part of Congress to be able to evaluate the Special Counsel's performance of his functions and to seek the Special Counsel's assistance in developing legislation which would enhance his performance of those functions. However, in view of the fact that such information may be obtained from the Special Counsel after review by appropriate Executive Branch officials and be no less valuable to Congress, the "need" can scarcely be considered "overriding."

Although we not know the precise formulation of this provision in the Special Counsel's "alternative" proposal, this Office has analyzed similar provisions in the past and has found that, if construed literally, they would unconstitutionally infringe the separation of powers. In 1977, the Office commented on a bill that would establish [*19] Offices of Inspectors General in various Executive Branch agencies, and require the Inspectors General to submit certain information directly to Congress without clearance or approval by appropriate authorities. We stated that the bill would

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 that 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 [*20] 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).

"Inspector General Legislation," 1 Op. O.L.C. 16, 17 (1977). More recently, we advised that a provision requiring the Federal Aviation Administrator to transmit certain budget information and legislative recommendations directly to Congress at the same time that they are transmitted to the Secretary of Transportation, the President, or OMB would, if construed literally, unconstitutionally interfere with the Executive process and thereby violate the separation of powers. See 6 Op. O.L.C. 632, *supra*.

As we have concluded in the past, we now conclude that the Special Counsel's proposal, which would require an Executive Branch officer, the Special

Counsel, to submit confidential or deliberative information directly to Congress without providing an opportunity for review by a superior Executive officer, would interfere unduly with the President's authority to supervise and control the affairs of the Executive Branch. Such legislation would effectively sever the Special Counsel [*21] from his superiors within the Executive Branch with respect to the areas of his responsibility on which he reports, and thereby make him an "independent agency reporting both to Congress and to the President." We believe that Congress' perceived "need" to receive legislative recommendations and other information directly from the Special Counsel without their first having been reviewed by his superiors within the Executive Branch cannot justify the infringement of the separation of powers principle that would necessarily result from such legislation.

Conclusion

In conclusion, we believe that the Department should continue to oppose the grant of litigating authority to the Special Counsel on policy grounds, and to raise the constitutional grounds discussed above where appropriate. In addition, we believe that the submission of legislative recommendations and other information by the Special Counsel directly to Congress, without prior review by appropriate Executive Branch officials, would violate the constitutional separation of powers by interfering with the Executive's ability to supervise and control his subordinates in the performance of their executive functions. Accordingly, [*22] we believe that S. 1662, and the Special Counsel's "alternative" proposal, should be opposed, and that he should be advised that, as an Executive Branch officer, his direct submissions to Congress are unauthorized.

Larry L. Simms

Deputy Assistant Attorney General

Office of Legal Counsel

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OFFICIAL OPINIONS
OF
THE ATTORNEYS GENERAL
OF
THE UNITED STATES
ADVISING THE
PRESIDENT AND HEADS OF DEPARTMENTS
IN RELATION TO
THEIR OFFICIAL DUTIES

EDITED BY
VIDA ORD ALEXANDER

VOLUME 41

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"LABOR STANDARDS ENFORCEMENT"

"In order to assure coordination of administration and consistency of enforcement of the labor standards provisions of each of the following Acts by the Federal agencies responsible for the administration thereof, the Secretary of Labor shall prescribe appropriate standards, regulations, and procedures, which shall be observed by these agencies, and cause to be made by the Department of Labor such investigations, with respect to compliance with and enforcement of such labor standards, as he deems desirable, namely: (a) The Act of March 3, 1931 (46 Stat. 1494, ch. 411), as amended; (b) the Act of June 13, 1934 (48 Stat. 948, ch. 482); (c) the Act of August 1, 1892 (27 Stat. 340, ch. 352), as amended; (d) the Act of June 19, 1912 (37 Stat. 137, ch. 174) as amended; (e) the Act of June 3, 1939 (53 Stat. 804, ch. 175), as amended; (f) the Act of August 13, 1946 (60 Stat. 1040, ch. 958); (g) the Act of May 13, 1946 (60 Stat. 170, ch. 251, as amended; and (h) the Act of July 15, 1949, ch. 338, Public Law 171, 81st Congress, first session."

MUTUAL SECURITY PROGRAM—CUTOFF OF FUNDS FROM OFFICE OF INSPECTOR GENERAL AND COMPTROLLER

Section 533A(d) of the Mutual Security Act of 1954 added by section 401(h) of the Mutual Security Act of 1959 (73 Stat. 253), which directs that the expenses of the Office of the Inspector General and Comptroller with respect to programs under the Mutual Security Act be charged to the appropriations made to carry out such programs, *provided* that all documents, reports, and other materials relating to the operations and activities of that Office are furnished upon request to the General Accounting Office, or to any appropriate congressional committee or duly authorized subcommittee, does not authorize the funds of the Office of the Inspector General and Comptroller to be cut off because of the failure of the State Department to furnish certain documents relating to that Office to a congressional subcommittee, if the President has issued a certificate pursuant to section 101(d) of the Mutual Security and Related Agencies Appropriation Act, 1961 (74 Stat. 778), to the effect that he has forbidden the production of those documents and states his reasons for so doing. A contrary conclusion reached by the Comptroller General is incorrect, and, therefore, funds continue to be available as heretofore for the Office of the Inspector General and Comptroller.

The proviso in section 533A(d) does not expressly authorize the funds of the Office of the Inspector General and Comptroller to be cut

III

Finally, the construction which the Comptroller General gives to the proviso of section 533A(d) of the Mutual Security Act of 1954, must be rejected because it is inconsistent with the familiar rule that courts will adopt an interpretation of a Federal statute which will avoid constitutional questions rather than one which raises serious constitutional doubts.³¹ In my opinion, the interpretation which the Comptroller General places upon the proviso does not merely raise constitutional doubts; interpreted to reach the documents here involved the proviso is unconstitutional.³²

That the papers and documents requested are of a character long protected by the Executive privilege in the administration of our Government can scarcely be denied. Thus, as you have certified, a number of documents contain investigative matter from confidential sources some of which is unsubstantiated, and disclosure of these "would be unfair to the individuals concerned and tend to impair the ability of the Executive to conduct effective investigations."

Here then we have an express certification by the President, personally, in exercise of his long-honored Executive privilege that disclosure of the papers requested would be contrary to the public interest. The Comptroller General in effect says, however, that his construction of the statute cannot be governed by the consequence that grave constitutional questions may arise because of it. The fallacy of this view is that it imputes an intention to Congress which in fact Congress attempted to avoid and which as a matter of sound precedent, courts generally are unwilling to accept. At the very least to adopt the Comptroller General's construction of the proviso raises grave constitutional problems under the separation-of-powers doctrine.

The congressional power of investigation is, of course, broad. Nevertheless it has limitations, one of which is based upon the doctrine of separation of powers inherent in our Constitution. Speaking for the majority of the Court in

³¹ See e.g. *United States v. Rumely*, 345 U.S. 41, 45; *Buttfield v. Stranahan*, 192 U.S. 470, 492.

³² In view of the conclusion reached earlier in this opinion that the construction given section 533A(d) by the Comptroller General is incorrect, there is no occasion to consider any problem of severability which may be involved in the constitutional aspects of the question.

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OPINION OF THE OFFICE OF LEGAL COUNSEL

AUTHORITY OF THE SPECIAL COUNSEL OF THE MERIT SYSTEMS
PROTECTION BOARD TO LITIGATE AND SUBMIT LEGISLATION TO
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See 6, 7

1984 OLC LEXIS 32; 8 Op. O.L.C. 39

February 22, 1984

NOTICE: THIS OPINION IS A PRELIMINARY VERSION AND HAS NOT
BEEN RELEASED FOR PUBLICATION IN THE PERMANENT VOLUME.

SYLLABUS:

[*1]

Congress may constitutionally authorize the Special Counsel of the Merit Systems Protection Board to conduct any litigation in which he is interested, except litigation in which the Special Counsel's position would be adverse to that taken by the United States in the same litigation. Such opposition would place the President in the untenable position of speaking with conflicting voices in the same lawsuit. In addition, because the Special Counsel is an Executive Branch officer subject to the supervision and control of the President, a grant by Congress to the Special Counsel of authority to submit legislative proposals directly to Congress without prior review by the President would raise serious separation of powers concerns.

ADDRESSEE:

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGISLATIVE AFFAIRS

OPINIONBY: SIMMS

OPINION:

This responds to your request for our views regarding the legislative recommendations of the Special Counsel of the Merit Systems Protection Board to permit the Special Counsel to "litigate before the courts on its behalf on any matter in which the Special Counsel has previously been involved," and empowering the Special Counsel to "submit directly to Congress any legislative [*2] recommendations that the Special Counsel deems necessary to further enhance the ability of the office to perform its duties under law." You indicated in your submission that your Office and the Civil Division are preparing a letter opposing such a grant of litigating authority to the Special Counsel. With respect to the Special Counsel's desire to submit legislative recommendations directly to Congress, you indicated that although you have been advised that the Office of Management and Budget (OMB) has secured the agreement of the Special Counsel to conform to the OMB legislative clearance process, you seek our advice on the question whether Congress constitutionally may authorize the Special Counsel to submit legislation to Congress directly, without first securing the approval of OMB, the legislative clearance office for the Executive Branch.

As discussed further below, we conclude that, as a legal matter, Congress constitutionally may authorize the Special Counsel to conduct, or otherwise participate in, any litigation in which he is interested except litigation in

which he would be taking a position that is adverse to that taken by the United States in the same litigation; although, [*3] as you point out, there are numerous policy reasons for opposing such a grant of authority. In addition, we conclude that, because the Special Counsel is an Executive Branch officer subject to the supervision and control of the President, Congress may not grant him the authority to submit legislative proposals directly to Congress without prior review and clearance by the President, or other appropriate authority, without raising serious separation of powers concerns.

I. Special Counsel as an Executive Officer

We will preface our responses to the specific questions raised in your memorandum by first reviewing the history of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, as it relates to the Special Counsel's status as an Executive Branch officer, including the concerns raised by the Department of Justice at the time of the Act's enactment.

The Civil Service Reform Act of 1978 was enacted to update, overhaul and make more efficient the federal civil service system by: (1) codifying merit system principles and subjecting employees who commit prohibited personnel practices to disciplinary action; (2) providing new protections for employees who disclose illegal [*4] or improper Government conduct; (3) establishing a new performance appraisal system and a new standard for dismissal based on unacceptable performance; (4) streamlining the processes for dismissing and disciplining federal employees; and (5) abolishing the Civil Service Commission and establishing in its stead the Office of Personnel Management within the Executive Branch, and an "independent Merit Systems Protection Board and Special Counsel to adjudicate employee appeals and protect the merit system." S. Rep. No. 969, 95th Cong., 2d Sess. 2 (1978). See also H.R. Rep. No. 1717, 95th Cong., 2d Sess. 1 (1978).

The Act established the Merit Systems Protection Board as a bipartisan body of three members, to be appointed by the President with the consent of the Senate, and removable "only for inefficiency, of duty, or malfeasance in office." 5 U.S.C. §§ 1201, 1202. The Board is authorized to hear and adjudicate all matters within its jurisdiction, to enforce its orders against any federal agency or employee, to stay certain agency personnel actions, and to conduct special studies relating to the civil service and other merit systems within the Executive Branch and to issue reports [*5] thereon to the President and the Congress. Id. § 1205(a). In addition, the Act provided for a Special Counsel to the Board, to be appointed by the President, with the consent of the Senate, for a term of five years, and removable by the President "only for inefficiency, neglect of duty, or malfeasance in office." Id. § 1204. The Special Counsel's primary duties under the Act are to receive and investigate allegations of prohibited personnel practices, to participate in proceedings before the Board when such participation is warranted, and to submit an annual report to Congress on his activities, including "whatever recommendations for legislation or other action by Congress the Special Counsel may deem appropriate." Id. § 1206.

Although the legislative history of the Act suggests that Congress intended both the MSPB and the Special Counsel to be independent of Presidential supervision and control, n1 this Department advised both Congress and the President that the bill which ultimately was enacted contained several provisions which raised very serious constitutional concerns. Those concerns focused primarily on the Act's attempt to limit the President's power of

removal [*6] over the Special Counsel, whom, in view of his primarily prosecutive functions, this Office determined to be an Executive officer. Similarly, in the Department's comments to OMB on the enrolled bill, we advised that Congress could not constitutionally limit the grounds for removal of the Special Counsel by the President. Thus, this Department has consistently taken the position, and we believe correctly, that although the Board may function as a quasi-adjudicative independent body, the Special Counsel is an Executive officer and as such is subject to the President's supervision and control. See also "Presidential Appointees -- Removal Power," 2 Op. O.L.C. 120 (1978).

n1 See, e.g., S. Rep. No. 969, 95th Cong., 2d Sess. 28-29 (1978).

II. Litigation Authority of the Special Counsel

Under current law, the Special Counsel's litigating authority is limited to "interven[ing as a matter of right] or otherwise participating in any proceeding before the Merit Systems Protection Board." 5 U.S.C. @ 1206(i). We understand from your memorandum that the Special Counsel now seeks to expand this authority to permit him to "appear as counsel on behalf of any party in any civil action [*7] brought in connection with any function carried out by the Special Counsel pursuant to this title or any other provision of law and to initiate and prosecute on behalf of any party in any such case an appeal of the decision of any district court of the United States or the United States Claims Court in such case." n2 As you have indicated, this proposal would permit the Special Counsel to seek judicial review of final orders or decisions of the Merit Systems Protection Board, as well as to prosecute appeals of federal court decisions, arguably even in instances in which he was not a party to the proceedings before the Board.

n2 This language is taken from the text of S. 1662, a bill reported by the Senate Committee on Government Affairs on July 21, 1983, to "amend title 5, United States Code, with respect to the authority of the Special Counsel of the Merit Systems Protection Board." Although you have advised us that the Special Counsel has submitted to the Committee an alternative to S. 1662, we believe that the comments in this memorandum will be equally applicable to the Special Counsel's alternate proposal.

As you are aware, this Administration, as a policy matter, has generally [*8] opposed any legislative proposal that would further erode the Attorney General's litigating authority under 28 U.S.C. @@ 516 & 519. This opposition, shared by previous Administrations, is grounded in the need for centralized control of all government litigation. Such control furthers a number of important policy goals, including the presentation of uniform positions on important legal issues, the selection of test cases that would produce results most favorable to governmental interests, more objective handling of cases by attorneys unaffected by an agency's narrower concerns, and the facilitation of Presidential supervision over Executive Branch policies implicated in government litigation. See generally "The Attorney General's Role as Chief Litigator for the United States," 6 Op. O.L.C. 47 (1982). Thus, there are numerous policy grounds on which to oppose a grant of litigating authority to the Special Counsel.

With respect to the legal considerations relevant to the proposed legislation, an agency's authority to litigate independently of the Attorney General in any particular circumstance generally depends on whether such

authority is vested by statute in the agency. However, [*9] when the agency asserting such authority is an Executive Branch agency, constitutional issues arise if Congress has simultaneously vested litigating authority over the case in either the Attorney General or another Executive Branch officer. Those issues involve the President's authority to exercise supervisory control over his subordinates so that he may properly discharge his constitutional obligation to "take care that the laws be faithfully executed," U.S. Const. art. II, @ 3, and Congress' potential violation of the constitutional separation of powers by interfering with the President's exercise of that authority. See *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); *Myers v. United States*, 272 U.S. 52 (1926).

Although the Special Counsel's legislative proposal defines his litigating authority so broadly as to provide no clear indication of the actual circumstances in which it could be exercised, we may assume that the Special Counsel would seek to initiate, or otherwise participate in, litigation in which both independent and Executive Branch agencies would be defending themselves against allegations of prohibited employment practices. In such circumstances, [*10] the litigating authority that would be vested in the Special Counsel pursuant to his proposal could not be construed constitutionally to place the President in the untenable position of speaking with two conflicting voices by both prosecuting and defending the same lawsuit. To permit otherwise would constitute an abdication by the President of his obligation to execute the laws faithfully, and would fall short of "that unitary and uniform execution of the laws which article 2 of the Constitution evidently contemplated in vesting general executive power in the President alone." *Myers v. United States*, 272 U.S. at 125. n3 Thus, in litigation challenging the personnel practices of independent agencies, there would be no constitutional impediment to the Special Counsel's exercise of statutorily vested litigating authority so long as the Attorney General or any other duly authorized Executive Branch officer n4 has not taken a position in the litigation on behalf of the United States that would be inconsistent with what the Special Counsel seeks to present. In litigation involving Executive Branch agencies, the Special Counsel's litigating authority would necessarily be limited [*11] to the presentation of views which would not conflict with those presented on behalf of the agency.

n3 See also "Litigation Authority of the Equal Employment Opportunity Commission in Title VII Suits Against State and Local Governmental Entities," 7 Op. O.L.C. ____ (1983).

n4 Although the Attorney General is the chief legal officer for the United States, see 28 U.S.C. @@ 516 & 519, there are circumstances in which other Executive Branch officers, subject to the supervision and control of the President, are authorized by statute to represent the United States in litigation. See, e.g., 29 U.S.C. @ 663 (granting the Solicitor of Labor authority to bring actions under the Occupational Safety and Health Act of 1970, "subject to the direction and control of the Attorney General"); 49 U.S.C. @ 1810(b) (granting the Secretary of Transportation authority to litigate imminent hazards under the Hazardous Materials Transportation Act, or upon his request the Attorney General shall do so); 28 U.S.C. @ 2348 (granting certain Executive Branch agencies the authority to appear through their own counsel in proceedings to review orders, although the Attorney General "is responsible for and has control of the interests of the Government in all court proceedings under the Act."). See generally Report of the Attorney General's Task Force on Litigating Authority (Oct. 28, 1982). [*12]

Nor may Congress authorize the Special Counsel to do otherwise. To permit Congress to do so would vest an essentially executive function, performed by a subordinate of the President, outside of the President's control, and thereby undermine the President's authority to control subordinate officers and the affairs of the Executive Branch. In short, to allow Congress to vest simultaneously litigating authority over the same case in two or more subordinates of the President would constitute an unconstitutional interference by the Legislative Branch with Executive process, a clear violation of the separation of powers. See *Humphrey's Executor v. United States*, 295 U.S. at 629; *Myers v. United States*, 272 U.S. at 164. n5

n5 An additional impediment to the Special Counsel's exercise of litigating authority in litigation involving Executive Branch agencies is @ 1-402 of Executive Order 12146, reprinted in 28 U.S.C. @ 509 note, pursuant to which the President, in the exercise of his constitutional authority over his subordinates, has required Executive agencies "whose heads serve at the pleasure of the President" and which are unable to resolve legal disputes among themselves to "submit the dispute to the Attorney General prior to proceeding in any court" (emphasis added). [*13]

III. Authority of the Special Counsel to Submit Legislative Proposals Directly to Congress

As noted in your submission, the Special Counsel has proposed legislation authorizing him to submit directly to Congress legislative recommendations that he "deems necessary to further enhance the ability of the office to perform its duties." n6 As discussed further below, we believe that such a statutory grant of authority to an Executive Branch officer, if construed to require concurrent transmittals that would preclude Presidential review of the proposed legislative recommendations prior to their submission to Congress, would constitute an unconstitutional intrusion by the Legislative Branch into the President's exclusive domain of supervisory authority over subordinate officials in the performance of their executive functions. n7

n6 The proposal outlined in S. 1662 contains a concurrent reporting requirement:

Each year, the Special Counsel shall prepare and submit to the President and, at the same time, to the appropriate committees of the Congress, a statement specifying estimates of expenditures and proposed appropriations for the Office of the Special Counsel for the fiscal year beginning on October 1 of the next succeeding calendar year after the calendar year in which the statement is submitted and the 4 fiscal years after that fiscal year.

* * *

Whenever the Special Counsel considers it appropriate to make recommendations for legislation relating to any function of the Special Counsel provided by this title in addition to the recommendations for legislation set forth in the latest annual report submitted pursuant to subsection (m) of [1206], the Special Counsel shall submit the recommendations to the President and, at the same time, to each House of Congress.

Section 1206(m) requires the Special Counsel to submit an annual report to Congress on his activities, "including the number, types, and disposition of

allegations of prohibited personnel practices filed with it, investigations conducted by it, and actions initiated by it before the Board, as well as a description of the recommendations and reports made by it to other agencies pursuant to this section and the actions taken by the agencies as a result of the reports or recommendations." In addition, the report "shall include whatever recommendations for legislation or other action by Congress the Special Counsel may deem appropriate."

Although the Department, to our knowledge, heretofore has not had occasion to construe this particular provision, we have construed similar provisions in the past to avoid impinging on the constitutional prerogatives of the Executive. See, e.g., Statement of Attorney General Elliot Richardson (June 1973) (construing 5 U.S.C. @ 2954, which requires Executive agencies to submit to the House or Senate Committees on Government Operations "any information requested of it relating to any matter within the jurisdiction of the committee," to grant to the pertinent committees access to only type of information that traditionally has been made available to Congress and that is not subject to valid claims of executive privilege); "Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress," 6 Op. O.L.C. 632 (1982) (construing @ 506(f) of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324, 677, which requires the Administrator to transmit certain budget information and legislative recommendations directly to Congress concurrently with their transmission to the Secretary of Transportation, the President or OMB, to require that only "final" budget information and legislative recommendations be sent, i.e., information that has been reviewed and approved by appropriate senior officials).

Thus, we would construe the Special Counsel's existing authority pursuant to @ 1206(m) to require him to submit only such information and legislative recommendations as have been cleared for transmittal by OMB, or other appropriate reviewing authorities. [*14]

n7 Of course, if such legislation were enacted, we would avoid the constitutional issue if possible, see *United States v. Rumely*, 345 U.S. 41, 45 (1956), by construing it as we do @ 1206(m), to authorize the Special Counsel to submit only "final" recommendations to Congress, i.e., those recommendations which have been reviewed and approved by appropriate senior officials in the Executive Branch. See also 6 Op. O.L.C. 632, *supra*.

The separation of powers principle is rooted in the Constitution's division of the Government into three separate Branches and the assignment of specific functions thereto. Article II vests the whole of the executive power in the President, charging him, *inter alia*, to "take Care that the Laws be faithfully executed." U.S. Const. art. II, @ 3. This means that the President must possess "exclusive and illimitable power" over his subordinates as they assist him in discharging his constitutional obligation to execute the laws faithfully, unencumbered by interference from the coordinate Branches:

The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive [*15] influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential co-equality. The sound application of a principle that makes one master in his own house precludes him from imposing

his control in the House of another who is master there.

Humphrey's Executor v. United States, 295 U.S. at 629-30. Although the rigid separation of powers standard first articulated in Humphrey's Executor has been viewed as more flexible in subsequent decisions by the Court, in each subsequent articulation remains the core concern that the President retain effective control over all matters within the Executive Branch in order to discharge properly his constitutional obligation faithfully to execute the laws. In Buckley v. Valeo, 424 U.S. 1 (1976), the Court recognized that "a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively," but it emphasized that there was a [*16] "common ground in the recognition of the intent of the Framers that the powers of the three great branches of the National Government be largely separate from one another." 424 U.S. at 120-21. The Court further declared that it "has not hesitated to enforce the principle of separation of powers embodied in the Constitution when its application has proved necessary for the decision of cases or controversies properly before it." Id. at 123. Most recently, the Court stated in Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977), that congressional enactments may not interfere with the Executive process unless such interference is "justified by an overriding need to promote objectives within the constitutional authority of Congress." See generally 6 Op. O.L.C. 632, supra.

Under the above standards, we believe that to permit Congress to authorize or require an Executive Branch officer to submit budget information and legislative recommendations directly to Congress, prior to their being reviewed and cleared by the President or another appropriate reviewing official, would constitute precisely the kind of interference in the affairs of one Branch by a [*17] coordinate Branch which the separation of powers is intended to prevent.

The Special Counsel's proposal would severely impair the President's ability to perform his constitutional obligation to "recommend to [Congress] Consideration such Measures as he shall judge necessary and expedient." U.S. Const. art. II, @ 3. As the President's subordinate, the Special Counsel is obligated to make his recommendations to the President, so that the President, on behalf of the Executive Branch, may judge which are "necessary and expedient," and thus should not interdict the process by making individual recommendations directly to Congress. For Congress to require the Special Counsel to report to it directly without such review would constitute a grave interference with the President's performance of his constitutional obligation, as well as "irreparably damage, if not destroy, the normal exchange of views between agency heads and the President (through OMB) before budget submissions and legislative recommendations are finally approved." 6 Op. O.L.C. at 641. n8

n8 In addition, such an interdiction regarding budget information would violate the process through which the President exercises his constitutional authority to supervise the affairs of the Executive Branch in the performance of his statutory obligation under 31 U.S.C. @@ 1104 et seq. to transmit an annual budget to Congress. The President has required all budget submissions to be reviewed by OMB, and OMB Circular No. A-10 requires that

the confidential nature of agency submissions, requests, recommendations, supporting materials and similar communications should be maintained, because these documents are an integral part of the decisionmaking process by which the President resolves budget issues and develops recommendations to the Congress

. . . . Budgetary materials should not be disclosed in any form prior to transmittal by the President of the material to which it pertains. The head of each agency is responsible for preventing premature disclosures of this budgetary information.

[*18]

By contrast, the Special Counsel has not articulated an "overriding need [of Congress] to promote objectives within the constitutional authority of Congress," to justify such a significant intrusion into the Executive process and the President's ability to supervise and control his subordinates. *Nixon v. Administrator of General Services*, 433 U.S. at 443. Presumably, the "need" is a strong desire on the part of Congress to be able to evaluate the Special Counsel's performance of his functions and to seek the Special Counsel's assistance in developing legislation which would enhance his performance of those functions. However, in view of the fact that such information may be obtained from the Special Counsel after review by appropriate Executive Branch officials and be no less valuable to Congress, the "need" can scarcely be considered "overriding."

Although we not know the precise formulation of this provision in the Special Counsel's "alternative" proposal, this Office has analyzed similar provisions in the past and has found that, if construed literally, they would unconstitutionally infringe the separation of powers. In 1977, the Office commented on a bill that would establish [*19] Offices of Inspectors General in various Executive Branch agencies, and require the Inspectors General to submit certain information directly to Congress without clearance or approval by appropriate authorities. We stated that the bill would

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 that 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 [*20] 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).

"Inspector General Legislation," 1 Op. O.L.C. 16, 17 (1977). More recently, we advised that a provision requiring the Federal Aviation Administrator to transmit certain budget information and legislative recommendations directly to Congress at the same time that they are transmitted to the Secretary of Transportation, the President, or OMB would, if construed literally, unconstitutionally interfere with the Executive process and thereby violate the separation of powers. See 6 Op. O.L.C. 632, *supra*.

As we have concluded in the past, we now conclude that the Special Counsel's proposal, which would require an Executive Branch officer, the Special

Counsel, to submit confidential or deliberative information directly to Congress without providing an opportunity for review by a superior Executive officer, would interfere unduly with the President's authority to supervise and control the affairs of the Executive Branch. Such legislation would effectively sever the Special Counsel [*21] from his superiors within the Executive Branch with respect to the areas of his responsibility on which he reports, and thereby make him an "independent agency reporting both to Congress and to the President." We believe that Congress' perceived "need" to receive legislative recommendations and other information directly from the Special Counsel without their first having been reviewed by his superiors within the Executive Branch cannot justify the infringement of the separation of powers principle that would necessarily result from such legislation.

Conclusion

In conclusion, we believe that the Department should continue to oppose the grant of litigating authority to the Special Counsel on policy grounds, and to raise the constitutional grounds discussed above where appropriate. In addition, we believe that the submission of legislative recommendations and other information by the Special Counsel directly to Congress, without prior review by appropriate Executive Branch officials, would violate the constitutional separation of powers by interfering with the Executive's ability to supervise and control his subordinates in the performance of their executive functions. Accordingly, [*22] we believe that S. 1662, and the Special Counsel's "alternative" proposal, should be opposed, and that he should be advised that, as an Executive Branch officer, his direct submissions to Congress are unauthorized.

Larry L. Simms

Deputy Assistant Attorney General

Office of Legal Counsel

Do a general "we won't give it to you argument" --take it off the OLC ops. Issues.

1. Is the White House an "executive agency"
2. Did the request come from "seven members of the committee?"
3. Is the information sought "within the jurisdiction of the committee?"

[Maybe. Arguably no.] 5 U.S.C. § 2954 and similar statutes have been construed narrowly by the executive branch so as not to impinge upon the constitutional prerogatives of the president. The White House could argue that the information sought is

STATUTE

TITLE 5

GOVERNMENT ORGANIZATION AND EMPLOYEES

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III. Employees	2101

PART I—THE AGENCIES GENERALLY

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PART III—EMPLOYEES

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§ 2954. Information to committees of Congress on request

An **Executive agency**, on request of the Committee on Government Operations of the House of Representatives, or of any seven members thereof, or on request of the Committee on Government Operations of the Senate, or any five members thereof, shall submit any information requested of it relating to any matter within the jurisdiction of the committee.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 413.

Historical and Revision Notes

Derivation: United States Code Revised Statutes and Statutes at Large
5 U.S.C. 105a May 29, 1928, ch. 901, § 2, 45 Stat. 996.

Explanatory Notes

The words "Executive agency" are substituted for "executive department and independent establishment" in view of the definition of "Executive agency" in section 105.

363

[Nothing more]

§ 105. Executive agency

For the purpose of this title, "Executive agency" means an **Executive department**, a **Government corporation**, and an **independent establishment**.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 379.

Historical and Revision Notes

Reviser's Note. The section is supplied to avoid the necessity for defining "Executive agency" each time it is used in this title.

Library References

United States § 31.

C.J.S. United States § 31.

17

[Nothing more]

§ 101. Executive departments

The Executive departments are:

- The Department of State.
- The Department of the Treasury.
- The Department of Defense.
- The Department of Justice.
- The Department of the Interior.
- The Department of Agriculture.
- The Department of Commerce.
- The Department of Labor.
- The Department of Health and Human Services.
- The Department of Housing and Urban Development.
- The Department of Transportation.
- The Department of Energy.
- The Department of Education.
- The Department of Veterans Affairs.

(As amended Pub.L. 95-91, Title VII, § 710(a), Aug. 4, 1977, 91 Stat. 609; Pub.L. 96-88, Title V, § 508(b), Oct. 17, 1979, 93 Stat. 692; Pub.L. 100-527, § 13(b), Oct. 25, 1988, 102 Stat. 2643.)

HISTORICAL AND STATUTORY NOTES**1988 Amendment**

Pub.L. 100-527, § 13(b), included the Department of Veterans Affairs.

1979 Amendment

Pub.L. 96-88 substituted "Department of Health and Human Services" for "Department of Health, Education, and Welfare" and inserted "The Department of Education."

1977 Amendment

Pub.L. 95-91 included the Department of Energy.

Effective Date of 1988 Amendment

Amendment by Pub.L. 100-527, effective March 15, 1989, except as otherwise provided therein, see section 18 of Pub.L. 100-527, set out as a note under section 201 of Title 38, Veterans' Benefits.

1

§ 103. Government corporation

For the purpose of this title—

- (1) "Government corporation" means a corporation owned or controlled by the Government of the United States; and
- (2) "Government controlled corporation" does not include a corporation owned by the Government of the United States.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 378.

[Nothing more]

§ 104. Independent establishment

For the purpose of this title, "independent establishment" means—

- (1) an establishment in the executive branch (other than the United States Postal Service or the Postal Rate Commission) which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment; and
- (2) the General Accounting Office.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 379; Pub.L. 91-375, § 6(c)(2), Aug. 12, 1970, 84 Stat. 775.

[Nothing more]

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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
Margaret Colgate Love

VOLUME 6

1982

See p 643
(last page)

WASHINGTON
1987

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Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress

Statute requiring the Administrator of the Federal Aviation Administration (FAA) to transmit concurrently to Congress any budget information and legislative recommendations that are transmitted to the Secretary of Transportation, the Office of Management and Budget (OMB), and the President, would, if interpreted strictly, on its face violate the constitutional principle of separation of powers.

Separation of powers requires that the President have ultimate control over subordinate officials who perform purely executive functions, which includes the right to supervise and review the work of such officials; this principle, coupled with the constitutional protection afforded the deliberative process within the Executive Branch, creates an area of executive prerogative that may not be invaded by a coordinate branch of government absent a very compelling and specific need.

Disclosure to Congress of unreviewed recommendations by subordinates within the Executive Branch would disrupt the normal interchange between agency heads and the President in connection with the decisionmaking process, and interfere with the President's ability to supervise the actions of his subordinate officials while this process is going on, thus adversely affecting the President's ability to carry out his responsibilities.

Because there appears to be no specific or compelling congressional need for the information at issue in this case, the concurrent reporting requirement can and should be construed so as to avoid constitutional infirmity, by allowing the FAA Administrator to provide Congress with budget data and legislative comments only after they have been approved by the Administrator's superiors in the Executive Branch, including, where appropriate, the President and OMB.

November 5, 1982

MEMORANDUM OPINION FOR THE GENERAL COUNSEL, DEPARTMENT OF TRANSPORTATION

This responds to your request for the advice of this Office regarding your implementation of § 506(f) of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324, 677 (1982), which requires the Administrator of the Federal Aviation Administration (Administrator) to transmit certain budget information and legislative recommendations directly to Congress at the same time that they are transmitted to the Secretary of Transportation (Secretary), the President, or the Office of Management and Budget (OMB). Specifically, you have expressed concern that this provision may conflict with the principle of separation of powers under the Constitution. In response to your request, we have reviewed the relevant statutory provisions, case law concerning separation of powers, the Constitution itself and the history of its development,

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§ 506

and prior opinions of this Office on this general subject. On the basis of this review, we have concluded that, if interpreted strictly, the statutory provision would, on its face, violate the separation of powers which is central to the structure of the United States Constitution.

As discussed in Section II of this opinion, several clearly established principles of the separation of powers doctrine apply to the question raised by the concurrent reporting provision. The separation of powers requires that the President have ultimate control over subordinate officials who perform purely executive functions and assist him in the performance of his constitutional responsibilities. This power includes the right to supervise and review the work of such subordinate officials, including reports issued either to the public or to Congress. This supervisory control is reinforced by the constitutional protection afforded to the deliberative process within the Executive Branch. These principles combine to create an area of executive prerogative that may not be invaded by a coordinate branch of government absent a very compelling and specific need.

As detailed in Section III, a requirement that subordinate officials within the Executive Branch submit reports directly to Congress, without any prior review by their superiors, would greatly impair the right of the President to exercise his constitutionally based right to control the Executive Branch. This interference contrasts with the relatively nonspecific request for information embodied in § 506(f). In balancing Congress' limited apparent need for direct reports against the President's right to control subordinates within the Executive Branch, it seems clear that § 506(f) would be unconstitutional if it were construed to require the Administrator to report to Congress without prior review by his superiors.

In Section IV, we consider how § 506(f) might be interpreted so as to avoid this constitutional problem. In brief, we conclude that in order to harmonize the statute with the requirements of the Constitution, the Administrator should provide to Congress only budget information and legislative comments that have been approved by the Administrator's superiors, including, where appropriate, the President, OMB, and the Secretary.

I. Background

The Airport and Airway Improvement Act of 1982 (AAIA) was enacted as Title V of the Tax Equity and Fiscal Responsibility Act of 1982. Pub. L. No. 97-248, 96 Stat. 324, 677 (1982). The AAIA generally authorizes an extension of, and enacts certain changes to, the Federal Airport Aid Program. In addition, § 506(f) provides:

(f) TRANSMITTAL OF BUDGET ESTIMATES.—Whenever the Administrator of the Federal Aviation Administration submits or transmits any budget estimate, budget request, supplemental budget estimate, or other budget information, legislative recommendation, or comment on legislation to the Secretary, the President of the United States, or to the Office of Management and

Budget pertaining to funds authorized in subsection (a) or (b) of this section, it shall concurrently transmit a copy thereof to the Speaker of the House of Representatives, the Committees on Public Works and Transportation and Appropriations of the House of Representatives, the President of the Senate, and the Committees on Commerce, Science, and Transportation and Appropriations of the Senate.

In essence, this provision purports to direct the Administrator to report concurrently to Congress any budget data or legislative comments that are transmitted to the President, the Secretary, or OMB. By the terms of § 506(f), this requirement applies to budget information or legislative comments "pertaining to funds authorized in subsection (a) or (b) of this section" Subsections (a) and (b) authorize funding for acquiring or establishing and improving air navigation facilities and for establishing demonstration projects in connection with certain research and development activities. In addition, § 504(b) requires the Administrator to prepare and submit to Congress "a national airways system plan" and directs that the preparation be "subject to the requirements of section 506(f). . . ."

Given this statutory language, it is arguable that the Administrator is required to submit the specified reports, information, and comments directly to Congress prior to any review or approval by the President, the Secretary, or OMB. If the statute were read to impose such a requirement, the Administrator would be severed from his superiors in the Executive Branch with respect to these matters and would, in effect, become an independent agency reporting to both Congress and the President. In addition, the internal deliberative process within the Executive Branch would be tapped by an information pipeline running directly to a coordinate branch of government. These possibilities raise serious separation of powers issues, which are discussed below.

II. Applicable Separation of Powers Principles

Article II, § 1 of the United States Constitution begins with the statement that "[t]he executive Power shall be vested in a President of the United States of America." Article II, § 3 requires the President to "take Care that the Laws be faithfully executed . . .," and also requires the President to "recommend to [Congress] Consideration such Measures as he shall judge necessary and expedient. . . ." These constitutional provisions, taken together, impose certain fundamental duties upon the President and grant the power to direct the Executive Branch to carry out those duties.

In order to execute the laws adopted by Congress, the President must have the assistance of subordinate officials who will carry out his policies and implement his instructions with respect to the execution of law. The Supreme Court has, from its earliest decisions, consistently recognized this basic principle. For example, in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 164 (1803), Chief Justice Marshall stated:

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By the Constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders. In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion.

Although it is clear that the Constitution does not contemplate "a complete division of authority between the three branches," *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977), each branch retains certain core prerogatives upon which the other branches may not transgress. See *Buckley v. Valeo*, 424 U.S. 1 (1976). In *Buckley*, the Court recognized that "a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively," but it emphasized that there was a "common ground in the recognition of the intent of the Framers that the powers of the three great branches of the National Government be largely separate from one another." 424 U.S. at 120–21. The Court declared that it "has not hesitated to enforce the principle of separation of powers embodied in the Constitution when its application has proved necessary for the decision of cases or controversies properly before it." 424 U.S. at 123.

The extent of the President's right to control subordinate officers was specifically considered by the Supreme Court in a trilogy of cases involving the President's power to remove federal officials. In *Myers v. United States*, 272 U.S. 52 (1926), the Court ruled unconstitutional a statute that limited the President's power to remove certain postmasters, and it declared, in *dictum*, that the repealed Tenure of Office Act had been unconstitutional as well.¹ In reaching this conclusion, the Court considered a number of factors, including the constitutional debates, previous congressional practice, and the relationship between the power to appoint and the power to remove. In addition, the Court expressly based its decision on the conclusion that "Article II grants to the President the executive power of the Government, i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed. . . ." 272 U.S. at 163–64. The Court based this conclusion on the following analysis of the President's control over subordinate officials:

¹ The Tenure of Office Act, 14 Stat. 430 (1867), had provided that all officers appointed by and with the consent of the Senate should hold their offices until their successors had been appointed and approved, and that certain heads of departments, including the Secretary of War, should hold their offices during the term of the President who appointed them, subject to removal by consent of the Senate. This Act was the principal basis for the articles of impeachment filed against President Andrew Johnson after he dismissed his Secretary of War without the consent of the Senate.

The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone. Laws are often passed with specific provision for the adoption of regulations by a department or bureau head to make the law workable and effective. The ability and judgment manifested by the official thus empowered, as well as his energy and stimulation of his subordinates, are subjects which the President must consider and supervise in his administrative control. Finding such officers to be negligent and inefficient, the President should have the power to remove them.

272 U.S. at 135.

The Court confirmed this view of the President's power over his subordinates within the Executive Branch in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). In that case, the Court ruled that Congress could, consistent with the Constitution, immunize a Commissioner of the Federal Trade Commission (FTC) from removal by the President at his pleasure. The Court reasoned that the FTC could not "be characterized as an arm or eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control." 295 U.S. at 628. *Myers* was distinguished on the ground that "[t]he actual decision in the *Myers* case finds support in the theory that such an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is." 295 U.S. at 627. The Court emphasized that within the Executive Branch, the President retained the right to direct the actions of his subordinates free from interference by another branch:

The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential co-equality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there.

295 U.S. at 629-30. Thus, by narrowing *Myers* to cover only subordinates of the President within the Executive Branch, the Court linked the removal power even more clearly to the right of the President to control purely executive officials.

This principle was reaffirmed in *Wiener v. United States*, 357 U.S. 349 (1958). In that case, the Court held that the President did not have a constitutional right to remove a member of the War Claims Commission. The Court ruled that the Commission was essentially judicial in nature and that it was intended by Congress to operate entirely free of the President's control. 357 U.S. at 355-56. The Court expressly linked the right of removal with the right of the President to control a particular official:

If, as one must take for granted, the War Claims Act precluded the President from influencing the Commission in passing on a particular claim, *a fortiori* must it be inferred that Congress did not wish to have hang over the Commission the Damocles' sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing.

357 U.S. at 356. The Court thus emphasized that *Humphrey's Executor* "drew a sharp line of cleavage between officials who were part of the Executive establishment and were thus removable by virtue of the President's constitutional powers," and those who were members of an independent body required to exercise its judgment without hindrance from the Executive. 357 U.S. at 353.

These three cases clearly establish the President's right to control the actions and duties of his subordinates within the Executive Branch. *Myers* explicitly set forth the President's right to control as one of the bases for establishing the presidential right to discharge subordinate officials. *Humphrey's Executor* and *Wiener*, while limiting the President's removal power, reinforced the link between the President's right to control and his right to remove Executive Branch officials.

The President's right to control the execution of the laws free from undue interference from coordinate branches of government is supported by an additional line of authority. In *United States v. Nixon*, 418 U.S. 683 (1974), the Supreme Court confirmed that the Constitution protects the integrity of the Executive Branch decisionmaking process from interference by another branch through demands for information about the Executive's deliberations. The Court recognized

the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.

418 U.S. at 705 (footnote omitted). The Court specifically acknowledged that this right of confidentiality "can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and

privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings." 418 U.S. at 705-06 (footnote omitted). The Court further noted that this protection "is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." 418 U.S. at 708 (footnote omitted).

This decision gives further content to the principle that the constitutional separation of powers requires the President to have effective control over the decisionmaking process within the Executive Branch. The constitutional prerogative recognized by the Court connects the President's constitutional responsibility to take care that the laws be faithfully executed with the practical need for confidentiality in Executive Branch deliberations. The Court has unmistakably declared that the powers necessary to the implementation of the President's authority over the Executive Branch cannot be abridged absent a compelling and specific need asserted by another branch.²

The D.C. Circuit has explicitly recognized the right of the President to protect himself from unwarranted intrusions by Congress into the domain of protected decisionmaking activity. In *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (*en banc*), the court ruled that the President was not required to produce to Congress certain transcripts of White House conversations. The court decided that the general presumption in favor of the confidentiality of executive deliberations could be overcome "only by a strong showing of need by another institution of government—a showing that the responsibilities of that institution cannot responsibly be fulfilled without access to records of the President's deliberations. . . ." 498 F.2d at 730. The court found that the general oversight need of Congress in this instance was not sufficient to meet the court's requirement that the information be "demonstrably critical to the responsible fulfillment of the Committee's functions." 498 F.2d at 731.

The decisions and the long practical history concerning the right of the President to protect his control over the Executive Branch are based on the fundamental principle that the President's relationship with his subordinates must be free from certain types of interference from the coordinate branches of government in order to permit the President effectively to carry out his constitutionally assigned responsibilities. The executive power resides in the President,

² Although the *Nixon* case dealt with communications between the President and White House advisors, it seems clear that the principles enunciated therein extend at least to other important decisionmakers within the Executive Branch. See *United States v. American Telephone & Telegraph Co.*, 567 F.2d 121 (D.C. Cir. 1977). The *Nixon* Court specifically referred not simply to the President but to "high government officials and those who advise and assist them. . . ." 418 U.S. at 705. Furthermore, as the Supreme Court recognized in *Barr v. Matteo*, 360 U.S. 564 (1959), where it extended the privilege against libel suits involving official utterances to executive officials below Cabinet rank:

We do not think that the principle announced in *Vilas* can properly be restricted to executive officers of cabinet rank, and in fact it never has been so restricted by the lower federal courts. The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy.

360 U.S. at 572-73 (footnotes omitted).

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and he is obligated to "take care that the laws are faithfully executed." In order to fulfill these responsibilities, the President must be able to rely upon the faithful service of subordinate officials. To the extent that Congress or the courts interfere with the President's right to control or receive effective service from his subordinates within the Executive Branch, those other branches limit the ability of the President to perform his constitutional function. Therefore, only the most compelling and specifically supported needs will justify any interference with the President's power within the Executive Branch.

III. Application of Separation of Powers Principles to § 506(f)

In this instance, the potential impact of § 506(f) on the Executive Branch is significant and adverse. On the other hand, the provision does not reflect any particularized congressional need for specific factual information. Under these circumstances, as described more fully below, the constitutionally based need to protect the executive process from a non-compelling intrusion by Congress suggests that the statutory provision should be very narrowly construed so as not to offend separation of powers principles.

A. *Interference with the Executive Process*

There is no doubt that the Administrator is a purely executive official who serves at the pleasure of the President and is subject to the President's control. The FAA, as a division of the Department of Transportation, is indisputably an executive agency. The Administrator is appointed by the President with the advice and consent of the Senate, and he serves at the pleasure of the President. 49 U.S.C. § 1652(e)(1). The Administrator reports directly to the Secretary of Transportation, who reports in turn to the President. 49 U.S.C. § 1652(e)(3). Since the Administrator is a purely executive official subject to the direct control of the President, under the principles set forth above, the Administrator must be responsible to the Secretary, and ultimately to the President, and the Administrator's superiors have the right to supervise and approve the Administrator's work.

The concurrent reporting provision could be construed to interfere greatly with the President's right to supervise the Administrator's action. The provision could be read to require the Administrator to submit any budget information or legislative comments directly to Congress prior to any approval or even review by the Administrator's superiors, including the Secretary and the President. If the provision were interpreted in that manner, the Administrator would be effectively severed from his superiors in the Executive Branch with respect to these areas of his responsibility. On these vital budget and legislative matters, the Administrator would become, in effect, an independent agency reporting both to Congress and to the President. This concurrent responsibility is entirely inconsistent with the separation of powers principles set forth above and with the

corollary right of the President to control his subordinates within the Executive Branch.

The practical effect of a broad interpretation of § 506(f) would severely impair the President's ability to carry out his constitutionally assigned responsibilities. The President's responsibility to take care that the laws are faithfully executed includes the responsibility imposed by the Budget and Accounting Act to present a unified national budget to Congress. *See* 31 U.S.C. § 11. In order to implement this statutory responsibility, the President has established a budget development and review process through OMB, which is a part of the Executive Office of the President. The President through OMB requires that

the confidential nature of agency submissions, requests, recommendations, supporting materials and similar communications should be maintained, since these documents are an integral part of the decisionmaking process by which the President resolves budget issues and develops recommendations to the Congress. . . . Budgetary material should not be disclosed in any form prior to transmittal by the President of the material to which it pertains. The head of each agency is responsible for preventing premature disclosures of this budgetary information.

OMB Circular No. A-10 (Nov. 12, 1976) at 2. Thus, the Executive has explicitly determined that disclosure of unreviewed recommendations by subordinates within the Executive Branch would adversely affect the President's ability to carry out his responsibilities.³

Moreover, the President has an explicit constitutional obligation to "recommend to [Congress] Consideration such Measures as he shall judge necessary and expedient. . . ." Article II, § 3. The Administrator is responsible for making recommendations to the President concerning such legislative action so that the President may review them and determine which measures "he shall judge necessary and expedient." *Id.* Congress seeks to interdict this process by requiring immediate reporting of such legislative recommendations prior to the President's review or approval. Thus, although the Constitution gives to the President the right to present legislative recommendations on behalf of the Executive Branch, Congress, by this concurrent reporting provision, purports to require a subordinate executive official to present legislative recommendations of his own. Such a provision clearly transgresses upon the President's constitutionally designated role.

Thus, the concurrent reporting provision presents a constitutional problem that transcends the issue of executive privilege.⁴ The issue here concerns not just

³ Although Congress has enacted concurrent reporting provisions with respect to certain independent agencies, we are unaware that it has ever imposed a concurrent reporting requirement upon a purely executive agency that is under the President's direct supervision and control. *See* 7 U.S.C. § 4a(h)(1) (Commodity Futures Trading Commission); 15 U.S.C. § 2076(k)(1) (Consumer Product Safety Commission); 31 U.S.C. § 11(j) (Interstate Commerce Commission).

⁴ The provision would present a more classic executive privilege problem if it required production of recommendations and deliberative documents after the final budget decisions had already been made and transmitted to Congress by the President. That type of statute would present constitutional problems, but they would be of a different character than the ones presented by § 506(f).

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protection of the deliberative process once a final decision has already been made, but rather protection of the President's ability to supervise the actions of his subordinate officials while the decisionmaking process is still going on. Because § 506(f) might be read to require a presidential subordinate to report both to Congress and his superiors within the Executive Branch, it intrudes deeply into the President's constitutional prerogative. Indeed, as thus construed, it would interdict and therefore irreparably damage, if not destroy, the normal exchange of views between agency heads and the President (through OMB) before budget submissions are finally approved. A potential result is that the Administrator might be cut out of the process and made into a figurehead with the budget work assigned to someone not subject to the constraints of § 506(f).

This Office has previously considered, and found constitutionally defective, legislative proposals that impose concurrent reporting requirements upon executive officials. For example, this Office has published an opinion concerning a proposal that an inspector general be required to report information directly to Congress, without review or approval by the head of the particular agency involved. *Inspector General Legislation*, 1 Op. O.L.C. 16 (1977).⁵ In that opinion, this Office determined that 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." *Id.* at 17. The opinion stated that the requirement to provide information directly to Congress without Executive Branch clearance was "inconsistent with [the Inspector General's] status as an officer in the executive branch, reporting to and under the general supervision of the head of the agency." *Id.* In conclusion, the opinion set forth the following principle:

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.

Id. at 18.

B. Congressional Need for § 506(f)

In the face of this significant interference with the President's right to control his subordinates, there does not appear from the legislation or its history a strong comparable Legislative Branch interest. Congress has not expressed a specific need for § 506, either in the statute itself or in the legislative history. One can only infer that Congress adopted the provision in order to obtain more information to assist it in carrying out its review of the budget. There is no indication that Congress could not obtain similar information to aid its deliberations from other sources or by other means that would be less intrusive upon the Executive Branch. Certainly there is no indication that the material "is demonstrably

⁵ See also *Proposals Regarding an Independent Attorney General*, 1 O.L.C. 75 (1977).

critical to the responsible fulfillment of the Committee's functions." See *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d at 731.

Moreover, the concurrent reporting provision is a blanket requirement that applies to all budget information and legislative comments. The provision is sweeping and indiscriminate in its demand for information from the Executive Branch. This type of requirement is inconsistent with the Constitution's "spirit of dynamic compromise" with respect to disputes between coordinate branches of government. See *United States v. American Telephone & Telegraph Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977). That case involved a Justice Department suit to block a congressional subpoena of third-party materials on the ground that production would pose a threat to national security. In resolving the clash between the Executive and Legislative Branches, the Court insisted on further efforts by the two branches to reach a compromise arrangement and emphasized that

the resolution of conflict between the coordinate branches in these situations must be regarded as an opportunity for a constructive *modus vivendi*, which positively promotes the functioning of our system. The Constitution contemplates such accommodation. Negotiation between the two branches should thus be viewed as a dynamic process affirmatively furthering the constitutional scheme.

567 F.2d at 130. By enacting a blanket statutory mechanism that would require automatic submission to Congress of preliminary and not fully developed Executive Branch positions, Congress has ignored this common sense construction of constitutional principles. Congress' need is much less significant than would be the case if Congress had made a specific, well-defined request for materials that were necessary for it to fulfill a vital legislative function. Congress may still make such a specific request, and it needs no statute to do so. Congress and its committees frequently obtain information in this manner from the Executive Branch when, in the view of the Executive Branch, the provision of such information will not have an unacceptable impact on the deliberative process.

On balance, if the concurrent reporting provision were construed to require immediate transmission to Congress of the Administrator's budget and legislative recommendations, it would violate the constitutionally prescribed separation of powers. The potential interference with the President's constitutional duty to supervise the actions of his subordinates would be substantial, while there does not appear to be any congressional need of comparable magnitude for the information. Therefore, the provision must be construed in a manner consistent with the separation of powers required under the Constitution.

IV. Implementation of § 506(f)

In implementing § 506(f), the Administrator must act in accordance with the constitutional principles set forth above. Therefore, § 506(f) must be carried out

in a manner that will permit the Secretary and, as necessary, the President or OMB to review the Administrator's reports prior to their submission to Congress.

Broadly worded statutes that could be interpreted in such a way as to create a conflict with the separation of powers have, in the past, been interpreted very narrowly so as not to impinge upon the constitutional prerogatives of the Executive Branch. For example, Congress has enacted a provision that on its face requires any executive agency to submit to the Government Operations Committees of the House or Senate "any information requested of it relating to any matter within the jurisdiction of the committee." 5 U.S.C. § 2954. This provision, however, has been narrowly interpreted by the Executive Branch to grant to the pertinent committees access to only the type of information that has traditionally been made available to Congress and that is not subject to valid claims of executive privilege. Statement of Attorney General Elliot Richardson, June 1973. Attorney General Rogers adopted a similar approach in response to a provision of the Mutual Security Act of 1954 in order to avoid a construction of the statute that would require production of documents presumptively protected by executive privilege. See 41 Op. Att'y Gen. 507, 525 (1960). This practice is, of course, consistent with the familiar rule that courts will adopt an interpretation of a statute that will avoid constitutional questions. See, e.g., *United States v. Rumely*, 345 U.S. 41, 45 (1953).

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for this.

In this instance, we have concluded that § 506(f) can and should be construed to be consistent with the Constitution by interpreting the budget information and legislative comments that the Administrator is required to produce to Congress to include only "final" information and comments. In other words, until budget information, legislative comments, or any other material required to be transmitted to Congress is reviewed and approved by the appropriate senior officials, the material should be regarded as tentative, rather than final, conclusions of the Administrator. The information or comments would not become final until the appropriate review process was complete, at which time the Administrator, pursuant to § 506(f), would transmit the final information or comments to both the Secretary and Congress.

V. Conclusion

In conclusion, we believe that § 506(f) is constitutional only if interpreted to permit the Secretary and the President to review the Administrator's reports prior to the time that they are submitted to Congress. We recommend that the Administrator carry out his responsibilities under § 506 in accordance with this constitutional requirement.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

Marvin
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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

Margaret Colgate Love

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See p. 643

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Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress

Statute requiring the Administrator of the Federal Aviation Administration (FAA) to transmit concurrently to Congress any budget information and legislative recommendations that are transmitted to the Secretary of Transportation, the Office of Management and Budget (OMB), and the President, would, if interpreted strictly, on its face violate the constitutional principle of separation of powers.

Separation of powers requires that the President have ultimate control over subordinate officials who perform purely executive functions, which includes the right to supervise and review the work of such officials; this principle, coupled with the constitutional protection afforded the deliberative process within the Executive Branch, creates an area of executive prerogative that may not be invaded by a coordinate branch of government absent a very compelling and specific need.

Disclosure to Congress of unreviewed recommendations by subordinates within the Executive Branch would disrupt the normal interchange between agency heads and the President in connection with the decisionmaking process, and interfere with the President's ability to supervise the actions of his subordinate officials while this process is going on, thus adversely affecting the President's ability to carry out his responsibilities.

Because there appears to be no specific or compelling congressional need for the information at issue in this case, the concurrent reporting requirement can and should be construed so as to avoid constitutional infirmity, by allowing the FAA Administrator to provide Congress with budget data and legislative comments only after they have been approved by the Administrator's superiors in the Executive Branch, including, where appropriate, the President and OMB.

November 5, 1982

MEMORANDUM OPINION FOR THE GENERAL COUNSEL, DEPARTMENT OF TRANSPORTATION

This responds to your request for the advice of this Office regarding your implementation of § 506(f) of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324, 677 (1982), which requires the Administrator of the Federal Aviation Administration (Administrator) to transmit certain budget information and legislative recommendations directly to Congress at the same time that they are transmitted to the Secretary of Transportation (Secretary), the President, or the Office of Management and Budget (OMB). Specifically, you have expressed concern that this provision may conflict with the principle of separation of powers under the Constitution. In response to your request, we have reviewed the relevant statutory provisions, case law concerning separation of powers, the Constitution itself and the history of its development,

and prior opinions of this Office on this general subject. On the basis of this review, we have concluded that, if interpreted strictly, the statutory provision would, on its face, violate the separation of powers which is central to the structure of the United States Constitution.

As discussed in Section II of this opinion, **several clearly established principles of the separation of powers doctrine apply to the question raised by the concurrent reporting provision.** The separation of powers requires that the President have ultimate control over subordinate officials who perform purely executive functions and assist him in the performance of his constitutional responsibilities. This power includes the right to supervise and review the work of such subordinate officials, including reports issued either to the public or to Congress. This supervisory control is reinforced by the constitutional protection afforded to the deliberative process within the Executive Branch. These principles combine to create an area of executive prerogative that may not be invaded by a coordinate branch of government absent a very compelling and specific need.

As detailed in Section III, a requirement that subordinate officials within the Executive Branch submit reports directly to Congress, without any prior review by their superiors, would greatly impair the right of the President to exercise his constitutionally based right to control the Executive Branch. This interference contrasts with the relatively nonspecific request for information embodied in § 506(f). In balancing Congress' limited apparent need for direct reports against the President's right to control subordinates within the Executive Branch, **it seems clear that § 506(f) would be unconstitutional if it were construed to require the Administrator to report to Congress without prior review by his superiors.**

In Section IV, we consider how § 506(f) might be interpreted so as to avoid this constitutional problem. In brief, we conclude that in order to harmonize the statute with the requirements of the Constitution, **the Administrator should provide to Congress only budget information and legislative comments that have been approved by the Administrator's superiors, including, where appropriate, the President, OMB, and the Secretary.**

I. Background

The Airport and Airway Improvement Act of 1982 (AAIA) was enacted as Title V of the Tax Equity and Fiscal Responsibility Act of 1982. Pub. L. No. 97-248, 96 Stat. 324, 677 (1982). The AAIA generally authorizes an extension of, and enacts certain changes to, the Federal Airport Aid Program. In addition, § 506(f) provides:

(f) TRANSMITTAL OF BUDGET ESTIMATES.—Whenever the Administrator of the Federal Aviation Administration submits or transmits any budget estimate, budget request, supplemental budget estimate, or other budget information, legislative recommendation, or comment on legislation to the Secretary, the President of the United States, or to the Office of Management and

Budget pertaining to funds authorized in subsection (a) or (b) of this section, it shall concurrently transmit a copy thereof to the Speaker of the House of Representatives, the Committees on Public Works and Transportation and Appropriations of the House of Representatives, the President of the Senate, and the Committees on Commerce, Science, and Transportation and Appropriations of the Senate.

In essence, this provision purports to direct the Administrator to report concurrently to Congress any budget data or legislative comments that are transmitted to the President, the Secretary, or OMB. By the terms of § 506(f), this requirement applies to budget information or legislative comments "pertaining to funds authorized in subsection (a) or (b) of this section" Subsections (a) and (b) authorize funding for acquiring or establishing and improving air navigation facilities and for establishing demonstration projects in connection with certain research and development activities. In addition, § 504(b) requires the Administrator to prepare and submit to Congress "a national airways system plan" and directs that the preparation be "subject to the requirements of section 506(f). . . ."

SoFP / Given this statutory language, it is arguable that the Administrator is required to submit the specified reports, information, and comments directly to Congress prior to any review or approval by the President, the Secretary, or OMB. If the statute were read to impose such a requirement, the Administrator would be severed from his superiors in the Executive Branch with respect to these matters and would, in effect, become an independent agency reporting to both Congress and the President. In addition, the internal deliberative process within the Executive Branch would be tapped by an information pipeline running directly to a coordinate branch of government. These possibilities raise serious separation of powers issues, which are discussed below.

II. Applicable Separation of Powers Principles

Article II, § 1 of the United States Constitution begins with the statement that "[t]he executive Power shall be vested in a President of the United States of America." Article II, § 3 requires the President to "take Care that the Laws be faithfully executed . . .," and also requires the President to "recommend to [Congress] Consideration such Measures as he shall judge necessary and expedient. . . ." These constitutional provisions, taken together, impose certain fundamental duties upon the President and grant the power to direct the Executive Branch to carry out those duties.

In order to execute the laws adopted by Congress, the President must have the assistance of subordinate officials who will carry out his policies and implement his instructions with respect to the execution of law. The Supreme Court has, from its earliest decisions, consistently recognized this basic principle. For example, in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 164 (1803), Chief Justice Marshall stated:

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By the Constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders. In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion.

Although it is clear that the Constitution does not contemplate "a complete division of authority between the three branches," *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977), each branch retains certain core prerogatives upon which the other branches may not transgress. See *Buckley v. Valeo*, 424 U.S. 1 (1976). In *Buckley*, the Court recognized that "a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively," but it emphasized that there was a "common ground in the recognition of the intent of the Framers that the powers of the three great branches of the National Government be largely separate from one another." 424 U.S. at 120–21. The Court declared that it "has not hesitated to enforce the principle of separation of powers embodied in the Constitution when its application has proved necessary for the decision of cases or controversies properly before it." 424 U.S. at 123.

The extent of the President's right to control subordinate officers was specifically considered by the Supreme Court in a trilogy of cases involving the President's power to remove federal officials. In *Myers v. United States*, 272 U.S. 52 (1926), the Court ruled unconstitutional a statute that limited the President's power to remove certain postmasters, and it declared, in *dictum*, that the repealed Tenure of Office Act had been unconstitutional as well.¹ In reaching this conclusion, the Court considered a number of factors, including the constitutional debates, previous congressional practice, and the relationship between the power to appoint and the power to remove. In addition, the Court expressly based its decision on the conclusion that "Article II grants to the President the executive power of the Government, i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed. . . ." 272 U.S. at 163–64. The Court based this conclusion on the following analysis of the President's control over subordinate officials:

¹ The Tenure of Office Act, 14 Stat. 430 (1867), had provided that all officers appointed by and with the consent of the Senate should hold their offices until their successors had been appointed and approved, and that certain heads of departments, including the Secretary of War, should hold their offices during the term of the President who appointed them, subject to removal by consent of the Senate. This Act was the principal basis for the articles of impeachment filed against President Andrew Johnson after he dismissed his Secretary of War without the consent of the Senate.

The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone. Laws are often passed with specific provision for the adoption of regulations by a department or bureau head to make the law workable and effective. The ability and judgment manifested by the official thus empowered, as well as his energy and stimulation of his subordinates, are subjects which the President must consider and supervise in his administrative control. Finding such officers to be negligent and inefficient, the President should have the power to remove them.

272 U.S. at 135.

The Court confirmed this view of the President's power over his subordinates within the Executive Branch in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). In that case, the Court ruled that Congress could, consistent with the Constitution, immunize a Commissioner of the Federal Trade Commission (FTC) from removal by the President at his pleasure. The Court reasoned that the FTC could not "be characterized as an arm or eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control." 295 U.S. at 628. *Myers* was distinguished on the ground that "[t]he actual decision in the *Myers* case finds support in the theory that such an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is." 295 U.S. at 627. The Court emphasized that within the Executive Branch, the President retained the right to direct the actions of his subordinates free from interference by another branch:

The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential co-equality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there.

295 U.S. at 629-30. Thus, by narrowing *Myers* to cover only subordinates of the President within the Executive Branch, the Court linked the removal power even more clearly to the right of the President to control purely executive officials.

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This principle was reaffirmed in *Wiener v. United States*, 357 U.S. 349 (1958). In that case, the Court held that the President did not have a constitutional right to remove a member of the War Claims Commission. The Court ruled that the Commission was essentially judicial in nature and that it was intended by Congress to operate entirely free of the President's control. 357 U.S. at 355-56. The Court expressly linked the right of removal with the right of the President to control a particular official:

If, as one must take for granted, the War Claims Act precluded the President from influencing the Commission in passing on a particular claim, *a fortiori* must it be inferred that Congress did not wish to have hang over the Commission the Damocles' sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing.

357 U.S. at 356. The Court thus emphasized that *Humphrey's Executor* "drew a sharp line of cleavage between officials who were part of the Executive establishment and were thus removable by virtue of the President's constitutional powers," and those who were members of an independent body required to exercise its judgment without hindrance from the Executive. 357 U.S. at 353.

These three cases clearly establish the President's right to control the actions and duties of his subordinates within the Executive Branch. *Myers* explicitly set forth the President's right to control as one of the bases for establishing the presidential right to discharge subordinate officials. *Humphrey's Executor* and *Wiener*, while limiting the President's removal power, reinforced the link between the President's right to control and his right to remove Executive Branch officials.

The President's right to control the execution of the laws free from undue interference from coordinate branches of government is supported by an additional line of authority. In *United States v. Nixon*, 418 U.S. 683 (1974), the Supreme Court confirmed that the Constitution protects the integrity of the Executive Branch decisionmaking process from interference by another branch through demands for information about the Executive's deliberations. The Court recognized

the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.

418 U.S. at 705 (footnote omitted). The Court specifically acknowledged that this right of confidentiality "can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and

privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings." 418 U.S. at 705-06 (footnote omitted). The Court further noted that this protection "is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." 418 U.S. at 708 (footnote omitted).

This decision gives further content to the principle that the constitutional separation of powers requires the President to have effective control over the decisionmaking process within the Executive Branch. The constitutional prerogative recognized by the Court connects the President's constitutional responsibility to take care that the laws be faithfully executed with the practical need for confidentiality in Executive Branch deliberations. The Court has unmistakably declared that the powers necessary to the implementation of the President's authority over the Executive Branch cannot be abridged absent a compelling and specific need asserted by another branch.²

The D.C. Circuit has explicitly recognized the right of the President to protect himself from unwarranted intrusions by Congress into the domain of protected decisionmaking activity. In *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (*en banc*), the court ruled that the President was not required to produce to Congress certain transcripts of White House conversations. The court decided that the general presumption in favor of the confidentiality of executive deliberations could be overcome "only by a strong showing of need by another institution of government—a showing that the responsibilities of that institution cannot responsibly be fulfilled without access to records of the President's deliberations. . . ." 498 F.2d at 730. The court found that the general oversight need of Congress in this instance was not sufficient to meet the court's requirement that the information be "demonstrably critical to the responsible fulfillment of the Committee's functions." 498 F.2d at 731.

The decisions and the long practical history concerning the right of the President to protect his control over the Executive Branch are based on the fundamental principle that the President's relationship with his subordinates must be free from certain types of interference from the coordinate branches of government in order to permit the President effectively to carry out his constitutionally assigned responsibilities. The executive power resides in the President,

² Although the *Nixon* case dealt with communications between the President and White House advisors, it seems clear that the principles enunciated therein extend at least to other important decisionmakers within the Executive Branch. See *United States v. American Telephone & Telegraph Co.*, 567 F.2d 121 (D.C. Cir. 1977). The *Nixon* Court specifically referred not simply to the President but to "high government officials and those who advise and assist them. . . ." 418 U.S. at 705. Furthermore, as the Supreme Court recognized in *Barr v. Matteo*, 360 U.S. 564 (1959), where it extended the privilege against libel suits involving official utterances to executive officials below Cabinet rank:

We do not think that the principle announced in *Vilas* can properly be restricted to executive officers of cabinet rank, and in fact it never has been so restricted by the lower federal courts. The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy.

360 U.S. at 572-73 (footnotes omitted).

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and he is obligated to "take care that the laws are faithfully executed." In order to fulfill these responsibilities, the President must be able to rely upon the faithful service of subordinate officials. To the extent that Congress or the courts interfere with the President's right to control or receive effective service from his subordinates within the Executive Branch, those other branches limit the ability of the President to perform his constitutional function. Therefore, only the most compelling and specifically supported needs will justify any interference with the President's power within the Executive Branch.

III. Application of Separation of Powers Principles to § 506(f)

In this instance, the potential impact of § 506(f) on the Executive Branch is significant and adverse. On the other hand, the provision does not reflect any particularized congressional need for specific factual information. Under these circumstances, as described more fully below, the constitutionally based need to protect the executive process from a non-compelling intrusion by Congress suggests that the statutory provision should be very narrowly construed so as not to offend separation of powers principles.

A. Interference with the Executive Process

There is no doubt that the Administrator is a purely executive official who serves at the pleasure of the President and is subject to the President's control. The FAA, as a division of the Department of Transportation, is indisputably an executive agency. The Administrator is appointed by the President with the advice and consent of the Senate, and he serves at the pleasure of the President. 49 U.S.C. § 1652(e)(1). The Administrator reports directly to the Secretary of Transportation, who reports in turn to the President. 49 U.S.C. § 1652(e)(3). Since the Administrator is a purely executive official subject to the direct control of the President, under the principles set forth above, the Administrator must be responsible to the Secretary, and ultimately to the President, and the Administrator's superiors have the right to supervise and approve the Administrator's work.

The concurrent reporting provision could be construed to interfere greatly with the President's right to supervise the Administrator's action. The provision could be read to require the Administrator to submit any budget information or legislative comments directly to Congress prior to any approval or even review by the Administrator's superiors, including the Secretary and the President. If the provision were interpreted in that manner, the Administrator would be effectively severed from his superiors in the Executive Branch with respect to these areas of his responsibility. On these vital budget and legislative matters, the Administrator would become, in effect, an independent agency reporting both to Congress and to the President. This concurrent responsibility is entirely inconsistent with the separation of powers principles set forth above and with the

corollary right of the President to control his subordinates within the Executive Branch.

The practical effect of a broad interpretation of § 506(f) would severely impair the President's ability to carry out his constitutionally assigned responsibilities. The President's responsibility to take care that the laws are faithfully executed includes the responsibility imposed by the Budget and Accounting Act to present a unified national budget to Congress. *See* 31 U.S.C. § 11. In order to implement this statutory responsibility, the President has established a budget development and review process through OMB, which is a part of the Executive Office of the President. The President through OMB requires that

the confidential nature of agency submissions, requests, recommendations, supporting materials and similar communications should be maintained, since these documents are an integral part of the decisionmaking process by which the President resolves budget issues and develops recommendations to the Congress. . . . Budgetary material should not be disclosed in any form prior to transmittal by the President of the material to which it pertains. The head of each agency is responsible for preventing premature disclosures of this budgetary information.

OMB Circular No. A-10 (Nov. 12, 1976) at 2. Thus, the Executive has explicitly determined that disclosure of unreviewed recommendations by subordinates within the Executive Branch would adversely affect the President's ability to carry out his responsibilities.³

Moreover, the President has an explicit constitutional obligation to "recommend to [Congress] Consideration such Measures as he shall judge necessary and expedient. . . ." Article II, § 3. The Administrator is responsible for making recommendations to the President concerning such legislative action so that the President may review them and determine which measures "he shall judge necessary and expedient." *Id.* Congress seeks to interdict this process by requiring immediate reporting of such legislative recommendations prior to the President's review or approval. Thus, although the Constitution gives to the President the right to present legislative recommendations on behalf of the Executive Branch, Congress, by this concurrent reporting provision, purports to require a subordinate executive official to present legislative recommendations of his own. Such a provision clearly transgresses upon the President's constitutionally designated role.

Thus, the concurrent reporting provision presents a constitutional problem that transcends the issue of executive privilege.⁴ The issue here concerns not just

³ Although Congress has enacted concurrent reporting provisions with respect to certain independent agencies, we are unaware that it has ever imposed a concurrent reporting requirement upon a purely executive agency that is under the President's direct supervision and control. *See* 7 U.S.C. § 4a(h)(1) (Commodity Futures Trading Commission); 15 U.S.C. § 2076(k)(1) (Consumer Product Safety Commission); 31 U.S.C. § 11(j) (Interstate Commerce Commission).

⁴ The provision would present a more classic executive privilege problem if it required production of recommendations and deliberative documents after the final budget decisions had already been made and transmitted to Congress by the President. That type of statute would present constitutional problems, but they would be of a different character than the ones presented by § 506(f).

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protection of the deliberative process once a final decision has already been made, but rather protection of the President's ability to supervise the actions of his subordinate officials while the decisionmaking process is still going on. Because § 506(f) might be read to require a presidential subordinate to report both to Congress and his superiors within the Executive Branch, it intrudes deeply into the President's constitutional prerogative. Indeed, as thus construed, it would interdict and therefore irreparably damage, if not destroy, the normal exchange of views between agency heads and the President (through OMB) before budget submissions are finally approved. A potential result is that the Administrator might be cut out of the process and made into a figurehead with the budget work assigned to someone not subject to the constraints of § 506(f).

This Office has previously considered, and found constitutionally defective, legislative proposals that impose concurrent reporting requirements upon executive officials. For example, this Office has published an opinion concerning a proposal that an inspector general be required to report information directly to Congress, without review or approval by the head of the particular agency involved. *Inspector General Legislation*, 1 Op. O.L.C. 16 (1977).⁵ In that opinion, this Office determined that 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." *Id.* at 17. The opinion stated that the requirement to provide information directly to Congress without Executive Branch clearance was "inconsistent with [the Inspector General's] status as an officer in the executive branch, reporting to and under the general supervision of the head of the agency." *Id.* In conclusion, the opinion set forth the following principle:

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.

Id. at 18.

B. Congressional Need for § 506(f)

In the face of this significant interference with the President's right to control his subordinates, there does not appear from the legislation or its history a strong comparable Legislative Branch interest. Congress has not expressed a specific need for § 506, either in the statute itself or in the legislative history. One can only infer that Congress adopted the provision in order to obtain more information to assist it in carrying out its review of the budget. There is no indication that Congress could not obtain similar information to aid its deliberations from other sources or by other means that would be less intrusive upon the Executive Branch. Certainly there is no indication that the material "is demonstrably

⁵ See also *Proposals Regarding an Independent Attorney General*, 1 O.L.C. 75 (1977).

critical to the responsible fulfillment of the Committee's functions." See *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d at 731.

Moreover, the concurrent reporting provision is a blanket requirement that applies to all budget information and legislative comments. The provision is sweeping and indiscriminate in its demand for information from the Executive Branch. This type of requirement is inconsistent with the Constitution's "spirit of dynamic compromise" with respect to disputes between coordinate branches of government. See *United States v. American Telephone & Telegraph Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977). That case involved a Justice Department suit to block a congressional subpoena of third-party materials on the ground that production would pose a threat to national security. In resolving the clash between the Executive and Legislative Branches, the Court insisted on further efforts by the two branches to reach a compromise arrangement and emphasized that

the resolution of conflict between the coordinate branches in these situations must be regarded as an opportunity for a constructive *modus vivendi*, which positively promotes the functioning of our system. The Constitution contemplates such accommodation. Negotiation between the two branches should thus be viewed as a dynamic process affirmatively furthering the constitutional scheme.

567 F.2d at 130. By enacting a blanket statutory mechanism that would require automatic submission to Congress of preliminary and not fully developed Executive Branch positions, Congress has ignored this common sense construction of constitutional principles. Congress' need is much less significant than would be the case if Congress had made a specific, well-defined request for materials that were necessary for it to fulfill a vital legislative function. Congress may still make such a specific request, and it needs no statute to do so. Congress and its committees frequently obtain information in this manner from the Executive Branch when, in the view of the Executive Branch, the provision of such information will not have an unacceptable impact on the deliberative process.

On balance, if the concurrent reporting provision were construed to require immediate transmission to Congress of the Administrator's budget and legislative recommendations, it would violate the constitutionally prescribed separation of powers. The potential interference with the President's constitutional duty to supervise the actions of his subordinates would be substantial, while there does not appear to be any congressional need of comparable magnitude for the information. Therefore, the provision must be construed in a manner consistent with the separation of powers required under the Constitution.

IV. Implementation of § 506(f)

In implementing § 506(f), the Administrator must act in accordance with the constitutional principles set forth above. Therefore, § 506(f) must be carried out

in a manner that will permit the Secretary and, as necessary, the President or OMB to review the Administrator's reports prior to their submission to Congress.

① Broadly worded statutes that could be interpreted in such a way as to create a conflict with the separation of powers have, in the past, been interpreted very narrowly so as not to impinge upon the constitutional prerogatives of the Executive Branch. For example, Congress has enacted a provision that on its face requires any executive agency to submit to the Government Operations Committees of the House or Senate "any information requested of it relating to any matter within the jurisdiction of the committee." 5 U.S.C. § 2954. This provision, however, has been narrowly interpreted by the Executive Branch to grant to the pertinent committees access to only the type of information that has traditionally been made available to Congress and that is not subject to valid claims of executive privilege. Statement of Attorney General Elliot Richardson, June 1973. Attorney General Rogers adopted a similar approach in response to a provision of the Mutual Security Act of 1954 in order to avoid a construction of the statute that would require production of documents presumptively protected by executive privilege. See 41 Op. Att'y Gen. 507, 525 (1960). This practice is, of course, consistent with the familiar rule that courts will adopt an interpretation of a statute that will avoid constitutional questions. See, e.g., *United States v. Rumely*, 345 U.S. 41, 45 (1953).

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In this instance, we have concluded that § 506(f) can and should be construed to be consistent with the Constitution by interpreting the budget information and legislative comments that the Administrator is required to produce to Congress to include only "final" information and comments. In other words, until budget information, legislative comments, or any other material required to be transmitted to Congress is reviewed and approved by the appropriate senior officials, the material should be regarded as tentative, rather than final, conclusions of the Administrator. The information or comments would not become final until the appropriate review process was complete, at which time the Administrator, pursuant to § 506(f), would transmit the final information or comments to both the Secretary and Congress.

V. Conclusion

In conclusion, we believe that § 506(f) is constitutional only if interpreted to permit the Secretary and the President to review the Administrator's reports prior to the time that they are submitted to Congress. We recommend that the Administrator carry out his responsibilities under § 506 in accordance with this constitutional requirement.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

§ 2954. Information to committees of Congress on request

An **Executive agency**, on request of the Committee on Government Operations of the House of Representatives, or of any seven members thereof, or on request of the Committee on Government Operations of the Senate, or any five members thereof, shall submit any information requested of it relating to any matter within the jurisdiction of the committee.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 413.

Historical and Revision Notes

Derivation: United States Code Revised Statutes and Statutes at Large
5 U.S.C. 105a May 29, 1928, ch. 901, § 2, 45 Stat. 996.

Explanatory Notes

The words "Executive agency" are substituted for the definition of "Executive agency" in section 105. Independent establishment" in view of

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[Nothing more]

§ 105. Executive agency

For the purpose of this title, "Executive agency" means an **Executive department**, a **Government corporation**, and an **independent establishment**.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 379.

Historical and Revision Notes

Reviser's Note. The section is supplied with the definition of "Executive agency" each time it is used in this title to avoid the necessity for defining "Executive agency" each time it is used in this title.

Library References

United States Code § 31.

C.J.S. United States § 31.

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[Nothing more]

§ 101. Executive departments

The Executive departments are:

- The Department of State.
- The Department of the Treasury.
- The Department of Defense.
- The Department of Justice.
- The Department of the Interior.
- The Department of Agriculture.
- The Department of Commerce.
- The Department of Labor.
- The Department of Health and Human Services.
- The Department of Housing and Urban Development.
- The Department of Transportation.
- The Department of Energy.
- The Department of Education.
- The Department of Veterans Affairs.

As amended Pub.L. 95-91, Title VII, § 710(a), Aug. 4, 1977, 91 Stat. 609; Pub.L. 96-88, Title V, § 508(b), Oct. 17, 1979, 93 Stat. 692; Pub.L. 100-527, § 13(b), Oct. 25, 1988, 102 Stat. 2643.)

HISTORICAL AND STATUTORY NOTES**1988 Amendment**

Pub.L. 100-527, § 13(b), included the Department of Veterans Affairs.

1979 Amendment

Pub.L. 96-88 substituted "Department of Health and Human Services" for "Department of Health, Education, and Welfare" and inserted "The Department of Education."

1977 Amendment

Pub.L. 95-91 included the Department of Energy.

Effective Date of 1988 Amendment

Amendment by Pub.L. 100-527, effective March 15, 1989, except as otherwise provided therein, see section 18 of Pub.L. 100-527, set out as a note under section 201 of Title 38, Veterans' Benefits.

§ 103. Government corporation

For the purpose of this title—

- (1) "Government corporation" means a corporation owned or controlled by the Government of the United States; and
- (2) "Government controlled corporation" does not include a corporation owned by the Government of the United States.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 378.

[Nothing more]

§ 104. Independent establishment

For the purpose of this title, "independent establishment" means—

- (1) an establishment in the executive branch (other than the United States Postal Service or the Postal Rate Commission) which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment; and
- (2) the General Accounting Office.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 379; Pub.L. 91-375, § 6(c)(2), Aug. 12, 1970, 84 Stat. 775.

[Nothing more]

HR 10104

Sen. Report
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-23357

(1) Is the White House an executive agency?

- DOD issue

(2) Is WH travel w/in the jurisdiction of the committee?

① E.A. G.

② w/in jurisdiction?



Department of Justice

STATEMENT

OF

ELLIOT L. RICHARDSON

ATTORNEY GENERAL

ON

VARIOUS BILLS RELATING TO

EXECUTIVE PRIVILEGE AND GOVERNMENT SECRECY

BEFORE

THE SEPARATION OF POWERS SUBCOMMITTEE

AND

THE ADMINISTRATIVE PRACTICE AND PROCEDURE SUBCOMMITTEE

OF THE

COMMITTEE ON THE JUDICIARY

AND

THE INTERGOVERNMENTAL RELATIONS SUBCOMMITTEE

OF THE

COMMITTEE ON GOVERNMENT OPERATIONS

UNITED STATES SENATE

June 26, 1973

Messrs. Chairmen and Members of the Subcommittees:

I am pleased to have the opportunity to appear before these Subcommittees today to discuss with you an area of the law that bears directly on the vitality of our democratic system. Freedom of Information is basic to the democratic process. It must remain viable if a government of the people is to exist in practice as well as description. Let me stress at the outset my commitment to the goal of implementing the public's "right to know" to the greatest extent consistent with good government.

I.

The term "government secrecy" -- the title of these hearings -- has a kind of foreboding resonance. Nothing would be so alien to our form of government as pervasive secrecy, for people cannot govern themselves if they cannot know the actions of their government. Yet it is elementary that the welfare of the nation and that of its citizens may require that some information be kept in confidence.

For example, there is some information and material within the federal government which must be given only very limited dissemination because it relates directly to the maintenance of our national defense and the successful

conduct of our foreign relations. The vital right of privacy requires that personal information accumulated in the extensive repositories of the federal government under income tax reporting laws, census reporting laws, government investigations and other official activities be protected from disclosure.

Similarly, a citizen must be able in confidence to complain to his government and provide information about matters that concern him. Confidential treatment must also be afforded to the decision-making process so that officials can give full, frank and disinterested advice to their superiors on policy matters without the fear that they will be exposed to public criticism. Furthermore, officials within the government cannot operate effectively if the internal instructions that guide them in dealing with official business and arriving at decisions are public knowledge or if the investigative files they compile are disclosed. The objective, of course, is not to keep secret the final decisions or supporting rationale--the ultimate resolution should be subject to full public debate. Instead, the aim is to maintain the confidentiality of the process that leads to sound resolutions where the process cannot otherwise operate.

The tension between these exigent interests that I have just outlined and the vital interest in a fully informed citizenry in our democratic society is unavoidable. Secrecy is thus a paradox. It is a threat as well as a necessary incident to democratic government. As the parent Committee of one of the Subcommittees holding these hearings today said in reporting on the bill that culminated in the Freedom of Information Act, it is not "an easy task to balance the opposing interests, but it is not an impossible one either Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure." S. Rep. No. 813, 89th Cong., 1st Sess. at 3.

In this continuing endeavor, I have been asked to discuss three major areas that bear directly on freedom of information: (1) the Freedom of Information Act which governs the disclosure of information to the public and its proposed amendment, S. 1142 introduced by Senator Muskie; (2) the need to withhold certain information from the congressional testimony process, or on occasion from Congress, the furnishing of which would be contrary to the public interest (referred to as Executive privilege); (3) the classification system designed to protect information

essential to our national security, S. 1520 introduced by Senator Roth and the concepts underlying those provisions in the proposed federal criminal code (S. 1400) that provide a basis for the prosecution of those who wrongfully disclose national security information.

II.

The Freedom of Information Act

Preface

The Freedom of Information Act, enacted in 1966, imposed on the Executive branch an affirmative obligation to provide access to official information that previously was long shielded from public view. Because the Act radically departed from a predecessor statute that was considered more as a withholding statute than a disclosure statute, it required a major overhaul of both administrative practices and procedures. It has been the experience of the Department of Justice, developed from our vantage point in advising other agencies on the legal requirements of the Act, that the overhaul has not been complete.

As we see it, the problem in affording the public more access to official information is not statutory but administrative. Although the language of the Act is not altogether clear, we do not believe that this constitutes a major

obstacle because the courts have resolved almost all legal doubts in favor of disclosure. The real need is not to revise the Act extensively but to improve compliance.

Less than ideal compliance within agencies has various causes. In part, it may be due to the viewpoint of those who administer the Act. Most employees, whether employed in the public or private sector, tend to identify with their assignments, their office and their files. Under these circumstances, some doubts about granting access to agency files may be resolved against disclosure, especially in view of the natural fear of creating a bad precedent. Additional problems arise because the administration of the Act, which can sometimes be very complex and time-consuming, requires the commitment of resources that are assigned to other statutory responsibilities of the agency. Implementation of the Act which is super-imposed on the regular work of the agency can be an onerous responsibility. For example, within our own Department, the Immigration and Naturalization Service handles each month approximately 7,500 formal requests for information in addition to meeting its other statutorily imposed objectives.

The most immediate way to ensure greater compliance is to provide assistance and training for agencies and their

staffs. Mindful of the admonition that the well-intended provisions of the Act can for the most part turn out to be hollow exhortations without an effective administrative system, we at the Department of Justice are considering several new means to upgrade the Act's administration. These include conducting seminars, publishing freedom of information newsletters or manuals, and perhaps other steps.

Furthermore, there are some steps that the Justice Department can take immediately to encourage better administration of the Act, and I am today directing that four such steps be taken now.

First, we will request the Civil Service Commission to include Freedom of Information material in its executive training and legal training programs and to assist us in arranging for inclusion of similar material in other programs for training government personnel.

Second, we will conduct an interagency symposium on the Freedom of Information Act before the end of this year, to emphasize the need for improved administration and to provide the wider sharing of problems and ideas. This symposium will involve two-way communications as well as

direct presentations, and we plan to invite the participation of Congressional and private speakers.

Third, we will promptly institute discussions with the Administrative Conference of the United States, the Civil Service Commission, the Office of Management and Budget, and perhaps other agencies, seeking their assistance in launching a comprehensive study of how the Executive Branch can better organize itself to administer the Act, both within and among the agencies. This study will cover staffing, budgeting, training, and meeting the need for research in the application of the Act to major areas like government procurement, regulatory programs, law enforcement, and computerized records. It will cover the extent to which desirable improvements should be effected by legislation, executive order, or departmental orders. It will take account of inputs from outside the Executive Branch, and it is designed to point the way to sound and relatively permanent improvements, including greater speed of processing, greater uniformity, and greater disclosure. Our objective will be to have this study launched within 90 days and completed within one year, with reports to be furnished to Congress.

Fourth, I will immediately remind all federal agencies of this Department's standing request that they consult our

Freedom of Information Committee before issuing final denials of requests under the Act. In this connection I will order our litigating divisions not to defend freedom of information law suits against the agencies unless the Committee has been consulted. And I will instruct the Committee to make every possible effort to advance the objective of the fullest responsible disclosure.

No law is wholly self-explanatory or self-executing. Its success depends heavily on the judgment and attitude of those officials who administer the Act and on the available resources that can be devoted to its execution. The most careful and continuous vigilance must be maintained to assure that no more information is withheld than is absolutely necessary. As these hearings demonstrate, both the Executive and Legislative branches have indispensable roles to play in maintaining that vigilance.

S. 1142

I shall now discuss S. 1142 introduced by Senator Muskie which would amend the Freedom of Information Act. Because the Department of Justice will submit the usual detailed report on this bill in the near future, my present brief examination will be confined to some of the major provisions of S. 1142.

-- Procedural Aspects

Two proposed amendments to the procedural provisions of the Freedom of Information Act cause us a great deal of concern. Several agencies, knowing that we would testify on S. 1142, asked us to reflect their vigorous objections to Section 1(c) of the bill which would amend the Act by imposing time limits of 10 working days for an agency to determine whether to comply with any request and 20 working days to decide an appeal from any denial. We sympathize with the contemplated purpose of imposing these deadlines -- namely, expediting responses to requests for information.

This amendment, however, is far too rigid in application. Often files cannot be obtained within ten days either because the filing systems are impervious to the description of the information requested or because the files are located in centers distantly located from the office receiving the request. Occasionally, it is necessary for an agency to consult other agencies, organizations, even foreign governments in order to determine the propriety of releasing or withholding information. Because such an amendment would encourage, indeed compel, hasty denials in acting on some complex or unique requests, it would, we believe be counter-

productive to the ultimate purpose of maximizing disclosure. No agency should be required to adhere to a rigid 10 or 20 day limit at the cost of denying requests, in a spirit of caution, that might with more study and time be granted in whole or part.

To avoid these problems yet provide for expeditious treatment of information requests, we suggest that our revised departmental regulations, which follow the recommendations of the Administrative Conference, be used as a working model. Our regulations provide for 10 and 20-day deadlines but permit extensions of time under certain limited circumstances. I say that our regulations should serve only as a "working" model because after three months of experience we have found that we were over-eager and under-sophisticated and accordingly we expect to make some adjustments in our deadline provisions. We believe that any amendment to the Freedom of Information Act, in addition to embodying the six reasons justifying extensions developed by the Administrative Conference, should also recognize the imperatives of processing large numbers of requests -- a problem with which some agencies such as the Immigration and Naturalization Service, referred to above, are confronted. Perhaps it would also be wise for each agency to maintain a public record of the number of requests it receives

and the time within which it responds in order to permit the necessary vigilance I spoke of earlier.

The second procedural aspect of S. 1142 I shall discuss in Subsection 1(d). Paragraph 1 of this Subsection would impose upon the courts the requirement to engage in in camera inspections in every case. In Environmental Protection Agency v. Mink, _____ U.S. _____, 93 S.Ct. 82 decided this term, the Supreme Court construed the Act as vesting in the courts, in cases other than those in which documents are classified, the discretion to determine whether an in camera inspection is necessary to the resolution of the case. We oppose any legislative attempt to overrule the Supreme Court's decision in Mink for two basic reasons.

First, to require in camera inspections of documents in every case is to underestimate the efficacy of oral testimony and sworn affidavits. As the Supreme Court said in Mink "[a]n agency should be given the opportunity, by means of detailed affidavits or oral testimony, to establish to the satisfaction of the District Court[s] that the documents fall [within the exemption]." The burden of proof is on the agency resisting disclosure. Only if the agency "fails to meet its burden without in camera

inspection, [may] the District Court . . . order such inspection In short," said the Court, "in camera inspection of all documents is not a necessary or inevitable tool in every case." 93 S.Ct. at 839. (Emphasis added).

Second, an automatic in camera inspection provision will impose an unnecessary burden on the courts. Such inspections consume a great amount of a judge's time particularly where the request is for a large number of documents. As the Supreme Court indicated in the above quoted passages, it may not be necessary or appropriate to examine the documents because the "surrounding circumstances" may demonstrate that the exemption is clearly applicable. We believe that the question whether a particular case is appropriate for an in camera inspection where one or more of exemptions 2 through 9 are claimed should be left to the considered judgment of the court.

Paragraph 2 of Subsection 1(d), which is a more specific application of the Paragraph just discussed, would direct the courts to decide whether disclosure would be harmful to the national defense or foreign relations if the records were withheld under the first exemption of the Act. In Mink, the Supreme Court found that judicial review did not extend

2. Section 2(b) would amend the fourth exemption. This exemption is designed to enable the government to maintain in confidence information submitted to it by persons, usually businessmen, who would not otherwise voluntarily furnish the information or customarily release it to the public. Some courts have treated this exemption as exclusively for business information, and the proposed amendment would similarly limit the scope of protection of exemption 4 to include only commercial or financial information. We suggest that there is an imbalance in an amendment that protects information submitted in confidence by businessmen but denies protection to confidential information furnished by other citizens.

This amendment would not permit an agency to withhold statements by witnesses to an industrial accident, an airplane crash or an explosion even if such statements could only be obtained upon a pledge of confidence. Nor would it permit an agency to assure a scientist that the confidential data he submits on the environment, automobile safety, health or other matters would be withheld from any person who requested it. Even information subject to a doctor-patient or lawyer-client privilege would no longer be protected unless "commercial or financial." We conclude

--Substantive Aspects

I turn now to the several proposed amendments in Section 2 of S. 1142, which would revise exemptions 2, 4, 6 and 7 of the Act.

1. Section 2(a) would amend the second exemption by restricting it solely to internal personnel practices, thereby excluding from its scope of protection operating rules, guidelines and manuals of procedure for government employees. We believe it is vital that this exemption encompass certain internal operating instructions, the disclosure of which would unduly impede the operations of an agency. An agency cannot negotiate contracts effectively if its instructions to its negotiators are not kept confidential. Nor can an agency effectively investigate the degree of compliance with regulatory requirements if its operating procedures or its standards for determining when to conduct unannounced inspections are publicized. Within our own Department, the FBI's procedures for protecting the lives of kidnap victims or for dealing with aircraft hijackers must remain secret. Although we believe that exemption 2, as now written should be interpreted to protect such operating rules, an amendment of exemption 2 that clearly provides for such protection is desirable.

to "Executive security classifications . . . at the insistence of anyone who might seek to question them." 93 S.Ct. at 833. We oppose this attempt to overrule legislatively the Mink decision simply because the courts, as they themselves have recognized, are not equipped to subject to judicial scrutiny Executive determinations that certain documents if disclosed would injure our foreign relations or national defense. As the Court of Appeals said in Epstein v. Resor, 421 F.2d 930 (9th Cir. 1970), cert. denied, 398 U.S. 965 (1970), "the question of what is desirable in the interest of national defense and foreign policy is not the sort of question that courts are designed to deal with." In C. & S. Air Lines v. Waterman Corp., 333 U.S. 103 (1948), the Supreme Court was more explicit:

[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

that whenever functions entrusted to government reasonably require information from sources which legitimately expect confidential treatment for such information, the government must be able to promise such treatment and thereafter honor its promise -- a citizen must be able to confide in his government. For these reasons, we endorse the amendment to the fourth exemption presented by the American Bar Association to the Subcommittees during these Hearings.

3. Section 2(c) would amend the sixth or privacy Exemption by exempting medical, personnel and other privacy-type "records," rather than exempting such type of "files." We believe that the existing exemption should be interpreted as you propose in this amendment and that agencies should exercise due diligence in protecting information the disclosure of which would invade a person's privacy. Records which would otherwise be non-exempt should not be withheld merely because they are part of a personal file. In sum, although we do not believe that an amendment is necessary, we support the purpose the amendment seeks to achieve.

4. Section 2(d) would amend in several respects the seventh exemption, which denies public access to "investigatory files compiled for law enforcement purposes."

(F) jeopardize law enforcement personnel or their families or assignments:

5. Section 3 of the bill would require every agency to furnish any information or records to Congress upon written request. Because it bears directly on the authority of the President to withhold those documents the disclosure of which would be contrary to the public interest, I will defer discussion of this aspect of the bill until the section of my statement on "Executive privilege."

6. Section 4 of S. 1142 would require each agency to make an annual report to Congress on its administration of the Act. Although we believe that no legislation is necessary to require the submission of these reports, we do not object to the general purpose of the amendment. In fact, we respect this vigilance by Congress. In our detailed report to be submitted on this bill, we posit some suggestions to improve any such reporting system.

Finally, the provision excluding from the coverage of exemption 7 records which serve as a basis for public statements or regulations not only would inhibit rulemaking in important regulatory areas but also would restrict the flow of information to the public by discouraging official discussion of public business. For example, if a Justice Department spokesman announced that on the basis of an investigation by the FBI and the Criminal Division a grand jury would be convened to consider indictments, all of the investigatory reports apparently would no longer be protected by exemption 7. The protection of this information cannot depend on the continued silence of officials in making public statements or issuing regulations.

If a fresh approach is needed, we suggest that a modified version of the ABA's proposed amendment should be considered along the following lines:

The provisions of this section shall not be applicable to matters that are . . . (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency; Provided, That this exemption shall be invoked only while a law enforcement proceeding or investigation to which such files pertain is pending or contemplated, or to the extent that the production of such files would (A) interfere with law enforcement functions designed directly to protect individuals against violations of law, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) disclose the identity of an informant, (D) disclose investigatory techniques and procedures, (E) damage the reputation of innocent persons, or

The provision excluding scientific tests, reports or data from the protection of the exemption presents several problems. First, it could jeopardize the right to an impartial trial by permitting any requester to obtain and publish any incriminating scientific tests, such as ballistic reports, before the defendant is brought to trial. Second, because the Act does not permit an agency to determine whether a requester has a rational basis for seeking information, any one could insist on obtaining autopsy reports or other medical reports on victims of crime, which reports may not be exempt under exemption 6 if the victim is dead. Because this same information can be obtained in discovery proceedings, in which the need of the individual for the reports is a proper consideration, we do not believe an amendment is necessary.

The provision denying the protection of Exemption 7 to inspection records relating to health, safety or environmental protection would impede the efforts of agencies to take law enforcement action against offenders. It would permit offenders to obtain these records and thereby discover all of the details that an agency intends to use against them in any law enforcement action, whether civil or criminal.

The phrase "law enforcement purposes" would be changed to "any specific law enforcement purpose the disclosure of which is not in the public interest." We are uncertain what change this amendment contemplates. We believe, though, that any amendment should make clear that law enforcement agencies are permitted to maintain in confidence investigatory techniques and information that may be employed in subsequent investigations. Often information obtained in an investigation, particularly in fields such as organized crime and antitrust, can be used in other law enforcement proceedings. The information therefore must remain confidential in order to prevent a prospective defendant from knowing how much or how little information the agency has about him and, indeed, whether he is under investigation. The proposed amendment should be made sufficiently clear to accommodate these vital interests in law enforcement.

Section 2(d) of the bill would also limit the coverage of the exemption by excluding (i) scientific tests, (ii) inspection reports relating to health, safety or environmental protection, and (iii) any investigatory records which are also used as a basis for public policy statements or rulemaking. These changes would seriously impair the law enforcement capability of many agencies.

III

"Executive Privilege"

As the foregoing discussion indicates, Congress has by statute recognized that there are certain types of information that should not be publicly disclosed. The Freedom of Information Act reflects, in effect, legislative value judgments as to when the public interest--normally served by disclosure--is better served by non-disclosure. These are judgments which, in different contexts, have been recognized by all three branches of government.

Congress has concluded on various occasions that certain documents in its possession should not be disclosed under certain circumstances because the long-term interests of representative government are better served by non-disclosure. For example, the House resolved that no documentary evidence in its control may be taken from it by judicial process without its consent. H.R. Res. 427, 81st Cong., 2d sess. The Senate has taken a comparable position. Senate Rule XXX.

Similarly the courts have concluded that it is not appropriate for them to be the ultimate arbiter of what information the other two branches should disclose or not disclose.

"If a court could say to the Congress that it could use or could not use information in its possession, the independence of the Legislature would be destroyed and the constitutional separation of the powers of government invaded. Nothing is better settled than that each of the three great departments of government shall be independent and not subject to be controlled directly or indirectly by either of the others." Hearst v. Black, 87 F. 2d 68, 72 (D.C. App. 1936); see also, United States v. Reynolds, 345 U.S. 1, 8 (1953).

The Executive Branch, of course, also subscribes to the broadly recognized principle that the public interest is, at times, better served by non-disclosure. When all three branches agree with the required value judgment in a given set of circumstances, accommodation follows as a matter of comity. It is when there is disagreement that conflict arises--and has arisen since the days of Washington. In very rare instances the Executive, asserting a privilege grounded in the public interest, has decided to withhold

information or to require safeguards on disclosure. In recent years the shorthand term "Executive privilege" has come to identify this traditional area of separation of powers.

If I may, Messrs. Chairmen, I would like to probe beyond that term, which has become controversial and sometimes mischaracterized, to explore with you the basic value judgments that must be made--not only by the Executive, but at times by all three branches of government.

We are agreed, I think, that our form of government presupposes openness and an informed citizenry. This is reflected by the First Amendment. We are also agreed, I hope, that there are, on occasion, circumstances which dictate that public exposure of certain data be at least deferred if not denied--not to deceive the public, but to better serve it.

From my own experience in the State Department, I know that there are times when premature disclosure of delicate negotiations or the discussions and instructions preceding them cannot be spread upon a public record. I know too

that Congress has recognized this. A time-honored formula for resolutions of inquiry to the Department of State has requested that information be furnished "if not incompatible with the public interest." See Cannon, Procedure in the House of Representatives, H. Doc. 610, 87th Cong., 2d sess., p. 219.

The Congress has staunchly defended the right of its members to secure the candid advice and assistance of legislative aides and has, I think, recognized that this necessary adjunct to the exercise of its constitutional responsibilities is equally necessary to the effective functioning of the other branches. The courts share this respect for the need of candid advice, Soucie v. David, 448 F. 2d 1067, 1080 (D.C. Cir. 1971) (Wilkey, J. concurring), as does the Executive Branch.

Another area in which the need to preserve secrecy is well understood, not only by all branches of the government, but by the public as well, is the security of military secrets. While "a slip of the lip may sink a ship" is almost

a forgotten slogan, the concept behind it is still valid and accepted. See S. Rept. 1761, 86th Cong., 2d sess., p. 22.

Today, more than ever, the value of personal privacy is recognized and zealously guarded by the people of this country. Yet it is this area, perhaps above all others, that presents conflicts for the people and their government. The desire to know as much as possible coupled with the technology that makes accumulation of vast stores of knowledge possible also engenders problems. Historically, we have been confronted with the fair-trial, free-press problem, but television adds greater dimensions. We have always had the question of governmental disclosure of investigative reports without due process checks and balances. Present large-scale dissemination capabilities exacerbate the problem by endangering both personal privacy and the confidentiality that may be necessary to effective law enforcement.

Given our form of government it is not surprising that although sharing basic values--the survival of our nation,

the keeping of commitments, the protection of the individual-- we can nevertheless disagree as to how these values are best served. What is perhaps surprising is how few the real disputes have been among the three branches of government in applying these values to concrete situations. It is a tribute to the spirit of comity that throughout history there have been so few true "invocations of executive privilege."

The legislation before these subcommittees, section 3 of S. 1142, S. 1923 and S.Con.Res. 30, attempts in various ways to provide a permanent, and more or less rigid, accommodation of these varying value judgments. Aside from the constitutional issues, which have previously been discussed in testimony by the Department's witnesses, I think it most unwise to attempt to legislate rigid solutions for what must always remain flexible in nature.

Almost 200 years of history has demonstrated very few serious and insoluble conflicts between Congress and the Executive over the question of what information must be disclosed to Congress. On the contrary, our history shows

consistent agreement on values, with only occasional conflicts on specifics, over a period of 184 years. Experience suggests that we have chosen comity as the wiser course. I would not turn away from that history; together we should build on it.

As a basic legal matter, attempts to define what congressional requests for information rise to the level of a constitutional confrontation are both difficult and hazardous. I urge the Congress not to force the issue. Our history tells us it is not necessary; surely, then, it is not desirable.

On a personal basis, I have a strong desire to reach accommodations and to be forthcoming in regard to public knowledge of the public business. I believe my record of public service demonstrates that I have translated that desire into practice. It is in that spirit that I have undertaken my new position.

IV

**National Security Information:
Classification and Sanctions**

Finally, Mr. Chairman, I would like to discuss briefly the need for constraints on the dissemination of classified information. As the Freedom of Information Act recognizes, there is genuine need to protect from being publicized information that bears directly on the effectiveness of our national security and the successful conduct of our foreign relations.

Even in times of peace, military secrecy is essential. The disclosure of contingency plans or weapons system capabilities could disturb the balance of power by helping other nations develop countermeasures to neutralize our defenses or eliminate our strategic advantages. The recent confidential discussions between Presidential Assistant Henry Kissinger and officials of the People's Republic of China illustrate the vital role that secrecy may also play in the conduct of foreign relations.

Our task, then, is to accommodate the interests of the government, in behalf of the public, in keeping some information secret with the general public's need to be informed. All democratic governments face this tension between the need for public accountability and the imperatives of national security.

This tension is, of course, highlighted by the attempt to define criminal offenses involving the unlawful dissemination of such national security information. This is the focus of certain provisions of two bills, S. 1 and S. 1400, presently pending in the Senate. I have briefly examined the "national security" provisions of those bills, but I have not had an opportunity to consider fully the substantive nature of the proposed legislation and its effect on current law. I do wish, however, to make some general comments on the considerations relevant to any effort to define the circumstances under which the disclosure of legitimately secret government information should be a criminal offense.

Basically, I believe that a carefully designed system of criminal sanctions is appropriate where the information is genuinely and directly related to the maintenance of our national defense or to the successful conduct of foreign relations. Any such system must accommodate three general--and often conflicting--objectives.

The first objective, of course, is to deter and, where necessary, to punish unauthorized disclosure of highly sensitive information in those situations where the national security requires it. The most troublesome problems inherent in achieving this objective involve the drawing of distinctions between types of offenses and the gradations among the penalties appropriate to each.

The second objective of any system of criminal sanctions should be the elimination so far as possible of the risk that such sanctions will inhibit the proper role of a free press or free expression under our Constitution. The system should focus primarily on the disclosure of secret government information by persons who are authorized possessors of it and who breach the trust the public reposes in them. Such persons are those upon whom the duty to protect the national interest is primarily imposed. A secondary and more limited function of the system, except where espionage is involved, should be to define those types of receipt and dissemination by persons not entrusted with the information which should appropriately be made subject to criminal sanctions.

A third objective should be to minimize the risk of unwarranted prosecutions for disclosing information that either should never have been classified in the first place or was no longer properly classified at the time of its disclosure. Apart from the exercise of sound prosecutorial discretion--which should always apply--one possible approach would be to permit the defendant in such a case to seek to show that the violation did not in fact harm a significant national interest. The difficulty, of course, with allowing this particular affirmative defense is that it would enable the defendant to take advantage of post-disclosure developments,

notwithstanding the fact that the considerations which led to the classification of the information disclosed were still, at the time of disclosure, valid and reasonable.

To obviate this objection, the defendant could alternatively be allowed to defend himself on the ground that the classification was improper ab initio, or at least as of the date of disclosure. This approach, while eliminating one difficulty, leaves open another serious question: how should the propriety of the classification be decided? To put the government to its proof in open court would in many if not most instances require making public circumstances justifying the classification whose publication might do more harm to the national interest than the disclosure for which the defendant was being prosecuted. One way to meet this difficulty is to establish a process by which the court would decide the issue in camera. It has also been suggested that the decision be made by some specially constituted body.

Quite apart, however, from the question of adjudicative process, there is the question of whether the issue is appropriately subject to adjudication. The Supreme Court in C. & S. Air Lines v. Waterman Corp., as cited earlier in my testimony, stated: "[T]he very nature of executive decisions as to foreign policy is political, not judicial. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to

judicial intrusion or inquiry."

This, in fact, is the concern which underlies the section of S. 1400 providing that "It is not a defense to a prosecution that the classified information was improperly classified at the time of its classification or at the time of the offense." [S1124(d)]. To me there is considerable force to this concern. By this route, at any rate, I am led to want to explore further the possibility of assuring that administrative remedies are available to an individual who wishes to challenge the legitimacy of a classification. It may well be that preclusion of an affirmative defense is only justified when adequate procedures exist for appeal of classification. It seems important, moreover, that this chain of appeal extend beyond the agency where the classification originates or where the party wishing to challenge it is employed.

Just such an administrative process is, as a matter of fact, now in operation, though it is of very recent origin. It provides for better intra-agency appeal and appeal beyond agency boundaries to the Interagency Classification Review Committee.

Recognizing that the classification system which first emerged in World War I and grew to maturity in World War II

had a tendency to emphasize secrecy at the expense of the public's "right to know," the President, in order to offset this tendency, issued Executive Order No. 11652 on March 8 of last year. The purpose of this Order is to foster the widest dissemination of information not required to be safeguarded in the interest of national defense and to prevent unauthorized disclosure of information properly withheld from the public domain.

There are a number of features in the Executive Order specifically designed to check any tendency toward overclassification. I would like to note them briefly.

First, the Order significantly reduces the number of agencies and officials which have authority to classify.

Second, the Order establishes a "General Declassification Schedule" designed to declassify documents automatically, without review, in a relatively short period of time.

Third, the Order provides that the originator of the classification must re-examine the propriety of the classification of the information he classified when requested by a holder of the classified information. A determination that the classification is appropriate can be appealed to a review committee which is established in each department to monitor the implementation of the Order.

Fourth, the Executive Order also establishes procedures under which a private individual can request that certain documents be declassified so that he may obtain access to them. Appropriate appellate procedures are provided to permit the requester to appeal any adverse determination.

Fifth, the Order requires that classified material identify on its face the classifying officer, and provides that "repeated abuse of the classification process shall be grounds for an administrative reprimand."

Finally, an Interagency Classification Review Committee is established to consider not only requests for declassification originally denied on the departmental level but also complaints from people within or without the government with respect to the administration of the Order.

In sum, the basic thrust of the Executive Order is to require Executive officials to classify less, to expedite declassification, and to provide better protection for that information which truly requires protection. I believe that this substantially revised system of classification will go a long way toward making more information available to the public more quickly.

In conjunction with this discussion of the classification system, I would also like to discuss S. 1520, which would establish a seven-member commission to study current laws and practices relating to the classification of documents and to

recommend what, if any, modifications may be necessary.

The commission would consist of two Senators, two Representatives, and three public members, at least one of whom must be a newsman.

We believe that the creation of such a commission would be premature. Executive Order No. 11652 was the culmination of a comprehensive review of classification policies and procedures by an interagency committee and has been in operation for only a little more than one year. I have already mentioned some of the progress being made toward tightening the classification process. The Interagency Committee is continuing to press for further progress. Until Executive Order No. 11652 has been in operation for a longer period, it seems unlikely that an accurate evaluation of its effectiveness can be made.

Aside from the foregoing, I note another major flaw in S. 1520. While the bill would create a commission to study the effectiveness of and need for changes in the classification law and practices within the Executive Branch, it contains no provision for Executive Branch representation on the commission. Since the people who regularly deal with the classification of documents and with declassification procedures have had valuable practical experience in the problems involved, it seems important that any group studying the subject should take advantage of that experience.

V.

In conclusion, Messrs. Chairmen, we deal here today with a field of law in which the interests are of the highest rank and necessity. It is indeed an unfortunate paradox that such vital interests as personal privacy and national defense sometimes conflict with the equally vital interest of the public in being informed as to the workings of the government. I hope these hearings will lead both the Executive and Legislative branches to a workable formula that strikes the proper balance.

MEMORANDUM

TO: Marvin Krislov
FR: Adam L. Rosman
RE: Request for information from House Committee on
Government Operations under 5 U.S.C. § 2954.
Date: August 4, 1994

You have asked whether the White House must provide information on White House travel, requested by the ranking minority member of the House Committee on Government Operations pursuant to 5 U.S.C. § 2954.

I. The Statute

Title 5 of the United States Code concerns "Government Organization and Employees." § 2954 provides:

§ 2954. Information to committees of Congress on request.

An Executive agency, on request of the Committee on Government Operations of the House of Representatives, or of any seven members thereof, or on request of the Committee on Government [Affairs] of the Senate, or any five members thereof, shall submit any information requested of it relating to any matter within the jurisdiction of the committee.

(Emphasis added.)

On its face, the statute requires any "Executive Agency" to submit "any information requested" by the House Committee on Government Operations.

II. Issues

A. In general.

There is no relevant caselaw or legislative history on § 2954. However, the Justice Department's Office of Legal Counsel (OLC) has expressed opinions on analogous statutes, discussed below.

B. Is the White House an "Executive Agency"?

§ 2954 requires "Executive agencies" to provide information to the House Committee on Government Operations. In § 105, an

DETERMINED TO BE AN ADMINISTRATIVE

MARKING INITIALS: M DATE: 2/18/73

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~~Privileged and Confidential~~

July 12, 1994

MEMORANDUM FOR J. VERONICA BIGGINS
ASSISTANT TO THE PRESIDENT AND DIRECTOR OF
PRESIDENTIAL PERSONNEL

FROM: BETH NOLAN
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: SES Appointments At Independent Regulatory Agencies

This responds to your request of March 31, 1994 for an opinion regarding the authority of the Office of Presidential Personnel in appointing, reviewing or approving non-career candidates below the PAS level at independent regulatory agencies. Specifically, you asked what restrictions are placed upon your office by Section 3392(d) of the Civil Service Reform Act of 1978, 5 U.S.C. 3392(d)[hereinafter the Act]. This memorandum briefly reviews the requirements of the statute and offers an opinion as to the three questions presented.

I. What authority does the Office of Presidential Personnel have to appoint, review or approve employees below the PAS level at independent regulatory agencies?

The authority of the Office of Presidential Personnel is restricted in the case of SES and Schedule C positions in independent regulatory agencies. Section 3392(d) of the Civil Service Reform Act of 1978 provides in its entirety:

Appointment or removal of a person to or from any Senior Executive Service position in an independent regulatory commission shall not be subject, directly or indirectly, to review or approval by any officer or entity within the Executive Office of the President.

5 U.S.C. 3392(d). According to our research, this provision has not been interpreted by any court or by the Office of Legal Counsel in the Department of Justice.

The legislative history of this provision clearly states that this section was included "in order

to ensure that independent regulatory agencies are not subject to political control in the appointment of their top non-career executives." The committee felt that this insulation from the White House in appointments is necessary to maintain the independence of these agencies, as intended by the Congress. 1978 U.S. Code Cong. and Adm. News 2723, 2798.

Based on the language of the statute and its legislative history, we conclude the following:

1. The statute only applies to agencies that are both independent and regulatory. For example, agencies that are independent, but do not regulate, such as AID or NASA, are not governed by this statute. A further analysis of this distinction follows below.

2. The statute applies to Schedule C positions as well as SES. While the statute only refers to SES positions, the intent of Congress, as expressed in the legislative history quoted above, suggests the statute also applies to Schedule C positions. Since Schedule C positions are usually subordinate to SES positions, the rationale for making agencies independent would also apply to them. Allowing the Executive Office of the President to interfere in Schedule C appointments would subject the agency to the same political control from which Congress was trying to insulate it at the SES level.

II. 5 U.S.C. 3392(d) makes reference to independent regulatory commissions. Are independent regulatory commissions the same as independent regulatory agencies?

For purposes of this statute, there is no distinction. While the statute specifically designates commissions, the legislative history refers to "agencies." The Act does not define "commission," but defines "agency" as an executive agency and specifically excludes government corporations as well as other specific government entities.¹ Black's Law

¹ For purposes of section 3392(d), 5 U.S.C. 3391 refers to 5 U.S.C. 3132(a) for the definition of "agency."

5 U.S.C. 3132(a)(1) and (c) states:

(a) For the purpose of this subchapter--

(1) "agency" means an Executive agency, except a Government corporation and the General Accounting Office, but does not include--

(A) any agency or unit thereof excluded from coverage by the President under subsection (c) of this section; or

(B) the Federal Bureau of Investigation, the Drug Enforcement Administration, the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, Department of

Dictionary equates "agency" with "any department, independent establishment, commission, administration, authority, board or bureau of the United States." Thus, the terms are interchangeable for Section 3392(d) purposes, with the exceptions of government corporations and the specified exclusions.

III. To which Federal Agencies does this apply? If this authority varies from agency to agency please list each independent regulatory agency and the details of the authority for each.

As discussed above, 5 U.S.C. 3392(d) only applies to those agencies that are both independent and regulatory. In making this determination we looked for guidance to the original statutes authorizing the agencies, known as the enabling legislation. If the enabling legislation for a particular entity indicates that it is both independent and regulatory, then Section 3392(d) does apply. The statutes for the various agencies are rarely that specific, however, and in many cases we had to look beyond the language of the legislation. In cases where the language was ambiguous, we made determinations based on the criteria described below.

1. Independent. An agency could be deemed to be "independent" if the enabling statute specifically states the agency is independent, if the language shows the agency is not a part of any department² or if political control is restricted.³ This general rule, however, has

Defense intelligence activities ... and, as determined by the President, an Executive agency, or unit thereof, whose principal function is the conduct of foreign intelligence or counterintelligence activities;

(C) the Federal Election Commission; or

(D) the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Housing Finance Board, the Resolution Trust Corporation, the Farm Credit Administration, the Office of Federal Housing Enterprise Oversight of the Department of Housing and Urban Development, and the National Credit Union Administration; ...

(c) An agency may file an application with the Office [of Personnel Management] setting forth reasons why it, or a unit thereof, should be excluded from the coverage of this subchapter....

² 5 U.S.C. 104 states:

For the purpose of this title, "independent establishment" means--

(1) an establishment in the executive branch (other than the United

not always been the final determination. For instance, the Environmental Protection Agency, based on its enabling legislation, appears to be an independent agency, but the District of Columbia Circuit Court of Appeals has held that the EPA has never been considered independent.⁴

2. Regulatory. While no definition for "regulatory" is provided in Title 5, enabling statutes usually indicate whether an entity is granted the power to regulate. Black's Law Dictionary defines "regulate" as "to fix, establish, or control; to adjust by rule, method, or established mode; to direct by rule or restriction; to subject to governing principles or laws." Hence, an agency must have the power to promulgate rules that affect people or entities outside the agency to be regulatory.

3. Statutory exemptions/exclusions. As noted above, government corporations and certain government entities were excluded from the definition of "agency." Therefore, these entities are not covered by the statute even if they are independent and regulatory because they are not agencies.

Three appendices (A, B and C) containing our determinations have been attached. Appendix A represents those agencies in which the Executive Office of the President may not review or approve SES or Schedule C candidates. Appendix B includes those agencies in which the Executive Office of the President may review or approve. Appendix C lists those government entities (i.e. government corporations) that were exempted or excluded by the Act. These lists are not exhaustive.

Attachments

States Postal Service or the Postal Rate Commission) which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment; and
(2) the General Accounting Office.

³ The U.S. Supreme Court has indicated that restrictions on the President's removal power over agency officers is a factor in determining an agency's independence. See e.g., Bowsher v. Synar, 106 S. Ct. 3181 (1986); Buckley v. Valeo, 424 U.S. 1 (1975); and Humphrey's Executor v. United States, 295 U.S. 602 (1935).

⁴ Sierra Club v. Costle, 657 F.2d 298, 406 (D.C. Cir. 1981).

MEMORANDUM

TO: Clarissa Cerda

FR: Adam L. Rosman

RE: Preliminary Information on the Federal Advisory
Committee Act (FACA)

Date: July 25, 1994

As we discussed, this presents preliminary information on the courts' interpretation of "advisory committee" under the Federal Advisory Committee Act (FACA). Under Nader v. Baroody, 396 F.Supp 1231 (D.D.C 1975) and cases following, a group will be considered an "advisory committee" subject to FACA if it meets all or most of the following characteristics:

1. Fixed membership, usually selected by a Federal official or determined on the basis of Federal law;
2. Established by a Federal official or on a the basis of Federal law;
3. A defined purpose of providing advice regarding a particular subject or subjects;
4. An organizational structure (e.g. officers) and a staff;
5. Regular meetings.

This analysis is preliminary only and is not a final legal memorandum.

MEMORANDUM

TO: Marvin Krislov
FR: Adam L. Rosman
RE: Request for information from House Committee on
Government Operations under 5 U.S.C. § 2954.
Date: August 4, 1994

This outlines issues with regard to 5 U.S.C. § 2954. Specifically, you have asked whether the White House must respond to a request for information from the ranking minority member of the House Committee on Government Operations pursuant to 5 U.S.C. § 2954.

I. The Statute

Title 5 of the United States Code concerns "Government Organization and Employees." § 2954 provides:

§ 2954. Information to committees of Congress on request.

An Executive agency, on request of the Committee on Government Operations of the House of Representatives, or of any seven members thereof, or on request of the Committee on Government [Affairs] of the Senate, or any five members thereof, shall submit any information requested of it relating to any matter within the jurisdiction of the committee.

On its face, the statute requires any "Executive Agency" to submit "any information requested" by the House Committee on Government Operations.

II. Issues

There has been no relevant caselaw interpreting § 2954 Is the White House and "Executive Agency"?

Assuming this

DISCUSSION

1. Separation of powers issue.

Do a general "we won't give it to you argument" --take it off the OLC ops.

Issues.

1. Is the White House an "executive agency"
2. Did the request come from "seven members of the committee?"
3. Is the information sought "within the jurisdiction of the committee?"

[Maybe. Arguably no.] 5 U.S.C. § 2954 and similar statutes have been construed narrowly by the executive branch so as not to impinge upon the constitutional prerogatives of the president. The White House could argue that the information sought is

STATUTE

Notes

utes and Statutes at Large

1. 744, § 10, 60 Stat. 809.

2. § 4, 63 Stat. 579 (former 5), which provides "Except to inconsistent with the provisions of title IV of the Act [National Security Act] as now or hereafter shall be applicable to the Department of Defense" is omitted from title is not repealed.

changes are made to conform definitions applicable and the title as outlined in the report.

537, 5751 and 6322 of this title.

tnesses § 35 et seq.

S.Ct. 272, 423 U.S. 927, 46 L.Ed.

who had twice previously been by Internal Revenue Service to be paid fees for past as well as for present one be- ended over records for inspec-

this section providing that wit- entitled to fees and allowances procured to appear at hearing- eney, proceedings before Inter- ne Service officer for purpose ng into liability for tax consti- "earing" within meaning of this ad witnesses summoned because knowledge of affairs of certain and taxpayer whose tax liabil- ader investigation, were entitled s fees and mileage. Roberts v. 114 S.Ct. 397 F.2d 968.

at investigations conducted by al Revenue Service for the pur- using a taxpayer's liability ntered informal proceedings nformation to govern fu- as distinguished from formal hearings which involved par- of law and of fact, and result in action that affect the rights of the

parties; therefore, the authorization in former section 95a of this title [now subsec. (b)(2) of this section] for pay- ment of mileage and fees of witnesses who were summoned to appear at formal government hearings might not be re- garded as applicable to witnesses who were summoned to appear at informal and private tax investigations. 1966, 45 Comp.Gen. 654.

3. Enforcement of subpoena

Claim for witness fees and mileage does not insulate taxpayer from enforce- ment of Internal Revenue Service subpoe- na. U. S. v. Awerkamp, C.A.III.1974, 497 F.2d 832.

SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

Historical Note

Popular Name. The provisions of this subchapter and chapter 7 of this title were originally enacted by Act June 11, 1946, c. 324, 60 Stat. 237, popularly known as the "Administrative Procedure Act".

That Act was repealed as part of the general revision of this title by Pub.L. 89-554 and its provisions incorporated into this subchapter and chapter 7 here- of.

§ 551. Definitions

For the purpose of this subchapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

— (A) the Congress;

— (B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be ad- mitted as a party, in an age- proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license;
or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

part of an agency statement
and future effect designed
law or policy or describing
practice requirements of an
prescription for the future
structures or reorganiza-
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ive action;

of an agency—

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privilege, ex-

petition

(12) "agency proceeding" means an agency process as de-
fined by paragraphs (5), (7), and (9) of this section;

(13) "agency action" includes the whole or a part of an agen-
cy rule, order, license, sanction, relief, or the equivalent or de-
nial thereof, or failure to act; and

(14) "ex parte communication" means an oral or written
communication not on the public record with respect to which
reasonable prior notice to all parties is not given, but it shall
not include requests for status reports on any matter or pro-
ceeding covered by this subchapter.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 381; Pub.L. 94-409, § 4(b),
Sept. 13, 1976, 90 Stat. 1247.

Historical and Revision Notes

Derivation:	United States Code	Revised Statutes and Statutes at Large
(1)	5 U.S.C. 1001(a)	June 11, 1946, ch. 324, § 2(a), 60 Stat. 237. Aug. 8, 1946, ch. 870, § 302, 60 Stat. 918. Aug. 10, 1946, ch. 951, § 601, 60 Stat. 903. Mar. 31, 1947, ch. 30, § 6(a), 61 Stat. 37. June 30, 1947, ch. 163, § 210, 61 Stat. 201. Mar. 30, 1948, ch. 161, § 301, 62 Stat. 99.
(2)-(13)	5 U.S.C. 1001 (less (a))	June 11, 1946, ch. 324, § 2 (less (a)), 60 Stat. 237.

Explanatory Notes

In paragraph (1), the sentence "Nothing in this Act shall be construed to repeal delegations of authority as provided by law." is omitted as surplusage since there is nothing in the Act which could reasonably be so construed.

In paragraph (1)(G), the words "or naval" are omitted as included in "military".

In paragraph (1)(H), the words "functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947" are omitted as executed. Reference to the "Selective Training and Service Act of 1940" is omitted as that Act expired Mar. 31, 1947. Reference to the "Sugar Control Extension Act of 1947" is omitted as that Act expired on Mar. 31, 1948. References to the "Housing and Rent Act of 1947, as amended" and the "Veterans' Emergency Housing Act of 1946" have been consolidated as they are related. The reference to former section 1641(b)(2) of title 50, appendix, is retained notwithstanding its repeal by § 111(a)(1) of the Act of Sept. 21, 1961, Pub.L. 87-256, 75 Stat. 538, since § 111(c) of the Act provides that a reference in other Acts to a provision of law repealed by § 111(a) shall be considered to be a reference to the appropriate provisions of Pub.L. 87-256.

In paragraph (2), the words "of any character" are omitted as surplusage.

In paragraph (3), the words "and a person or agency admitted by an agency as a party for limited purposes" are substituted for "but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes".

In paragraph (9), a comma is supplied between the words "limitation" and "amendment" to correct an editorial error of omission.

In paragraph (10)(C), the words "of any form" are omitted as surplusage.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

1976 Amendment. Par. (14). Pub.L. 94-409 added par. (14).

Effective Date of 1976 Amendment. Amendment by Pub.L. 94-409 effective 180 days after Sept. 13, 1976, see section 6 of Pub.L. 94-409, set out as a note under section 552b of this title.

Legislative History. For legislative history and purpose of Pub.L. 94-409, see 1976 U.S.Code Cong. and Adm.News, p. 2183.

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§ 2954. Information to committees of Congress on request

An Executive agency, on request of the Committee on Government Operations of the House of Representatives, or of any seven members thereof, or on request of the Committee on Government Operations of the Senate, or any five members thereof, shall submit any information requested of it relating to any matter within the jurisdiction of the committee.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 413.

Historical and Revision Notes

Derivation:	United States Code	Revised Statutes and Statutes at Large
	5 U.S.C. 105a	May 29, 1928, ch. 901, § 2, 45 Stat. 996.

Explanatory Notes

The words "Executive agency" are substituted for "executive department and independent establishment" in view of the definition of "Executive agency" in section 105.

363

[nothing more]

§ 105. Executive agency

For the purpose of this title, "Executive agency" means an executive department, a Government corporation, and an independent establishment.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 379.

Historical and Revision Notes

Reviser's Note. The section is supplied to avoid the necessity for defining "Executive agency" each time it is used in this title.

Library References

United States Code § 31.

C.J.S. United States § 31.

17

[nothing more]

PHOTOCOPY
PRESERVATION**§ 101. Executive departments**

The Executive departments are:

- The Department of State.
- The Department of the Treasury.
- The Department of Defense.
- The Department of Justice.
- The Department of the Interior.
- The Department of Agriculture.
- The Department of Commerce.
- The Department of Labor.
- The Department of Health and Human Services.
- The Department of Housing and Urban Development.
- The Department of Transportation.
- The Department of Energy.
- The Department of Education.
- The Department of Veterans Affairs.

(As amended Pub.L. 95-91, Title VII, § 710(a), Aug. 4, 1977, 91 Stat. 609; Pub.L. 96-88, Title V, § 508(b), Oct. 17, 1979, 93 Stat. 692; Pub.L. 100-527, § 13(b), Oct. 25, 1988, 102 Stat. 2643.)

§ 103. Government corporation

For the purpose of this title—

- (1) "Government corporation" means a corporation controlled by the Government;
- (2) "Government corporation" means a corporation owned by the Government.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 379.

§ 104. Independent establishment

For the purpose of this title, "independent establishment" means—

- (1) an establishment in the executive branch of the Government which is not an Executive department or an Executive agency;

Executive Department, a Government corporation, and an independent establishment.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 379.

Historical and Revision Notes

Reviser's Note. The section is supplied to avoid the necessity for defining "Executive agency" each time it is used in this title.

Library References

United States $\Rightarrow$ 31.

C.J.S. United States § 31.

17

[Nothing more]

§ 101. Executive departments

The Executive departments are:

- The Department of State.
- The Department of the Treasury.
- The Department of Defense.
- The Department of Justice.
- The Department of the Interior.
- The Department of Agriculture.
- The Department of Commerce.
- The Department of Labor.
- The Department of Health and Human Services.
- The Department of Housing and Urban Development.
- The Department of Transportation.
- The Department of Energy.
- The Department of Education.
- The Department of Veterans Affairs.

(As amended Pub.L. 95-91, Title VII, § 710(a), Aug. 4, 1977, 91 Stat. 609; Pub.L. 96-88, Title V, § 508(b), Oct. 17, 1979, 93 Stat. 692; Pub.L. 100-527, § 13(b), Oct. 25, 1988, 102 Stat. 2643.)

HISTORICAL AND STATUTORY NOTES

1988 Amendment

Pub.L. 100-527, § 13(b), included the Department of Veterans Affairs.

1979 Amendment

Pub.L. 96-88 substituted "Department of Health and Human Services" for "Department of Health, Education, and Welfare" and inserted "The Department of Education."

1977 Amendment

Pub.L. 95-91 included the Department of Energy.

Effective Date of 1988 Amendment

Amendment by Pub.L. 100-527, effective March 15, 1989, except as otherwise provided therein, see section 18 of Pub.L. 100-527, set out as a note under section 201 of Title 38, Veterans' Benefits.

1

§ 103. Government corporations

For the purpose of this title—

(1) "Government corporation" means a corporation controlled by the Government

(2) "Government controlled corporation" means a corporation owned by the Government

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 379

§ 104. Independent establishments

For the purpose of this title, "independent establishment" means—

(1) an establishment in the executive branch of the Government which is not an Executive department, Government corporation, or part thereof

(2) the General Accounting Office.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 379; Pub.L. 91-354, Aug. 12, 1970, 84 Stat. 775.

PHOTOCOPY
PRESERVATION

Explanatory Notes

The words "Executive agency" are substituted for "executive department and independent establishment" in view of the definition of "Executive agency" in section 105.

363

[Nothing more]

PHOTOCOPY
PRESERVATION

§ 105. Executive agency

For the purpose of this title, "Executive agency" means an Executive department, a Government corporation, and an independent establishment.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 379.

Historical and Revision Notes

Reviser's Note. The section is supplied to avoid the necessity for defining "Executive agency" each time it is used in this title.

Library References

United States § 31.

C.J.S. United States § 31.

17

[Nothing more]

101. Executive departments

The Executive departments are:

The Department of State.
The Department of the Treasury.
The Department of Defense.
The Department of Justice.
The Department of the Interior.
The Department of Agriculture.
The Department of Commerce.
The Department of Labor.
The Department of Health and Human Services.
The Department of Housing and Urban Development.
The Department of Transportation.
The Department of Energy.
The Department of Education.
The Department of Veterans Affairs.

as amended Pub.L. 95-91, Title VII, § 710(a), Aug. 4, 1977, 91 Stat. 609; Pub.L. 96-88, Title V, § 508(b), Oct. 17, 1979, 93 Stat. 692; Pub.L. 100-527, § 13(b), Oct. 25, 1988, 102 Stat. 2643.)

HISTORICAL AND STATUTORY NOTES

1988 Amendment

Pub.L. 100-527, § 13(b), included the Department of Veterans Affairs.

1977 Amendment

Pub.L. 95-91 included the Department of Energy.

Effective Date of 1988 Amendment

1979 Amendment

§ 103. Government corporation

For the purpose of this title—

- (1) "Government corporation" means a corporation owned or controlled by the Government of the United States; and
- (2) "Government controlled corporation" does not include a corporation owned by the Government of the United States.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 378.

[Nothing more]

§ 104. Independent establishment

For the purpose of this title, "independent establishment" means—

- (1) an establishment in the executive branch (other than the United States Postal Service or the Postal Rate Commission) which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment; and
- (2) the General Accounting Office.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 379; Pub.L. 91-375, § 6(c)(2), Aug. 12, 1970, 84 Stat. 775.

[Nothing more]

Historical and Revision Notes

Derivation:	United States Code	Revised Statutes and Statutes at Large
(a)	5 U.S.C. 17b	Aug. 14, 1937, ch. 624, 50 Stat. 640. Nov. 22, 1943, ch. 303, 57 Stat. 591.
(b)	5 U.S.C. 17c	Mar. 28, 1955, ch. 17, 69 Stat. 14.

Explanatory Notes

In subsection (a), the word "civilian" is omitted as unnecessary because of the definition of "employee" in section 2105. The words "Executive agency" are coextensive with and substituted for "executive departments and independent establishments of the United States" because of the definition of "Executive agency" in section 105. The words "the Secretary of a military department with respect to an employee of his department" are inserted to preserve the application of the source law. Before enactment of the National Security Act Amendments of 1949 (63 Stat. 578), the Department of the Army, the Department of the Navy, and the Department of the Air Force were Executive departments. The National Se-

curity Act Amendments of 1949 established the Department of Defense as an Executive Department including the Department of the Army, the Department of the Navy, and the Department of the Air Force as military departments, not as Executive departments. However, the source law for this section, which was in effect in 1949, remained applicable to the Secretaries of the military departments by virtue of section 12(g) of the National Security Act Amendments of 1949 (63 Stat. 591), which is set out in the reviser's note for section 301.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

§ 2906. Oath; custody

The oath of office taken by an individual under section 3331 of this title shall be delivered by him to, and preserved by, the House of Congress, agency, or court to which the office pertains.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 412.

Historical and Revision Notes

Derivation:	United States Code	Revised Statutes and Statutes at Large
	5 U.S.C. 21	R.S. § 1750.

Explanatory Notes

Standard changes are made to conform style of this title as outlined in the preface to the report.

SUBCHAPTER II—REPORTS

§ 2951. Reports to the Civil Service Commission

The President may prescribe rules which shall provide, as nearly as conditions of good administration warrant, that—

(1) the appointing authority notify the Civil Service Commission in writing of the following actions and their dates as to each individual selected for appointment in the competitive service from among those who have been examined—

- (A) appointment and residence of appointee;
- (B) separation during probation;
- (C) transfer;
- (D) resignation; and
- (E) removal; and

(2) the Commission keep records of these actions.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 412.

Historical and Revision Notes

Derivation:	United States Code	Revised Statutes and Statutes at Large
	5 U.S.C. 633(2)8 (less last sentence)	Jan. 16, 1883, ch. 27, § 2(2) 8 (less last sentence), 22 Stat. 404.

Explanatory Notes

The authority of the President to prescribe rules is added on authority of former section 633(1), which is carried into section 3302.

In paragraph (1), the word "authority" is substituted for "power". The words "or employment" are omitted as included within "appointment".

In paragraph (1) (B), the words "separation during probation" are substituted for "of the rejection of any such person after probation". The words "rejection . . . after probation" refer to a rejection, i. e., separation, after a portion of the probationary period has been served but before the end of the probationary period. This is so because an in-

dividual can be rejected only during the probationary period. After he has completed the probationary period, he can be removed only under procedures governing removals from the competitive service, and removals of this nature are covered by paragraph (E).

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

Official Personnel Folders. Notice required by this section as part of Official Personnel Folders, see Ex.Ord.No.10561, Sept. 14, 1954, 19 F.R. 5963, set out as a note under section 1302 of this title.

Cross References

President's power to grant exceptions from provisions of this section, see section 3302 of this title.

Library References

Officers ⇐ 11.4.

C.J.S. Officers § 34.

§ 2952. Time of making annual reports

Except when a different time is specifically prescribed by statute, the head of each Executive department or military department shall make the annual reports, required to be submitted to Congress, at the beginning of each regular session of Congress. The reports shall cover the transactions of the preceding year.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 413.

Historical and Revision Notes

Derivation:	United States Code	Revised Statutes and Statutes at Large
	5 U.S.C. 106	R.S. § 195.

Explanatory Notes

The words "Executive department" are substituted for "department" as the definition of "department" applicable to this section is coextensive with the definition of "Executive department" in section 101.

The words "or military department" are inserted to preserve the application of the source law. Before enactment of the National Security Act Amendments of 1949 (63 Stat. 578), the Department of the Army, the Department of the Navy, and the Department of the Air Force were Executive departments. The National Security Act Amendments of 1949 established the Department of Defense as an Executive Department including the Department of the Army, the Department of the Navy, and the Department of the Air Force as military departments, not as Executive departments. However, the source law for this section, which was in effect in 1949, remained applicable to the

Secretaries of the military departments by virtue of section 12(g) of the National Security Act Amendments of 1949 (63 Stat. 591), which is set out in the reviser's note for section 301.

This section was part of title IV of the Revised Statutes. The Act of July 26, 1947, ch. 343, § 201(d), as added Aug. 10, 1949, ch. 412, § 4, 63 Stat. 579 (former 5 U.S.C. 171-1), which provides "except to the extent inconsistent with the provisions of this Act [National Security Act of 1947] the provisions of title IV of the Revised Statutes as now or hereafter amended shall be applicable to the Department of Defense" is omitted from this title but is not repealed.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

§ 2953. Reports to Congress on additional employee requirements

(a) Each report, recommendation, or other communication, of an official nature, of an Executive agency which—

(1) relates to pending or proposed legislation which, if enacted, will entail an estimated annual expenditure of appropriated funds in excess of \$1,000,000;

(2) is submitted or transmitted to Congress or a committee thereof in compliance with law or on the initiative of the appropriate authority of the executive branch; and

(3) officially proposes or recommends the creation or expansion, either by action of Congress or by administrative action, of a function, activity, or authority of the Executive agency to be in addition to those functions, activities, and authorities thereof existing when the report, recommendation, or other communication is so submitted or transmitted;

shall contain a statement, concerning the Executive agency, for each of the first 5 fiscal years during which each additional or expanded function, activity, or authority so proposed or recommended is to be in effect, setting forth the following information—

(A) the estimated maximum additional—

(i) man-years of civilian employment, by general categories of positions;

(ii) expenditures for personal services; and

(iii) expenditures for all purposes other than personal services;

which are attributable to the function, activity, or authority and which will be required to be effected by the Executive agency in connection with the performance thereof; and

(B) such other statement, discussion, explanation, or other information as is considered advisable by the appropriate authority of the executive branch or that is required by Congress or a committee thereof.

(b) Subsection (a) of this section does not apply to—

- (1) the Central Intelligence Agency;
- (2) a Government controlled corporation; or
- (3) the General Accounting Office.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 413.

Historical and Revision Notes

Derivation:	United States Code	Revised Statutes and Statutes at Large
	5 U.S.C. 642a.	July 25, 1956, ch. 730, § 1, 70 Stat. 652.

Explanatory Notes

In subsection (a), the words "Executive agency" are substituted for "department, agency, or independent establishment of the executive branch of the Federal Government (including any corporation wholly owned by the United States)" in view of the definition of "Executive agency" in section 105. The exception of "a Government controlled corporation" in subsection (b)(2) is added to preserve the application to corporations wholly owned by the United States.

The exception of "the General Accounting Office" in subsection (b)(3) is added to preserve application to the executive branch.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

§ 2954. Information to committees of Congress on request

An Executive agency, on request of the Committee on Government Operations of the House of Representatives, or of any seven members thereof, or on request of the Committee on Government Operations of the Senate, or any five members thereof, shall submit any information requested of it relating to any matter within the jurisdiction of the committee.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 413.

Historical and Revision Notes

Derivation:	United States Code	Revised Statutes and Statutes at Large
	5 U.S.C. 105a	May 29, 1928, ch. 901, § 2, 45 Stat. 996.

Explanatory Notes

The words "Executive agency" are substituted for "executive department and independent establishment" in view of the definition of "Executive agency" in section 105.

The words "Committee on Government Operations of the House of Representatives" are substituted for "Committee on Expenditures in the Executive Departments of the House of Representatives" on authority of H.Res. 647 of the 82d Congress, adopted July 3, 1952.

The words "Committee on Government Operations of the Senate" are substituted for "Committee on Expenditures in the Executive Departments of the Senate" on authority of S.Res. 280 of the 82d Congress, adopted Mar. 3, 1952.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

SUBPART B—EMPLOYMENT AND RETENTION

CHAPTER 31—AUTHORITY FOR EMPLOYMENT

Sec.

- 3101. General authority to employ.
- 3102. Employment of readers for blind employees.
- 3103. Employment at seat of Government only for services rendered.
- 3104. Employment of specially qualified scientific and professional personnel.
- 3105. Appointment of hearing examiners.
- 3106. Employment of attorneys; restrictions.
- 3107. Employment of publicity experts; restrictions.
- 3108. Employment of detective agencies; restrictions.
- 3109. Employment of experts and consultants; temporary or intermittent.
- 3110. Employment of relatives; restrictions.

Historical Note

1967 Amendment. Pub.L. 90-206, Title II, § 221(b), Dec. 16, 1967, 81 Stat. 640, added item 3110.

§ 3101. General authority to employ

Each Executive agency, military department, and the government of the District of Columbia may employ such number of employees of the various classes recognized by chapter 51 of this title as Congress may appropriate for from year to year.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 414.

Historical and Revision Notes

Derivation:	United States Code	Revised Statutes and Statutes at Large
	5 U.S.C. 43	R.S. § 169.
		June 26, 1930, ch. 618, 46 Stat. 817.
	5 U.S.C. 514d (2d par.)	Sept. 21, 1944, ch. 412, § 709, 58 Stat. 743.

Explanatory Notes

The authorization is restated to conform to the style of this title. The words "Executive agency" are substituted for "executive department, independent establishment" in view of the definitions in sections 103, 104, and 105. The source statute (an act to authorize the appointment of employees in the executive branch etc.) applied to the entire executive branch, and government corporations as well as other agencies in the executive branch were included within the words "independent establishment". The words "or a military department" are inserted

to preserve the application of the source statute. Before enactment of the National Security Act Amendments of 1949 (63 Stat. 578), the Department of the Army, the Department of the Navy, and the Department of the Air Force were Executive departments. The National Security Act Amendments of 1949 established the Department of Defense as an Executive department including the Department of the Army, the Department of the Navy, and the Department of the Air Force as military departments, not as Executive departments. However, the

(iii) expenditures for all purposes other than personal services;

which are attributable to the function, activity, or authority and which will be required to be effected by the Executive agency in connection with the performance thereof; and

(B) such other statement, discussion, explanation, or other information as is considered advisable by the appropriate authority of the executive branch or that is required by Congress or a committee thereof.

(b) Subsection (a) of this section does not apply to—

- (1) the Central Intelligence Agency;
- (2) a Government controlled corporation; or
- (3) the General Accounting Office.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 413.

Historical and Revision Notes

Derivation:	United States Code 5 U.S.C. 642a.	Revised Statutes and Statutes at Large July 25, 1956, ch. 730, § 1, 70 Stat. 652.
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Explanatory Notes

In subsection (a), the words "Executive agency" are substituted for "department, agency, or independent establishment of the executive branch of the Federal Government (including any corporation wholly owned by the United States)" in view of the definition of "Executive agency" in section 105. The exception of "a Government controlled corporation" in subsection (b)(2) is added to preserve

the application to corporations wholly owned by the United States.

The exception of "the General Accounting Office" in subsection (b)(3) is added to preserve application to the executive branch.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

§ 2954. Information to committees of Congress on request

An Executive agency, on request of the Committee on Government Operations of the House of Representatives, or of any seven members thereof, or on request of the Committee on Government Operations of the Senate, or any five members thereof, shall submit any information requested of it relating to any matter within the jurisdiction of the committee.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 413.

Historical and Revision Notes

Derivation:	United States Code 5 U.S.C. 105a	Revised Statutes and Statutes at Large May 29, 1928, ch. 901, § 2, 45 Stat. 996.
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Explanatory Notes

The words "Executive agency" are substituted for "executive department and independent establishment" in view of

the definition of "Executive agency" in section 105.

The words "Committee on Government Operations of the House of Representatives" are substituted for "Committee on Expenditures in the Executive Departments of the House of Representatives" on authority of H.Res. 647 of the 82d Congress, adopted July 3, 1952.

The words "Committee on Government Operations of the Senate" are substituted for "Committee on Expenditures in the Executive Departments of the Senate" on authority of S.Res. 280 of the 82d Congress, adopted Mar. 3, 1952.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

BACK UP

EMPLOYEES

5 USCS § 2954

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	5 USC § 642a	July 25, 1956, ch 730, § 1, 70 Stat. 652.

In subsec. (a), the words, "Executive agency" are substituted for "department, agency, or independent establishment of the executive branch of the Federal Government (including any corporation wholly owned by the United States)" in view of the definition of "Executive agency" in 5 USCS § 105. The exception of "a Government controlled corporation" is subsec. (b)(2) is added to preserve the application to corporations wholly owned by the United States.

The exception of "the General Accounting Office" in subsec. (b)(3) is added to preserve application to the executive branch.

Standard changes are made to conform with the definitions applicable and the style of this title.

§ 2954. Information to committees of Congress on request

An Executive agency, on request of the Committee on Government Operations of the House of Representatives, or of any seven members thereof, or on request of the Committee on Government Operations [Governmental Affairs] of the Senate, or any five members thereof, shall submit any information requested of it relating to any matter within the jurisdiction of the committee.

(Sept. 6, 1966, P. L. 89-554, § 1, 80 Stat. 413.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
.....	5 USC § 105a	May 29, 1928, ch 901, § 2, 45 Stat. 996.

The words "Executive agency" are substituted for "executive department and independent establishment" in view of the definition of "Executive agency" in 5 USCS § 105.

The words "Committee on Government Operations of the House of Representatives" are substituted for "Committee on Expenditures in the Executive Departments of the House of Representatives" on authority of H. Res. 647 of the 82d Congress, adopted July 3, 1952.

The words "Committee on Government Operations of the Senate" are substituted for "Committee on Expenditures in the Executive Departments of the Senate" on authority of S. Res. 280 of the 82d Congress, adopted March 3, 1952.

Standard changes are made to conform with the definitions applicable and the style of this title.

Explanatory notes:

The bracketed words "Governmental Affairs" were inserted on the authority of S. Res. 4, Jan. 4, 1977, which changed the name of the Senate Committee on Government Operations to the Senate Committee on Governmental Affairs, effective Feb. 11, 1977.

[END]

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OFFICIAL OPINIONS
OF
THE ATTORNEYS GENERAL
OF
THE UNITED STATES
ADVISING THE
PRESIDENT AND HEADS OF DEPARTMENTS
IN RELATION TO
THEIR OFFICIAL DUTIES

EDITED BY
VIDA ORD ALEXANDER

VOLUME 41

JANUARY 1, 1949, TO DECEMBER 31, 1960

Also opinions dated October 3, 1928, April 24, 1936, September 20, 1940, June 7, 1947,
January 20, 1948, August 24, 1948, October 4, 1948, and October 11, 1948

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"LABOR STANDARDS ENFORCEMENT"

"In order to assure coordination of administration and consistency of enforcement of the labor standards provisions of each of the following Acts by the Federal agencies responsible for the administration thereof, the Secretary of Labor shall prescribe appropriate standards, regulations, and procedures, which shall be observed by these agencies, and cause to be made by the Department of Labor such investigations, with respect to compliance with and enforcement of such labor standards, as he deems desirable, namely: (a) The Act of March 3, 1931 (46 Stat. 1494, ch. 411), as amended; (b) the Act of June 13, 1934 (48 Stat. 948, ch. 482); (c) the Act of August 1, 1892 (27 Stat. 340, ch. 352), as amended; (d) the Act of June 19, 1912 (37 Stat. 137, ch. 174) as amended; (e) the Act of June 3, 1939 (53 Stat. 804, ch. 175), as amended; (f) the Act of August 13, 1946 (60 Stat. 1040, ch. 958); (g) the Act of May 13, 1946 (60 Stat. 170, ch. 251, as amended; and (h) the Act of July 15, 1949, ch. 338, Public Law 171, 81st Congress, first session."

MUTUAL SECURITY PROGRAM—CUTOFF OF FUNDS FROM OFFICE OF INSPECTOR GENERAL AND COMPTROLLER

Section 533A(d) of the Mutual Security Act of 1954 added by section 401(h) of the Mutual Security Act of 1959 (73 Stat. 253), which directs that the expenses of the Office of the Inspector General and Comptroller with respect to programs under the Mutual Security Act be charged to the appropriations made to carry out such programs, *provided* that all documents, reports, and other materials relating to the operations and activities of that Office are furnished upon request to the General Accounting Office, or to any appropriate congressional committee or duly authorized subcommittee, does not authorize the funds of the Office of the Inspector General and Comptroller to be cut off because of the failure of the State Department to furnish certain documents relating to that Office to a congressional subcommittee, if the President has issued a certificate pursuant to section 101(d) of the Mutual Security and Related Agencies Appropriation Act, 1961 (74 Stat. 778), to the effect that he has forbidden the production of those documents and states his reasons for so doing. A contrary conclusion reached by the Comptroller General is incorrect, and, therefore, funds continue to be available as heretofore for the Office of the Inspector General and Comptroller.

The proviso in section 533A(d) does not expressly authorize the funds of the Office of the Inspector General and Comptroller to be cut

III

Finally, the construction which the Comptroller General gives to the proviso of section 533A(d) of the Mutual Security Act of 1954, must be rejected because it is inconsistent with the familiar rule that courts will adopt an interpretation of a Federal statute which will avoid constitutional questions rather than one which raises serious constitutional doubts.³¹ In my opinion, the interpretation which the Comptroller General places upon the proviso does not merely raise constitutional doubts; interpreted to reach the documents here involved the proviso is unconstitutional.³²

That the papers and documents requested are of a character long protected by the Executive privilege in the administration of our Government can scarcely be denied. Thus, as you have certified, a number of documents contain investigative matter from confidential sources some of which is unsubstantiated, and disclosure of these "would be unfair to the individuals concerned and tend to impair the ability of the Executive to conduct effective investigations."

Here then we have an express certification by the President, personally, in exercise of his long-honored Executive privilege that disclosure of the papers requested would be contrary to the public interest. The Comptroller General in effect says, however, that his construction of the statute cannot be governed by the consequence that grave constitutional questions may arise because of it. The fallacy of this view is that it imputes an intention to Congress which in fact Congress attempted to avoid and which as a matter of sound precedent, courts generally are unwilling to accept. At the very least to adopt the Comptroller General's construction of the proviso raises grave constitutional problems under the separation-of-powers doctrine.

The congressional power of investigation is, of course, broad. Nevertheless it has limitations, one of which is based upon the doctrine of separation of powers inherent in our Constitution. Speaking for the majority of the Court in

³¹ See e.g. *United States v. Rumely*, 345 U.S. 41, 45; *Buttfield v. Stranahan*, 192 U.S. 470, 492.

³² In view of the conclusion reached earlier in this opinion that the construction given section 533A(d) by the Comptroller General is incorrect, there is no occasion to consider any problem of severability which may be involved in the constitutional aspects of the question.

Historical and Revision Notes

Derivation:	United States Code	Revised Statutes and Statutes at Large
(a)	5 U.S.C. 17b	Aug. 14, 1937, ch. 624, 50 Stat. 640. Nov. 22, 1943, ch. 303, 57 Stat. 591.
(b)	5 U.S.C. 17c	Mar. 28, 1955, ch. 17, 69 Stat. 14.

Explanatory Notes

In subsection (a), the word "civilian" is omitted as unnecessary because of the definition of "employee" in section 2105. The words "Executive agency" are coextensive with and substituted for "executive departments and independent establishments of the United States" because of the definition of "Executive agency" in section 105. The words "the Secretary of a military department with respect to an employee of his department" are inserted to preserve the application of the source law. Before enactment of the National Security Act Amendments of 1949 (63 Stat. 578), the Department of the Army, the Department of the Navy, and the Department of the Air Force were Executive departments. The National Se-

curity Act Amendments of 1949 established the Department of Defense as an Executive Department including the Department of the Army, the Department of the Navy, and the Department of the Air Force as military departments, not as Executive departments. However, the source law for this section, which was in effect in 1949, remained applicable to the Secretaries of the military departments by virtue of section 12(g) of the National Security Act Amendments of 1949 (63 Stat. 591), which is set out in the reviser's note for section 301.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

§ 2906. Oath; custody

The oath of office taken by an individual under section 3331 of this title shall be delivered by him to, and preserved by, the House of Congress, agency, or court to which the office pertains.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 412.

Historical and Revision Notes

Derivation:	United States Code	Revised Statutes and Statutes at Large
	5 U.S.C. 21	R.S. § 1759.

Explanatory Notes

Standard changes are made to conform style of this title as outlined in the preface to the report.

SUBCHAPTER II—REPORTS

§ 2951. Reports to the Civil Service Commission

The President may prescribe rules which shall provide, as nearly as conditions of good administration warrant, that—

(1) the appointing authority notify the Civil Service Commission in writing of the following actions and their dates as to each individual selected for appointment in the competitive service from among those who have been examined—

- (A) appointment and residence of appointee;
- (B) separation during probation;
- (C) transfer;
- (D) resignation; and
- (E) removal; and

(2) the Commission keep records of these actions.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 412.

Historical and Revision Notes

Derivation:	United States Code	Revised Statutes and Statutes at Large
	5 U.S.C. 633(2)8 (less last sentence)	Jan. 16, 1883, ch. 27, § 2(2) 8 (less last sentence), 22 Stat. 404.

Explanatory Notes

The authority of the President to prescribe rules is added on authority of former section 633(1), which is carried into section 3302.

In paragraph (1), the word "authority" is substituted for "power". The words "or employment" are omitted as included within "appointment".

In paragraph (1) (B), the words "separation during probation" are substituted for "of the rejection of any such person after probation". The words "rejection . . . after probation" refer to a rejection, i. e., separation, after a portion of the probationary period has been served but before the end of the probationary period. This is so because an in-

dividual can be rejected only during the probationary period. After he has completed the probationary period, he can be removed only under procedures governing removals from the competitive service, and removals of this nature are covered by paragraph (E).

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

Official Personnel Folders. Notice required by this section as part of Official Personnel Folders, see Ex.Ord.No.10561, Sept. 14, 1954, 19 F.R. 5963, set out as a note under section 1302 of this title.

Cross References

President's power to grant exceptions from provisions of this section, see section 3302 of this title.

Library References

Officers ⇐ 11.4.

C.J.S. Officers § 34.

§ 2952. Time of making annual reports

Except when a different time is specifically prescribed by statute, the head of each Executive department or military department shall make the annual reports, required to be submitted to Congress, at the beginning of each regular session of Congress. The reports shall cover the transactions of the preceding year.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 413.

Historical and Revision Notes

Derivation:	United States Code	Revised Statutes and Statutes at Large
	5 U.S.C. 106	R.S. § 195.

Explanatory Notes

The words "Executive department" are substituted for "department" as the definition of "department" applicable to this section is coextensive with the definition of "Executive department" in section 101.

The words "or military department" are inserted to preserve the application of the source law. Before enactment of the National Security Act Amendments of 1949 (63 Stat. 578), the Department of the Army, the Department of the Navy, and the Department of the Air Force were Executive departments. The National Security Act Amendments of 1949 established the Department of Defense as an Executive Department including the Department of the Army, the Department of the Navy, and the Department of the Air Force as military departments, not as Executive departments. However, the source law for this section, which was in effect in 1949, remained applicable to the

Secretaries of the military departments by virtue of section 12(g) of the National Security Act Amendments of 1949 (63 Stat. 591), which is set out in the reviser's note for section 301.

This section was part of title IV of the Revised Statutes. The Act of July 26, 1947, ch. 343, § 201(d), as added Aug. 10, 1949, ch. 412, § 4, 63 Stat. 579 (former 5 U.S.C. 171-1), which provides "except to the extent inconsistent with the provisions of this Act [National Security Act of 1947] the provisions of title IV of the Revised Statutes as now or hereafter amended shall be applicable to the Department of Defense" is omitted from this title but is not repealed.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

§ 2953. Reports to Congress on additional employee requirements

(a) Each report, recommendation, or other communication, of an official nature, of an Executive agency which—

(1) relates to pending or proposed legislation which, if enacted, will entail an estimated annual expenditure of appropriated funds in excess of \$1,000,000;

(2) is submitted or transmitted to Congress or a committee thereof in compliance with law or on the initiative of the appropriate authority of the executive branch; and

(3) officially proposes or recommends the creation or expansion, either by action of Congress or by administrative action, of a function, activity, or authority of the Executive agency to be in addition to those functions, activities, and authorities thereof existing when the report, recommendation, or other communication is so submitted or transmitted;

shall contain a statement, concerning the Executive agency, for each of the first 5 fiscal years during which each additional or expanded function, activity, or authority so proposed or recommended is to be in effect, setting forth the following information—

(A) the estimated maximum additional—

(i) man-years of civilian employment, by general categories of positions;

(ii) expenditures for personal services; and

(iii) expenditures for all purposes other than personal services;

which are attributable to the function, activity, or authority and which will be required to be effected by the Executive agency in connection with the performance thereof; and

(B) such other statement, discussion, explanation, or other information as is considered advisable by the appropriate authority of the executive branch or that is required by Congress or a committee thereof.

(b) Subsection (a) of this section does not apply to—

(1) the Central Intelligence Agency;

(2) a Government controlled corporation; or

(3) the General Accounting Office.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 413.

Historical and Revision Notes

Derivation:	United States Code	Revised Statutes and Statutes at Large
	5 U.S.C. 642a.	July 25, 1956, ch. 730, § 1, 70 Stat. 652.

Explanatory Notes

In subsection (a), the words "Executive agency" are substituted for "department, agency, or independent establishment of the executive branch of the Federal Government (including any corporation wholly owned by the United States)" in view of the definition of "Executive agency" in section 105. The exception of "a Government controlled corporation" in subsection (b)(2) is added to preserve

the application to corporations wholly owned by the United States.

The exception of "the General Accounting Office" in subsection (b)(3) is added to preserve application to the executive branch.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

§ 2954. Information to committees of Congress on request

An Executive agency, on request of the Committee on Government Operations of the House of Representatives, or of any seven members thereof, or on request of the Committee on Government Operations of the Senate, or any five members thereof, shall submit any information requested of it relating to any matter within the jurisdiction of the committee.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 413.

Historical and Revision Notes

Derivation:	United States Code	Revised Statutes and Statutes at Large
	5 U.S.C. 105a	May 29, 1928, ch. 901, § 2, 45 Stat. 996.

Explanatory Notes

The words "Executive agency" are substituted for "executive department and independent establishment" in view of the definition of "Executive agency" in section 105.

The words "Committee on Government Operations of the House of Representatives" are substituted for "Committee on Expenditures in the Executive Departments of the House of Representatives" on authority of H.Res. 647 of the 82d Congress, adopted July 3, 1952.

The words "Committee on Government Operations of the Senate" are substituted for "Committee on Expenditures in the Executive Departments of the Senate" on authority of S.Res. 280 of the 82d Congress, adopted Mar. 3, 1952.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

SUBPART B—EMPLOYMENT AND RETENTION

CHAPTER 31—AUTHORITY FOR EMPLOYMENT

Sec.

- 3101. General authority to employ.
- 3102. Employment of readers for blind employees.
- 3103. Employment at seat of Government only for services rendered.
- 3104. Employment of specially qualified scientific and professional personnel.
- 3105. Appointment of hearing examiners.
- 3106. Employment of attorneys; restrictions.
- 3107. Employment of publicity experts; restrictions.
- 3108. Employment of detective agencies; restrictions.
- 3109. Employment of experts and consultants; temporary or intermittent.
- 3110. Employment of relatives; restrictions.

Historical Note

1967 Amendment. Pub.L. 90-206, Title II, § 221(b), Dec. 16, 1967, 81 Stat. 640, added item 3110.

§ 3101. General authority to employ

Each Executive agency, military department, and the government of the District of Columbia may employ such number of employees of the various classes recognized by chapter 51 of this title as Congress may appropriate for from year to year.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 414.

Historical and Revision Notes

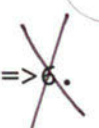
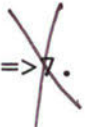
Derivation:	United States Code	Revised Statutes and Statutes at Large
	5 U.S.C. 43	R.S. § 169.
		June 26, 1930, ch. 618, 46 Stat. 817.
	5 U.S.C. 514d (2d par.)	Sept. 21, 1944, ch. 412, § 709, 58 Stat. 743.

Explanatory Notes

The authorization is restated to conform to the style of this title. The words "Executive agency" are substituted for "executive department, independent establishment" in view of the definitions in sections 103, 104, and 105. The source statute (an act to authorize the appointment of employees in the executive branch etc.) applied to the entire executive branch, and government corporations as well as other agencies in the executive branch were included within the words "independent establishment". The words "or a military department" are inserted

to preserve the application of the source statute. Before enactment of the National Security Act Amendments of 1949 (63 Stat. 578), the Department of the Army, the Department of the Navy, and the Department of the Air Force were Executive departments. The National Security Act Amendments of 1949 established the Department of Defense as an Executive department including the Department of the Army, the Department of the Navy, and the Department of the Air Force as military departments, not as Executive departments. However, the

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- =>1. (Preliminary Print) ISSUES RAISED BY SECTION 102(C)(2) OF H.R.3792
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1990 WL 488469 (O.L.C.)
- =>2. APPLICABILITY OF EXECUTIVE PRIVILEGE TO THE RECOMMENDATIONS OF
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LEGISLATION December 22, 1986 10 U.S. Op. OLC 176,
10 U.S. Op. Off. Legal Counsel 176, 1986 WL 213252 (O.L.C.)
- =>3. THE PRESIDENT'S COMPLIANCE WITH THE "TIMELY NOTIFICATION" REQUIREMENT OF
SECTION 501(B) OF THE NATIONAL SECURITY ACT December 17, 1986
10 U.S. Op. OLC 159, 10 U.S. Op. Off. Legal Counsel 159, 1986 WL 213251
(O.L.C.)
- =>4. PROSECUTION FOR CONTEMPT OF CONGRESS OF AN EXECUTIVE BRANCH OFFICIAL WHO
HAS ASSERTED A CLAIM OF EXECUTIVE PRIVILEGE May 30, 1984
8 U.S. Op. OLC 101, 8 U.S. Op. Off. Legal Counsel 101, 1984 WL 178358
(O.L.C.)
- =>5. AUTHORITY OF THE SPECIAL COUNSEL OF THE MERIT SYSTEMS PROTECTION BOARD TO
LITIGATE AND SUBMIT LEGISLATION TO CONGRESS February 22, 1984
8 U.S. Op. OLC 30, 8 U.S. Op. Off. Legal Counsel 30, 1984 WL 178351
(O.L.C.)
- =>6. HISTORY OF REFUSALS BY EXECUTIVE BRANCH OFFICIALS TO PROVIDE INFORMATION
DEMANDED BY CONGRESS PART II--INVOCATIONS OF EXECUTIVE PRIVILEGE BY
EXECUTIVE OFFICIALS January 27, 1983 6 U.S. Op. OLC 782,
6 U.S. Op. Off. Legal Counsel 782, 1983 WL 160492 (O.L.C.)
- =>7. HISTORY OF REFUSALS BY EXECUTIVE BRANCH OFFICIALS TO PROVIDE INFORMATION
DEMANDED BY CONGRESS PART I--PRESIDENTIAL INVOCATIONS OF EXECUTIVE
PRIVILEGE VIS-A-VIS CONGRESS December 14, 1982 6 U.S. Op. OLC 751,
6 U.S. Op. Off. Legal Counsel 751, 1982 WL 170737 (O.L.C.)
- =>8. CONSTITUTIONALITY OF STATUTE REQUIRING EXECUTIVE AGENCY TO REPORT
DIRECTLY TO CONGRESS November 5, 1982 6 U.S. Op. OLC 632,
6 U.S. Op. Off. Legal Counsel 632, 1982 WL 170732 (O.L.C.)

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LEVEL 1 - 1 OF 2 CASES

OPINION OF THE OFFICE OF LEGAL COUNSEL

1984 OLC LEXIS 32; 8 Op. O.L.C. 39

February 22, 1984

NOTICE: THIS OPINION IS A PRELIMINARY VERSION AND HAS NOT
BEEN RELEASED FOR PUBLICATION IN THE PERMANENT VOLUME.

OPINION:

... [*13] heretofore has not had occasion to construe this particular provision, we have construed similar provisions in the past to avoid impinging on the constitutional prerogatives of the Executive. See, e.g., Statement of Attorney General Elliot Richardson (June 1973) (construing 5 U.S.C. @ 2954, which requires Executive agencies to submit to the House or Senate Committees on Government Operations "any information requested of it relating to any matter within the jurisdiction of the committee," to grant to the pertinent committees access to only type of information that traditionally has been made ...

✓
printing

LEVEL 1 - 2 OF 2 CASES

OPINION OF THE OFFICE OF LEGAL COUNSEL

1982 OLC LEXIS 19; 6 Op. O.L.C. 632

November 5, 1982

OPINION:

... [*30] [**643] Executive Branch. For example, Congress has enacted a provision that on its face requires any executive agency to submit to the Government Operations Committees of the House or Senate "any information requested of it relating to any matter within the jurisdiction of the committee." 5 U.S.C. @ 2954. This provision, however, has been narrowly interpreted by the Executive Branch to grant to the pertinent committees access to only the type of information that has traditionally been made available to Congress and that is not subject to valid claims of executive privilege. Statement of Attorney ...

Gary A. SOUCIE et al., Appellants

v.

**Edward E. DAVID, Jr., Director, Office
of Science and Technology, et al.**

No. 24573.

United States Court of Appeals,
District of Columbia Circuit.

Argued Dec. 7, 1970.

Decided April 13, 1971.

Suit by citizens against Director of Office of Science and Technology for injunctive relief under Freedom of Information Act to compel the director to release to them a certain document. The United States District Court for the District of Columbia, John H. Pratt, J., dismissed the suit and the citizens appealed. The Court of Appeals, Bazelon, Chief Judge, held that where Office of Science and Technology had independent function of evaluating federal scientific programs, the office was "agency" subject to the Administrative Procedure Act and the Freedom of Information Act. The court further held that the "Garwin Report" which evaluates the federal government's program for development of supersonic transport aircraft was a record of the agency and ordered remand for determination of whether the report was within any of the statutory exemptions.

Reversed and remanded with directions.

Wilkey, Circuit Judge, concurred and filed opinion.

1. Records ⇨14

Where doctrine of executive privilege was not expressly invoked by the government as defense to citizens' suit under Freedom of Information Act to acquire copy of report by Office of Science and Technology concerning feasibility of supersonic transport program, the privilege was not properly before the court and was not available as basis for dismissal of the suit. 5 U.S.C.A. §§ 552,

913; Federal Aviation Act of 1958, § 312 (c), 49 U.S.C.A. § 1353(c); Department of Transportation Act, § 6(c) (1), 49 U.S.C.A. § 1655(c) (1); 28 U.S.C.A. § 291(a).

2. Constitutional Law ⇨76

Doctrine of executive privilege is inherent in constitutional requirement of separation of powers.

3. Records ⇨14

The power of Congress to compel disclosure of agency records to the public is no greater than its power to compel disclosure to Congress itself. 5 U.S.C.A. § 2954; 31 U.S.C.A. § 1002.

4. Constitutional Law ⇨46(1)

As serious constitutional questions would be presented by claim of executive privilege as defense to suit under Freedom of Information Act, the court should avoid unnecessary decision of constitutional questions. 5 U.S.C.A. § 552 (a) (3).

5. Constitutional Law ⇨67

Judicial power extends to resolution of questions of separation of powers raised by constitutional claim of executive privilege as defense to suit under the Freedom of Information Act. 5 U.S.C.A. § 552(a) (3).

6. Constitutional Law ⇨67

The courts have power to compel subordinate executive officials to disobey illegal presidential commands.

7. Injunction ⇨75

If nondisclosure by Office of Science and Technology of scientific report was not supported by statutory exemption or constitutional executive privilege, Freedom of Information Act required issuance of injunction to compel the office to release the report to citizens, regardless of whether refusal to disclose was attributable to the office or to the President. 5 U.S.C.A. §§ 552, 913; Federal Aviation Act of 1958, § 312(c), 49 U.S.C.A. § 1353(c); Department of Transportation Act, § 6(c) (1), 49 U.S.C.A. § 1655(c) (1); 28 U.S.C.A. § 291(a).

8. Injunction ⇐114(3)

The President was not indispensable party to citizens' suit under Freedom of Information Act to compel Office of Science and Technology to release report on feasibility of supersonic transport program. 5 U.S.C.A. §§ 552, 913; Federal Aviation Act of 1958, § 312(c), 49 U.S.C.A. § 1353(c); Department of Transportation Act, § 6(c) (1), 49 U.S.C.A. § 1655(c) (1); 28 U.S.C.A. § 291(a).

9. Administrative Law and Procedure

⇐103

Records ⇐14

While primary purpose of Administrative Procedure Act is to regulate the processes of rule making and adjudication, administrative entities that perform neither function are nevertheless "agencies" and therefore subject to the public information provisions of the Act. 5 U.S.C.A. § 551(1).

See publication Words and Phrases for other judicial constructions and definitions.

10. Constitutional Law ⇐50

The power of investigation is an incident of legislative power necessary to enactment and effective enforcement of wise laws.

11. United States ⇐23(2)

The chief limitation on congressional inquiry is that it must be exercised for valid legislative purposes and not in derogation of fundamental personal liberties.

12. Administrative Law and Procedure

⇐5

Records ⇐14

Where Office of Science and Technology had independent function of evaluating federal scientific programs, office was "agency" subject to the Administrative Procedure Act and the Freedom of Information Act. 5 U.S.C.A. §§ 552, 913; Federal Aviation Act of 1958, § 312(c), 49 U.S.C.A. § 1353(c); Department of Transportation Act, § 6(c) (1), 49 U.S.C.A. § 1655(c) (1); 28 U.S.C.A. § 291(a).

13. Records ⇐14

The "Garwin Report", prepared by the Office of Science and Technology as an evaluation of feasibility of supersonic transports, was record of the office under the Freedom of Information Act. 5 U.S.C.A. §§ 552, 913; Federal Aviation Act of 1958, § 312(c), 49 U.S.C.A. § 1353(c); Department of Transportation Act, § 6(c) (1), 49 U.S.C.A. § 1655(c) (1); 28 U.S.C.A. § 291(a).

14. Records ⇐14

Any report prepared by the Office of Science and Technology or its consultants in fulfillment of its function to evaluate federal scientific programs is a record of the agency for purposes of Freedom of Information Act. 5 U.S.C.A. § 552(a) (3).

15. Records ⇐14

Fact that President requested that Office of Science and Technology prepare assessment of supersonic transport program did not deprive the office's report of its character as record of study made in performance of ordinary functions of the agency, although a request might bring the document within a statutory or constitutional exemption from the disclosure requirements of the Freedom of Information Act. 5 U.S.C.A. § 552(a) (3).

16. Constitutional Law ⇐50

Congress has power to eliminate ordinary discretionary barriers to injunctive relief against a federal agency.

17. Records ⇐14

Chief purpose of Freedom of Information Act is to increase public access to governmental records by substituting limited categories of privileged material for the standards of agency discretion and to provide effective judicial remedy. 5 U.S.C.A. §§ 552, 552(c).

18. Records ⇐14

The district courts do not have general power to deny relief under Freedom of Information Act on equitable grounds apart from the exemptions in the Act itself. 5 U.S.C.A. §§ 552, 552(c).

19. Records ⇐14

Exemption within the Freedom of Information Act of "inter-agency or intra-agency memorandums or letters" was intended to encourage free exchange of ideas during process of deliberation and policy-making and to protect internal communications consisting of advice, recommendations, opinions and other material reflecting deliberative or policy-making processes, but not purely factual or investigatory reports; factual information may be protected only if it is inextricably intertwined with policy-making processes. 5 U.S.C.A. § 552(b) (5).

20. Records ⇐14

The government may have special need for opinions and recommendations of temporary consultants, and those individuals should be able to give their judgments freely without fear of publicity, therefore Freedom of Information Act exemption for internal communications is available in connection with reports prepared for an agency by outside experts. 5 U.S.C.A. § 552(b) (4, 6, 8).

21. Records ⇐14

Exemption within Freedom of Information Act of "trade secrets and commercial or financial information obtained from a person and privileged or confidential" is intended to encourage individuals to provide confidential information to the government, and it must be read narrowly in accordance with that purpose. 5 U.S.C.A. § 552(b) (4, 6, 8).

22. Records ⇐14

Exemption within Freedom of Information Act of investigatory files compiled for law enforcement purposes covers files prepared for both civil and criminal law enforcement. 5 U.S.C.A. § 552(b), (4, 6, 8).

23. Records ⇐14

Exemption of confidential information within Freedom of Information Act is available only with respect to information received by the government from sources outside the government. 5 U.S.C.A. § 552(b) (4, 6, 8).

24. Records ⇐14

In order to qualify for Freedom of Information Act exemption of matters specifically required by executive order to be kept secret in interest of national defense or foreign policy, government need only show that the record is specifically required to be kept secret pursuant to an executive order; review of the propriety of keeping it secret is limited to determining that the administrative decision was not arbitrary and capricious. 5 U.S.C.A. § 552(a) (3), (b) (1).

25. Courts ⇐406.9(10)

On remand, district court would be required to expedite proceedings to determine whether report by the Office of Science and Technology to the President on the feasibility of the supersonic transport program was protected by statutory exemption or constitutional privilege; such statutory de novo evaluation would be most effectively undertaken by examination of report in camera. 5 U.S.C.A. § 552(a) (3), (b) (1).

26. Records ⇐14

The touchstone of any proceeding under the Freedom of Information Act must be the clear legislative intent to assure public access to all governmental records whose disclosure would not significantly harm specific governmental interests; the policy of the Act requires that the disclosure requirements be construed broadly, the exemptions narrowly. 5 U.S.C.A. § 552.

Mr. Peter L. Koff, Boston, Mass., with whom Messrs. Lawrence Speiser and Melvin L. Wulf, Washington, D. C., were on the brief, for appellants. Mrs. Hope Eastman, Washington, D. C., also entered an appearance for appellants.

Mr. Jeffrey F. Axelrad, Atty., Department of Justice, with whom Messrs. Thomas A. Flannery, U. S. Atty., Robert V. Zener and Harland F. Leathers, Attys., Department of Justice, were on the brief, for appellees. Mr. Morton Hol-

lander, Atty., Department of Justice, also entered an appearance for appellees.

Mr. Peter L. Koff, Asst. Corporation Counsel for the City of Boston, Massachusetts, filed a brief on behalf of the City of Boston as amicus curiae.

Before BAZELON, Chief Judge, VAN DUSEN,* Circuit Judge, U. S. Court of Appeals for the Third Circuit, and WILKEY, Circuit Judge.

BAZELON, Chief Judge:

This is an appeal from the dismissal of a suit for injunctive relief under the Freedom of Information Act.¹ Two citizens seek to compel the Director of the Office of Science and Technology (OST)² to release to them a document, known as the Garwin Report, which evaluates the Federal Government's program for development of a supersonic transport aircraft (SST).³

* Sitting by designation pursuant to 28 U.S.C. § 291(a) (1964).

1. Pub.L.No.89-487, 80 Stat. 250 (1966), amending Administrative Procedure Act, ch. 324, § 3, 60 Stat. 238 (1946), 5 U.S.C. § 1002 (1964). Pub.L.No.89-487 was repealed, but its substantive provisions enacted into the United States Code, by Pub.L.No.90-23, 81 Stat. 54 (1967), 5 U.S.C. § 552 (Supp. V, 1970).
2. The OST was established in the Executive Office of the President by Reorganization Plan No. 2 of 1962, Pt. I, 3 C.F.R. 879 (1959-63 Compilation), set out following 5 U.S.C. § 133z-15 (1964), at 247. Section 133z-15 has been replaced by 5 U.S.C. § 913 (Supp. V, 1970).
3. The statutory basis for the SST program is a provision in the Federal Aviation Act of 1958 authorizing the Administrator of the Federal Aviation Agency to undertake research and development in aviation. Pub.L.No.85-726, Tit. III, § 312(c), 72 Stat. 752 (1958), 49 U.S.C. § 1353(c) (1964). This function was transferred to the Secretary of Transportation, to be exercised by the Federal Aviation Administrator, by the Department of Transportation Act. Pub.L.No. 89-670, § 6(c) (1), 80 Stat. 938 (1966), 49 U.S.C. § 1655(c) (1) (Supp. V, 1970).
4. Dr. Edward E. David, Jr. has replaced Dr. DuBridge as Director of the OST and as a party to this litigation.

The Report originated in the following manner. The President asked the Director of the OST, then Dr. Lee A. DuBridge,⁴ to provide him with an "independent assessment" of the SST program. Dr. DuBridge convened a panel of experts, headed by Dr. Richard L. Garwin, to assist him. When the President learned of the panel, he asked to see its report. Dr. DuBridge subsequently transmitted the Garwin Report, along with his own evaluation, to the President.⁵

When appellants inquired about the Garwin Report, the OST indicated that it would not release the Report to members of the public because the Report was a Presidential document over which the OST had no control, and was "in the nature of inter- and intra-agency memoranda which contained opinions, conclusions and recommendations prepared for the advice of the President."⁶ Appel-

5. These uncontroverted facts are set forth in the record in statements of Dr. DuBridge. Affidavit of Dr. Lee A. DuBridge, Appendix at 14-16; Letter of April 3, 1970 from Dr. Lee A. DuBridge to The Honorable Henry S. Reuss, Member of the United States House of Representatives, Appendix at 8-9.
6. Letter of May 20, 1970 from Mr. John D. Ehrlichman, Assistant to the President for Domestic Affairs, to The Honorable Henry S. Reuss, Member of the United States House of Representatives, Appendix at 11. In two letters to Dr. DuBridge, Mr. Reuss had tried to obtain the Garwin Report. Appendix at 6-7. Dr. DuBridge sent two letters in reply, the second of which referred Mr. Reuss' request to the Counsel to the President. Appendix at 8-10. Then Mr. Ehrlichman declined to release the Report to Mr. Reuss for the reason quoted in text above. When appellants' attorney Koff asked the OST about the availability of the Report, the Special Assistant to the Director told him that the OST "was without authority to make available to a member of the public the report of Dr. Garwin, since this matter involved a Presidential document over which the [OST] had no control, and that the [OST] would abide by the ruling of John D. Ehrlichman * * * as contained in his May 20, 1970 letter to The Honorable Henry S. Reuss * * * if a request for said report was made by

lants brought suit under the Freedom of Information Act to compel disclosure of the Report.⁷ The District Court dismissed the complaint with a brief order stating that the Report is a Presidential document, and consequently, that the court has neither authority to compel its release nor jurisdiction over a suit to obtain that relief. At the hearing, the trial judge discussed the basis for his ruling. He stated that the OST is not an "agency" for the purposes of the Freedom of Information Act, but rather a part of the Office of the President, and that the Garwin Report is protected from compulsory disclosure by the doctrine of executive privilege.

In Part I of this opinion we review the origin and functions of the OST and conclude that the OST is an agency, and that the Garwin Report is an agency record. Consequently, subject to any

constitutional issues which may be raised, the complaint states a cause of action under the Freedom of Information Act, and the District Court erred in dismissing the suit. The case must be remanded for that court to consider whether the document is protected, in whole or in part, by any of the specific exemptions enumerated in the Act. In Part II of this opinion we indicate some of the considerations that will be relevant to that determination.

[1-8] While the District Court referred to the doctrine of executive privilege in support of its decision, the privilege was not expressly invoked by the Government, and therefore, it was not properly before the court.⁸ Serious constitutional questions would be presented by a claim of executive privilege as a defense to a suit under the Freedom of Information Act,⁹ and the court should

a member of the public." Affidavit of Peter L. Koff, Appendix at 12-13.

This chain of events provided ample basis for appellants to bypass as futile the step of filing a written request for the document, as ordinarily required by the OST, 32 Fed.Reg. 11,060 (1967). See generally 3 K. Davis, Administrative Law Treatise §§ 20.07-20.08 (1958, Supp. 1970); L. Jaffe, Judicial Control of Administrative Action 425-437, 446-449 (1965). The OST's refusal to disclose the Report to Mr. Reuss is especially significant, for while his right as a citizen to obtain the Report under the Act is equal to that of appellants, his right as a Congressman is presumably greater. See H.R.Rep.No.1497, 89th Cong., 2d Sess. 11-12 (1966).

7. The Act provides:

[E]ach agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complaint [sic]. In such a case the court shall determine

the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee * * *.

5 U.S.C. § 552(a) (3) (Supp. V, 1970).

8. See *United States v. Reynolds*, 345 U.S. 1, 7-8, 73 S.Ct. 528, 532, 97 L.Ed. 727 (1953):

The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. [footnotes omitted.]

See also *General Services Administration v. Benson*, 415 F.2d 878, 879 (9th Cir. 1969).

9. The doctrine of executive privilege is to some degree inherent in the constitutional requirement of separation of powers. See, e. g., *Berger, Executive Privilege V. Congressional Inquiry* (Pts. I & II), 12 U.C.L.A.L.Rev. 1043, 1287 (1965); Bishop, *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 Yale L.J. 477 (1957); Davis, *The Information Act: A Preliminary Analysis*, 34 U.Chi.L.Rev. 761, 763-765 (1967). As the concurring opinion points out, the power of Congress to compel disclosure

avoid the unnecessary decision of those questions.¹⁰ Accordingly, whether or not the Government makes a claim of privilege on remand, the court should first consider whether the Report falls within any statutory exemption.¹¹ Only if the Act seems to require disclosure, and if the Government makes an express claim of executive privilege, will it be neces-

sary for the court to consider whether the disclosure provisions of the Act exceed the constitutional power of Congress to control the actions of the executive branch.¹²

I

Congress passed the Freedom of Information Act in 1966 to strengthen the

of agency records to the public is no greater than its power to compel disclosure to Congress itself. Since 1789, Congress has frequently exercised the latter power in statutes requiring executive officers to transmit information to Congress. See, e. g., Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65, as amended, 31 U.S.C. § 1002 (Supp. V, 1970) (Sec'y of Treasury must give certain information to either house of Congress on request); Act of May 29, 1928, ch. 901, § 2, 45 Stat. 996, as amended, 5 U.S.C. § 2954 (Supp. V, 1970) (each executive agency must disclose certain information to Gov't Operations Committees of House and Senate on request). However, courts have never been asked to rule on the scope of executive privilege in the context of a congressional command to disclose information. They have considered the scope of the privilege only in ruling on a litigant's request for discovery of information held by the Government, both in litigation with the Government, e. g., *Roviano v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957); *United States v. Reynolds*, 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727 (1953), and in litigation between private parties, e. g., *Carl Zeiss Stiftung v. V. E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C.1966), *aff'd per curiam*, 128 U.S. App.D.C. 10, 384 F.2d 979, cert. denied, 389 U.S. 952, 88 S.Ct. 334, 19 L.Ed.2d 361 (1967).

10. See *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345-348, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring).

11. If the Government asserts a constitutional privilege on remand, the court will not thereby be deprived of jurisdiction, for the judicial power extends to resolving the questions of separation of powers raised by the constitutional claim. See *Powell v. McCormack*, 395 U.S. 486, 512-522, 548-549, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969); *Baker v. Carr*, 369 U.S. 186, 198-204, 208-237, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); cf. *Berger* (Pt.

II), *supra* note 9, at 1349-1360. The precise limits of legislative authority over the executive branch are not clear. In discussing the President's power to remove officers, the Supreme Court has drawn an uncertain distinction between officers who exercise purely executive functions, and those whose functions are quasi-legislative or quasi-judicial; only the former are removable at the will of the President in spite of a contrary congressional enactment. Compare *Wickner v. United States*, 357 U.S. 349, 78 S.Ct. 1275, 2 L.Ed.2d 1377 (1958), and *Humphrey's Ex'r v. United States*, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611 (1935), with *Myers v. United States*, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160 (1926). See also *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 610, 612-613, 9 L.Ed. 1181 (1838).

12. The fact that the President may have ordered the Director of the OST not to release the Garwin Report does not leave the courts without power to review the legality of withholding the Report, for courts have power to compel subordinate executive officials to disobey illegal Presidential commands. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952). If nondisclosure of the Garwin Report is not supported by a statutory exemption or a constitutional executive privilege, the Freedom of Information Act requires issuance of an injunction to compel the OST to release the Report, whether the refusal to disclose is attributable to the OST or to the President. The President is not an indispensable party, because a "decree granting the relief sought will [not] require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him," and because "the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court." *Williams v. Fanning*, 332 U.S. 490, 493, 494, 68 S.Ct. 188, 189, 92 L.Ed. 95 (1947).

disclosure requirements of the Administrative Procedure Act (APA). Each federal agency subject to the APA must now make its records, with certain specific exceptions, available to "any person" who requests them; district courts have jurisdiction to order the production of any "identifiable record" which is "improperly withheld," and "the burden is on the agency to sustain its action."

[9] Under the APA, an agency is any "authority of the Government of the United States, whether or not it is within or subject to review by another agency."¹³ The statutory definition of "agency" is not entirely clear, but the APA apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions.¹⁴ While the primary purpose of the APA is to regulate the processes of rule making and adjudication, administrative entities that perform neither function are nevertheless agencies, and therefore subject to the public

information provisions of the APA, *i. e.*, the Freedom of Information Act.¹⁵

The District Court ruled that the OST is not an agency, but merely staff to the President.¹⁶ On that theory, the only "authority" controlling the Garwin Report is the President, and the trial court held that the President is not subject to the disclosure provisions of the APA. We need not determine whether Congress intended the APA to apply to the President,¹⁷ and whether the Constitution would permit Congress to require disclosure of his records,¹⁸ for we have concluded that the OST is a separate agency, subject to the requirements of the Freedom of Information Act, and that the Garwin Report is a record of that agency.

The OST, created in 1962 by an executive reorganization plan, is authorized (1) to evaluate the scientific research programs of the various federal agencies, and (2) to advise and assist the President in achieving coordinated federal

13. 5 U.S.C. § 551(1) (Supp. V, 1970).

14. See H.R.Rep.No.1980, 79th Cong., 2d Sess. 19 (1946); S.Rep.No.752, 79th Cong., 1st Sess. 10 (1945); Staff of Senate Comm. on the Judiciary, 79th Cong., 1st Sess., Report on the Administrative Procedure Act 2 (Comm. Print 1945); Attorney General's Comm. on Administrative Procedure, Final Report, Administrative Procedure in Government Agencies, S.Doc.No.8, 77th Cong., 1st Sess. 7 (1941); Attorney General's Manual on the Administrative Procedure Act 9-10 (1947). See generally Freedman, Administrative Procedure and the Control of Foreign Direct Investment, 119 U.Pa. L.Rev. 1, 4-18 (1970).

15. See H.R.Rep.No.1980, 79th Cong., 2d Sess. 19 (1946); Staff of Senate Comm. on the Judiciary, 79th Cong., 1st Sess., Report on the Administrative Procedure Act 2 (Comm. Print 1945); Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 4 (1967). For example, the APA's definition of agency apparently includes the U. S. Commission on Civil Rights, which investigates, evaluates and recommends, but does not adjudicate. Civil Rights Act of 1957, Pub.L. No. 85-315, Pt. I, 71 Stat. 635, as amended, 42

U.S.C. § 1975c (Supp. V, 1970); *Larche v. Hannah*, 176 F.Supp. 791, 796 & n. 15 (W.D.La.1959) (Comm'n is an agency and subject to APA's adjudication provisions), adopted in 177 F.Supp. 816, 819 n. 5 (W.D.La.1959) (three-judge court), rev'd on other grounds, 363 U.S. 420, 441, 452-453, 80 S.Ct. 1502, 4 L.Ed.2d 1307 (1960) (Comm'n is not subject to APA's adjudication provisions). See also Exec. Order No. 11,236, 3 C.F.R. 329 (1964-1965 Compilation); *Skolnick v. Parsons*, 397 F.2d 523 (7th Cir. 1968) (President's Comm'n on Law Enforcement & Admin. of Justice).

16. *Compare International Paper Co. v. F.P.C.*, Civ. No. 69-5169 (S.D.N.Y., May 15, 1970) (typewritten opinion at 12-13) (staff of FPC is not a separate agency) (unreported; typewritten opinion filed in this action in the District Court, Civ. No. 1571-70, D.D.C.).

17. The statutory definition of "agency" specifically excludes Congress and the courts of the United States, but does not specifically exclude the President. 5 U.S.C. § 551(1) (Supp. V, 1970).

18. See *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 499-501, 18 L.Ed. 437 (1867).

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policies in science and technology.¹⁹ Its functions had previously been assigned to the National Science Foundation,²⁰ but the President found that arrangement unsatisfactory:²¹

[T]he Foundation, being at the same organizational level as other agencies, cannot satisfactorily coordinate Federal science policies or evaluate programs of other agencies. Science policies, transcending agency lines, need to be coordinated and shaped at the level of the Executive Office of the President drawing upon many resources both within and outside of government. Similarly, staff efforts at that higher level are required for the evaluation of Government programs in science and technology.

The President therefore proposed a reorganization plan that transferred certain functions to an administrative unit "outside the White House Office, but in the Executive Office of the President on roughly the same basis as the Budget Bureau, the Council of Economic Advi-

sors, the National Security Council, and the Office of Emergency Planning."²²

A reorganization plan proposed by the President can take effect only if both houses of Congress acquiesce, *i. e.*, if neither house passes a resolution disapproving the plan within a fixed period of time.²³ The congressional understanding of a proposed plan is therefore entitled to considerable weight in determining its effect. The one house of Congress that explicitly considered the plan creating the OST²⁴ clearly contemplated that the OST would function as a distinct entity and not merely as part of the President's staff. The House Committee on Government Operations stated:²⁵

Heretofore, the Congress has not been able to obtain adequate information on Government-wide science matters because the President's Special Assistant for Science has been unavailable for questioning by congressional committees due to his confidential relationship with the President. We express no opinion here on the merits

19. Reorganization Plan No. 2 of 1962, Pt. I, § 3, 3 C.F.R. 879, 879-80 (1959-63 Compilation), set out following 5 U.S.C. § 133z-15 (1964), at 247.

20. National Science Foundation Act of 1950, ch. 171, § 3(a) (1) & (6), 64 Stat. 149, as amended, 42 U.S.C. § 1862(a) (1) & (6) (1964); see Exec. Order No. 10,521, 3 C.F.R. 183 (1954-58 Compilation), 42 U.S.C. § 1862 (1964), as amended by Exec. Order No. 10,807, § 6(b), 3 C.F.R. 329, 331 (1959-63 Compilation), 42 U.S.C. § 1862 (1964).

21. Message from the President of the United States Transmitting Reorganization Plan No. 2 of 1962, Providing for Certain Reorganizations in the Field of Science and Technology, H.R.Doc.No.372, 87th Cong., 2d Sess. (1962), reproduced in 108 Cong.Rec. 5439-5440, 5456-5457 (1962). See also H.R.Rep.No.34, 90th Cong., 1st Sess. 6 (1967); S.Rep.No. 1137, 90th Cong., 2d Sess. 7 (1968).

22. H.R.Rep.No.1635, 87th Cong., 2d Sess. 9 (1962), quoting Hearings on Reorganization Plan No. 2 of 1962 Before the Subcomm. on Executive and Legislative Reorganization of the House Comm. on Gov't Operations, 87th Cong., 2d Sess. 33

(1962) (statement of Elmer B. Staats, Deputy Director, Bureau of the Budget). See also 108 Cong.Rec. 8469, 8471-8472 (1962) (remarks of Reps. Anderson and Monagan). In 1968, the National Science Foundation Act of 1950 was amended to reflect the new distribution of functions. Pub.L.No. 90-407, 82 Stat. 360 (1968), 42 U.S.C. § 1862(a) (5) & (d) (Supp. V, 1970); see H.R.Rep.No.34, 90th Cong., 1st Sess. 6, 21 (1967); S.Rep.No.1137, 90th Cong., 2d Sess. 7, 16 (1968). The Director of the OST was also expected to replace the President's Special Assistant for Science and Technology in the capacity of personal adviser to the President on scientific matters. See H.R.Rep.No. 1635, *supra*, at 5; Hearings, *supra*, at 10-11, 13-15.

23. Reorganization Act of 1949, ch. 226, § 6, 63 Stat. 205, as amended, 5 U.S.C. § 906 (Supp. V, 1970).

24. A resolution disapproving the plan which created the OST was introduced in the House of Representatives, but did not pass. H.R.Res. 595, 87th Cong., 2d Sess. (1962); 108 Cong.Rec. 8473 (1962).

25. H.R.Rep.No.1635, 87th Cong., 2d Sess. 9 (1962).

of this reasoning but this committee's position on excessive invocation of executive privilege is well known. With the creation of the new office the Director will become available to Congress and provide us with more information than we now obtain.

A Congressman commenting on the plan emphasized the same point:²⁶

With an Office established by the reorganization plan, and a Director and Deputy Director to head it, congressional committees will be able to deal with this organization on the same basis as they do with the Bureau of the Budget and the Council of Economic Advisers. We will have a responsible officer to whom we can direct inquiries, and whom we can summon to committees to give testimony on subjects of the greatest national importance.

[10-12] If the OST's sole function were to advise and assist the President, that might be taken as an indication that the OST is part of the President's staff and not a separate agency. In addition to that function, however, the OST inherited from the National Science Foundation the function of evaluating federal programs. When Congress initially imposed that duty on the Foundation, it was delegating some of its own broad power of inquiry²⁷ in order to improve

the information on federal scientific programs available to the legislature. When the responsibility for program evaluation was transferred to the OST, both the executive branch and members of Congress contemplated that Congress would retain control over information on federal programs accumulated by the OST, despite any confidential relation between the Director of the OST and the President—a relation that might result in the use of such information as a basis for advice to the President.²⁸ By virtue of its independent function of evaluating federal programs, the OST must be regarded as an agency subject to the APA and the Freedom of Information Act.

Moreover, the OST's interpretation of its own charter in 1967 lends additional support to the conclusion that it is a separate administrative entity.²⁹ At that time, the OST apparently considered itself an agency subject to the APA, for it published a notice in the Federal Register describing the information available to the public from the OST under the new Freedom of Information Act, and setting forth procedures for obtaining that information.³⁰

[13-15] Having concluded that the OST is an agency, we think it clear that the Garwin Report is a record of that agency for purposes of a suit under the Freedom of Information Act. The function of the OST is to evaluate feder-

26. 108 Cong.Rec. 8473 (1962) (statement of Rep. Holifield). See also *id.* at 8472 ("I think the very fact that this makes the scientific program more answerable to the Congress in itself justifies the establishment of this Office * * *") (remarks of Rep. Holifield).

27. The power of investigation has long been recognized as an incident of legislative power necessary to the enactment and effective enforcement of wise laws. See, e. g., *McCraun v. Daugherty*, 273 U.S. 135, 47 S.Ct. 319, 71 L.Ed. 580 (1927). The chief limitation on congressional inquiry is that it must be exercised for valid legislative purposes and not in derogation of fundamental personal liberties. See, e. g., *Watkins v. United States*, 354 U.S. 178, 187, 198, 77 S.Ct. 1173, 1 L.Ed.2d 1273

(1957). Congress has often delegated portions of its investigatory power to administrative agencies. See 1 K. Davis, *Administrative Law Treatise* §§ 3.01-3.14 (1958, Supp.1970).

28. See Hearings, *supra* note 22, at 13-14 (remarks of Elmer B. Staats, Deputy Director, Bureau of the Budget, and of Reps. Anderson and Holifield).

29. See *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965):

When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.

30. 32 F.R. Reg. 11,060 (1967).

al scientific programs.³¹ Consequently, any report prepared by the agency or its consultants in fulfillment of that function must be regarded as a record of the agency. It is true that the SST program was selected for evaluation because the President had requested an assessment of it. That request may bring the document within a statutory or constitutional exemption from the disclosure requirements of the Act.³² But the request does not deprive the Garwin Report of its character as the record of a study made in the performance of the ordinary functions of the agency.

II

The conclusion that the Garwin Report is an agency record is only the beginning of the inquiry required under the Freedom of Information Act. The Act enumerates nine specific exemptions to its general requirement of disclosure.³³ On remand, the trial court must determine whether any of those exemptions is applicable.

[16] It has been argued that courts may recognize other grounds for non-disclosure, apart from the statutory exemptions. At least one court has held that the Act's grant of "jurisdiction to enjoin" improper withholding of agency records leaves district courts with discretion to deny relief on general equitable grounds, even when no exemption is applicable.³⁴ But Congress clearly has the power to eliminate ordinary discretionary barriers to injunctive relief, and we believe that Congress intended to do so here.³⁵

[17, 18] Prior to the Freedom of Information Act, the disclosure provisions of the APA allowed the agencies to withhold information "in the public interest," or "for good cause shown," or on the ground that the person seeking the record was not "properly and directly concerned."³⁶ The chief purpose of the new Act was to increase public access to governmental records by substituting limited categories of privileged material for these discretionary standards, and providing an effective judicial remedy.³⁷

31. The Garwin Report is precisely the sort of evaluation the OST is authorized to undertake, *i. e.*, an evaluation of another agency's scientific program involving technological developments and applications. The National Science Foundation, focusing its effort on basic science, had not gathered much information on technological applications and developments, nor had it studied agency programs. The Foundation's function of evaluating federal programs was transferred to the OST to improve performance in these very respects. See Message From the President of the United States Transmitting Reorganization Plan No. 2 of 1962, Providing for Certain Reorganizations in the Field of Science and Technology, H.R.Doc.No. 372, 87th Cong., 2d Sess. (1962), reproduced in 108 Cong.Rec. 5439-5440, 5456-5457 (1962); H.R.Rep.No.1635, 87th Cong., 2d Sess. 7-8 (1962).

32. See pp. 1077-1078 *infra*.

33. 5 U.S.C. § 552(b) (1)-(9) (Supp. V, 1970).

34. Consumers Union of the United States, Inc. v. Veterans Administration, 301 F. Supp. 796, 806-808 (S.D.N.Y.1969); see General Services Administration v. Ben-

son, 415 F.2d 878, 880 (9th Cir. 1969). See generally 1 K. Davis, Administrative Law Treatise § 3A.6 (Supp.1970).

35. Compare United Steelworkers v. United States, 361 U.S. 39, 55-59, 80 S.Ct. 1, 4 L.Ed.2d 12 (1959) (Frankfurter, J., concurring) (80-day injunction against strike causing national emergency is mandatory), with Hecht Co. v. Bowles, 321 U.S. 321, 326-331, 64 S.Ct. 587, 88 L.Ed. 754 (1944) (injunction against violation of Emergency Price Control Act is discretionary). See Note, Judicial Discretion and the Freedom of Information Act: Disclosure Denied: Consumers Union v. Veterans Administration, 45 Ind.L.J. 421 (1970). It is well established that Congress may modify the usually strict standards for equitable relief in providing for injunctions in aid of important federal policies. See, *e. g.*, Virginia Ry. v. System Fed'n, No. 40, 300 U.S. 515, 552, 57 S.Ct. 592, 81 L.Ed. 789 (1937).

36. 5 U.S.C. § 1002 (1964).

37. 5 U.S.C. § 552 (Supp. V, 1970); see Bristol-Myers Co. v. FTC, 138 U.S.App. D.C. 22, 25, 424 F.2d 935, 938 (1970); American Mail Line, Ltd. v. Gulick, 133

The Act rejects the usual principle of deference to administrative determinations by requiring a trial "de novo" in the district court. By directing disclosure to any person, the Act precludes consideration of the interests of the party seeking relief. Most significantly, the Act expressly limits the grounds for non-disclosure to those specified in the exemptions.³⁸ Through the general disclosure requirement and specific exemptions, the Act thus strikes a balance among factors which would ordinarily be deemed relevant to the exercise of equitable discretion, *i. e.*, the public interest in freedom of information and countervailing public and private interests in secrecy. Since judicial use of traditional equitable principles to prevent disclosure would upset this legislative resolution of conflicting interests, we are persuaded that Congress did not intend to confer on district courts a general power to deny relief on equitable grounds apart from the exemptions in the Act itself.³⁹ There may be exceptional circumstances in which a court could fairly conclude that

Congress intended to leave room for the operation of limited judicial discretion, but no such circumstance appears in the present record of this case.

Thus, unless the Government on remand makes a valid claim of constitutional privilege, it will be able to prevent disclosure only by showing that the Garwin Report falls within one or more of the statutory exemptions.

[19] On the basis of the present record, the exemption which seems most likely to be relevant is the fifth, protecting "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."⁴⁰ That exemption was intended to encourage the free exchange of ideas during the process of deliberation and policy-making; accordingly, it has been held to protect internal communications consisting of advice, recommendations, opinions, and other material reflecting deliberative or policy-making processes, but not purely factual or investigatory reports.⁴¹ Factual information may be

U.S.App.D.C. 382, 385, 411 F.2d 696, 699 (1969); H.R.Rep.No.1497, 89th Cong., 2d Sess. 1-2, 5-6, 8-9, 11 (1966); S.Rep.No.813, 89th Cong., 1st Sess. 3-6, 8, 10 (1965).

38. This section does not authorize withholding information or limit the availability of records to the public, except as specifically stated in this section. 5 U.S.C. § 552(c) (Supp. V, 1970); see *Epstein v. Resor*, 421 F.2d 930, 932 (9th Cir.), cert. denied, 398 U.S. 965, 90 S.Ct. 2176, 26 L.Ed.2d 549 (1970).

39. One statement in the report of the Senate Committee on the Judiciary specifically supports the conclusion that Congress intended to eliminate equitable discretion. S.Rep.No.813, 89th Cong., 1st Sess. 3 (1965) ("It is essential that agency personnel, and the courts as well, be given definitive guidelines in setting information policies.") (emphasis added). The report of the House Committee on Government Operations contains language indicating that district courts do have discretion. H.R.Rep.No.1497, 89th Cong., 2d Sess. 9 (1966) ("The Court will have authority whenever it considers such action equitable and appropriate to enjoin

the agency from withholding its records and to order the production of agency records improperly withheld.") (Emphasis added.) However, the House report was published after the Senate had passed its bill. Since only the Senate report was considered by both houses of Congress, the Senate Committee's reading of the Act is a better indication of legislative intent when the two reports conflict. See *Consumers Union of the United States, Inc. v. Veterans Administration*, 301 F.Supp. 796, 801 (S.D.N.Y.1966); *Benson v. General Services Administration*, 289 F.Supp. 590, 595 (W.D.Wash. 1968), aff'd on other grounds, 415 F.2d 878 (9th Cir. 1969); 1 K. Davis, *Administrative Law Treatise* § 3A.2 (Supp. 1970).

40. 5 U.S.C. § 552(b) (5) (Supp. V, 1970).

41. See *Grumman Aircraft Eng'r Corp. v. Renegotiation Bd.*, 138 U.S.App.D.C. 147, 151, 425 F.2d 578, 582 (1970); *Bristol-Myers Co. v. F.T.C.*, 138 U.S.App.D.C. 22, 26, 424 F.2d 935, 939 (1970); see H.R. Rep.No.1497, 89th Cong., 2d Sess. 10 (1966); S.Rep.No.813, 89th Cong., 2d Sess. 9 (1965). See also *Freeman v. Seligson*, 132 U.S.App.D.C. 56, 68-69, 405

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protected only if it is inextricably intertwined with policy-making processes.⁴² Thus, for example, the exemption might include a factual report prepared in response to specific questions of an executive officer, because its disclosure would expose his deliberative processes to undue public scrutiny. But courts must beware of "the inevitable temptation of a governmental litigant to give [this exemption] an expansive interpretation in relation to the particular records in issue."⁴³

[20] The OST is specifically authorized by Congress to evaluate federal scientific programs in order to provide Congress and the President with better information. Its evaluations may be useful to the President, the Congress, and other agencies with the power to make science policy. Nevertheless, the evaluations themselves may not reflect the internal policy deliberations that the "internal communications" privilege is designed to protect. The Garwin Report may con-

tain some policy advice and recommendations which are protected by the statutory exemption.⁴⁴ In the present record, however, there is no evidence to indicate that releasing the factual information in the Garwin Report will expose the decisional processes of the President or other executive officers with policy-making functions. Unless the Government introduces such evidence on remand, the factual information in the Report will not be protected by the exemption for internal communications.

[21-23] Another statutory exemption which may be applicable to the Garwin Report is the fourth, protecting "trade secrets and commercial or financial information obtained from a person and privileged or confidential."⁴⁵ This exemption is intended to encourage individuals to provide certain kinds of confidential information to the Government, and it must be read narrowly in accordance with that purpose.⁴⁶ If the Garwin Report contains material protected by

F.2d 1326, 1338-1339 (1968); *Machin v. Zuckert*, 114 U.S.App.D.C. 335, 338-340, 316 F.2d 336, 339-341 (1962), cert. denied, 375 U.S. 896, 84 S.Ct. 172, 11 L.Ed. 2d 124 (1963); *Boeing Airplane Co. v. Coggeshall*, 108 U.S.App.D.C. 106, 112, 280 F.2d 654, 660 (1960); note 42 *infra*.

42. *Cf. United States v. Morgan*, 313 U.S. 409, 422, 61 S.Ct. 999, 85 L.Ed. 1429 (1941); *Morgan v. United States*, 304 U.S. 1, 18, 58 S.Ct. 773, 82 L.Ed. 1129 (1938); *Carl Zeiss Stifting v. V. E. B. Carl Zeiss, Jena*, 40 F.R.D. 318, 325-326 (D.D.C.1966), *aff'd per curiam*, 128 U.S.App.D.C. 10, 384 F.2d 979, cert. denied, 389 U.S. 952, 88 S.Ct. 334, 19 L.Ed.2d 361 (1967).

43. *Ackerly v. Ley*, 137 U.S.App.D.C. 133, 138, 420 F.2d 1336, 1341 (1969).

44. The rationale of the exemption for internal communications indicates that the exemption should be available in connection with the Garwin Report even if it was prepared for an agency by outside experts. The Government may have a special need for the opinions and recommendations of temporary consultants, and those individuals should be able to give their judgments freely without fear of publicity. A document like the Garwin Report should therefore be treated as an intra-agency

memorandum of the agency which solicited it.

45. 5 U.S.C. § 552(b) (4) (Supp. V, 1970). Other statutory exemptions also protect information that might be communicated to the Government on a confidential basis. The Act exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," and matters "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions." *Id.*, § 552(b) (6) & (8). The Act also exempts "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." *Id.*, § 552(b) (7). This exemption covers files prepared for both civil and criminal law enforcement. *See Clement Bros. v. N. L. R. B.*, 282 F. Supp. 540, 542 (N.D.Ga.1968).

46. *See H.R.Rep.No.1497*, 89th Cong., 2d Sess., 10 (1966); *S.Rep.No.813*, 88th Cong., 1st Sess. 9 (1965); *Grumman Aircraft Eng'r Corp. v. Renegotiation Bd.*, 138 U.S.App.D.C. 147, 151, 425 F.2d 578, 582 (1970); *Bristol-Myers Co. v. F. T. C.*, 138 U.S.App.D.C. 22, 25-26, 424 F.2d 935, 938-939 (1970); *Consumers Union*

this exemption, then that material should be deleted before disclosure of the remainder may be required.⁴⁷

[24] Finally, the trial court on remand may be called upon to consider the first exemption for matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy."⁴⁸

[25] Under the Freedom of Information Act, the District Court is required to expedite the proceedings on remand to determine whether the Garwin Report is protected by any statutory exemption or constitutional privilege.⁴⁹ The court can

most effectively undertake the statutory de novo evaluation of the Government's claim by examining the Report *in camera*. Since the record indicates that the Report is an evaluation of the federal program for development of the SST, it seems likely that the Report contains factual information on the SST and on the Government's activities with respect to it. If the Government asserts a specific privilege on remand, inspection of the Report will enable the court to delete any privileged matter, so that the remainder may be disclosed in accordance with the policies of the Act.⁵⁰ Even

of the United States, Inc. v. Veterans Administration, 301 F.Supp. 796, 802-804 (S.D.N.Y.1969). See also Roviano v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957) (identity of informers); In re Quarles & Butler, 158 U.S. 532, 15 S.Ct. 959, 39 L.Ed. 1080 (1895); Vogel v. Gruaz, 110 U.S. 311, 4 S.Ct. 12, 28 L.Ed. 158 (1884); Freeman v. Seligson, 132 U.S.App.D.C. 56, 69-70, 405 F.2d 1326, 1339-1340 (1968); Westinghouse Elec. Corp. v. City of Burlington, 122 U.S.App.D.C. 65, 70-74, 351 F.2d 762, 767-771 (1965); Boeing Airplane Co. v. Coggeshall, 108 U.S.App.D.C. 106, 113, 280 F.2d 654, 661 (1960); Arnstein v. United States, 54 App.D.C. 199, 203-204, 296 F. 946, 950-951 (1924).

47. The exemption for confidential information is available only with respect to information received from sources outside the Government. The Garwin panel's Report is therefore eligible for this exemption only to the extent it contains private information given confidentially by panel members or information obtained from nongovernmental parties on a confidential basis. See Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 138 U.S.App. D.C. 147, 151, 425 F.2d 578, 582 (1970); Consumers Union of the United States, Inc. v. Veterans Administration, 301 F. Supp. 796, 802-804 (S.D.N.Y.1969).

48. 5 U.S.C. § 552(b) (1) (Supp. V, 1970). The other exemptions require a de novo determination of whether the record the Government seeks to withhold contains information of the class protected by an exemption. But to qualify for the first exemption, the Government need show only that the record is "specifically required * * * to be kept secret" pursuant to an Executive order; review of the propriety of keeping it secret is then

limited to determining that the administrative decision was not arbitrary and capricious. See Epstein v. Resor, 421 F.2d 930, 933 (9th Cir.), cert. denied, 398 U.S. 965, 90 S.Ct. 2176, 26 L.Ed.2d 549 (1970). See also United States v. Reynolds, 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727 (1953); Totten v. United States, 92 U.S. 105, 23 L.Ed. 605 (1875); cf. Dayton v. Dulles, 102 U.S.App.D.C. 372, 378, 254 F.2d 71, 77 (1957), rev'd on other grounds, 357 U.S. 144, 78 S.Ct. 1127, 2 L.Ed.2d 1221 (1958).

49. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

5 U.S.C. § 552(a) (3) (Supp. V, 1970).

50. See Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 138 U.S.App.D.C. 147, 150, 425 F.2d 578, 581 (1970). See also Boeing Airplane Co. v. Coggeshall, 108 U.S.App.D.C. 106, 114, 280 F.2d 654, 662 (1960):

In the present case, where no military or state secrets are involved, and where the generally meritorious basis of the subpoena—including necessity—has been established, we think it proper for the District Judge to examine *in camera* the individual papers which are alleged to be privileged, and direct exclusions or excisions in a manner deemed lawful and appropriate, keeping in mind the issues of the case, the nature and importance of the interests supporting the claim of privilege, and the fundamental policy of free societies that justice is usually promoted by disclosure rather than secrecy. [citations omitted]

if the Government asserts that public disclosure would be harmful to the national defense or foreign policy, *in camera* inspection may be necessary. In such a case, however, the court need not inspect the Report if the Government describes its relevant features sufficiently to satisfy the court that the claim of privilege is justified.⁵¹

III

[26] Congress passed the Freedom of Information Act in response to a persistent problem of legislators and citizens, the problem of obtaining adequate information to evaluate federal programs and formulate wise policies. Congress recognized that the public cannot make intelligent decisions without such information, and that governmental institutions become unresponsive to public needs if knowledge of their activities is denied to the people and their representatives. The touchstone of any proceedings under the Act must be the clear legislative intent to assure public access to all governmental records whose disclosure would not significantly harm specific governmental interests. The policy of the Act requires that the disclosure requirement be construed broadly, the exemptions narrowly.

The public's need for information is especially great in the field of science and technology, for the growth of specialized scientific knowledge threatens to outstrip our collective ability to control its effects on our lives. The OST itself was created to help alleviate this problem; Congress intended that the OST would provide better information and coordination with respect to federal activities in the scientific field. It would defeat the purposes of the OST, as well as the purposes of the Act, to withhold from the public factual information on a

federal scientific program whose future is at the center of public debate.

Reversed and remanded for further proceedings in accordance with this opinion.

WILKEY, Circuit Judge (concurring):

I concur in the result reached and in the court's opinion, except on the point of equitable discretion discussed below.

I.

It is necessary to remand this matter to the trial court, because the trial court did err in not holding the Garwin Report a record of an agency subject to the Freedom of Information Act, and therefore quite logically did not proceed to consider the exemptions under that Act.

II.

Conceivably on remand the trial court may also reach a question of constitutional privilege.¹ To put this question in perspective, it must be understood that the privilege against disclosure of the decision-making process is a tripartite privilege, because precisely the same privilege in conducting certain aspects of public business exists for the legislative and judicial branches as well as for the executive. It arises from two sources, one common law and the other constitutional.

Historically, and apart from the Constitution, the privilege against public disclosure or disclosure to other coequal branches of the Government arises from the common sense-common law principle that not all public business can be transacted completely in the open, that public officials are entitled to the private advice of their subordinates and to confer among themselves freely and frankly, without fear of disclosure, otherwise the

51. See *United States v. Reynolds*, 345 U.S. 1, 8-10, 73 S.Ct. 528, 97 L.Ed. 727 (1953); *Epstein v. Resor*, 421 F.2d 930, 933 (9th Cir.), cert. denied, 398 U.S. 965, 90 S.Ct. 2176, 26 L.Ed.2d 549 (1970).

1. Although the trial court cited this as a second ground of its ruling, this issue has not been raised by the Government.

advice received and the exchange of views may not be as frank and honest as the public good requires.

No doubt all of us at times have wished that we might have been able to sit in and listen to the deliberation of judges in conference, to an executive session of a Congressional committee or to a Cabinet meeting in order to find out the basis for a particular action or decision. However, Government could not function if it was permissible to go behind judicial, legislative or executive action and to demand a full accounting from all subordinates who may have been called upon to make a recommendation in the matter. Such a process would be self-defeating. It is the President, not the White House staff, the heads of departments and agencies, not their subordinates, the judges, not their law clerks, and members of Congress, not their executive assistants, who are accountable to the people for official public actions within their jurisdiction. Thus, whether the advice they receive and act on is good or bad there can be no shifting of ultimate responsibility.²

Insofar as the executive branch is concerned, most, if not all, of the information protected by this common law privilege is now covered by the fifth exemption to the Freedom of Information Act which exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."³

The constitutional part of the privilege arises from the principle of the separation of powers among the legislative, executive and judicial branches of our Government. This at first glance may not seem relevant here, where the appellants are private citizens relying on the Freedom of Information Act, but it puts the matter in a different focus to

know that originally Congressman Henry S. Reuss had sought to obtain this Report over a period of months. Whatever justification lies behind the refusal of his request has a bearing on appellants' rights here. Only after both Dr. DuBridge and Mr. Ehrlichman, Assistant to the President, had declined to accede to the Congressman's request—on the ground that "the report was in the nature of inter- and intra-agency memoranda which contained opinions, conclusions and recommendations prepared for the advice of the President"—did the appellants make their request.

Appellants invoked the Freedom of Information Act in support of their request, but as the court's opinion points out—without deciding whether the refusal of the Assistant to the President was justified or not—" * * * while his [Mr. Reuss'] right as a citizen to obtain the Report under the Act is equal to that of appellants, his right as a Congressman is presumably greater" (footnote 6). Obviously Congress could not surmount constitutional barriers—if such exist in this or any other given case—by conferring upon any member of the general public a right which Congress, neither individually nor collectively, possesses. Water does not naturally rise higher than its source.

Recognition of the necessity, on both grounds cited above, of preserving the confidentiality of certain papers and deliberations has come from all three branches of our Government. A few examples demonstrate the universality and antiquity of the principles involved here.

While the constitutional privilege has been asserted most frequently in our history by the executive against the demands of the legislature, yet the Congress itself has always recognized a privilege for its own private papers and deliberations. Not only is there no provision or procedure for a demand by a

2. Rogers, *The Right to Know Government Business From the Viewpoint of the Government Official*, 40 Marq.L.Rev. 83, 89 (1956). See generally, Kramer and

Marcuse, *Executive Privilege—A Study of the Period 1953-1960*, 29 Geo.Wash. L.Rev. 623 (1961).

3. 5 U.S.C. § 552(b) (5) (Supp. V, 1970).

private citizen for access to any papers deemed confidential, but no court subpoena is complied with by the Congress or its committees without a vote of the house concerned to turn over the documents willingly in response to the request of the court, thus properly preserving the co-equal separate status of that branch of the Government. For example,

[N]o evidence of a documentary character under the control and in the possession of the House of Representatives can, by the mandate of process of the ordinary courts of justice, be taken from such control or possession but by its permission.⁴

The judiciary, as perhaps inherently the weakest of the three branches, has most frequently reiterated the principle of separation of powers, the classic expression being in *Kilbourn v. Thompson*:

It is * * * essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.⁵

The reason for the separation of powers was well put by Mr. Justice Brandeis:

The doctrine of the separation of powers was adopted by the convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid

friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments to save the people from autocracy.⁶

When President Washington first declined to furnish the House of Representatives with a document requested by it, he gave as his reason for refusal,

[I]t is essential to the due administration of the Government that the boundaries fixed by the Constitution between the different departments should be preserved, a just regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbids a compliance with your request.⁷

These examples of recognition by all three branches of a constitutional privilege to withhold certain documents under given circumstances not only show the tripartite nature of the constitutional privilege, but are relevant here, where the appellants are private citizens, because the original request for the Garwin Report stemmed from a Congressman and was denied by the executive on grounds the validity of which is not yet finally determined. But it would be an absurdity to contend that a Congressman—who is both citizen and Member of the House of Representatives—could not have access to a document in the executive branch, and yet another citizen could gain access on the strength of a statute enacted by Congress. Thus, if the exemptions to the Freedom of Information Act are found not to permit withholding of the information sought here, the exec-

4. H.R.Res. 427, 81st Cong., 2d Sess., 96 Cong.Rec. 565-66 (1950); see H.R.Res. 460, 81st Cong., 2d Sess., 96 Cong.Rec. 1400 (1950); H.R.Res. 465, 81st Cong., 2d Sess., 96 Cong.Rec. 1695 (1950); H.R.Res. 469, 81st Cong., 2d Sess., 96 Cong.Rec. 1735 (1950). Only recently, in a situation substantially the inverse of the present case, *i. e.*, a suit to suppress publication of congressional documents, the House indicated its displeasure with, and asserted its independence from what it deemed an intrusion by the ju-

diciary into its prerogatives with respect to its own documents. See *Hentoff v. Ichord*, 318 F.Supp. 1175 (D.D.C.1970), and H.R.Res. 1306, 91st Cong., 2d Sess., 116 Cong.Rec.H 11606, 11625 (daily ed. 14 Dec. 1970).

5. 103 U.S. 168, 191, 26 L.Ed. 377 (1880).

6. *Myers v. United States*, 272 U.S. 52, 293, 47 S.Ct. 21, 81, 71 L.Ed. 160 (1926) (dissenting opinion).

7. 1 Richardson, Messages and Papers of the Presidents 196 (1896).

utive may still assert a constitutional privilege on the ground that Congress may not compel by statute disclosure of information which it would not be entitled to receive directly upon request.

Part II of the court's opinion also expresses the view that Congress, in providing for *de novo* court review of agency refusals to disclose information, intended to require the courts to enjoin withholding of any agency record not exempted by the Act and not protected by a constitutional privilege. Congress, the opinion states, "did not intend to confer on district courts a general power to deny relief on equitable grounds apart from the exemptions in the Act itself." This quoted statement and related discussion relate to an issue which is not presented for decision in this case and is not likely to face the trial court on remand. There is no suggestion in the record that the District Court here denied relief on equitable grounds, nor is it likely that such grounds could be presented in the context of this case. It has been suggested that a court may, on equitable grounds, decline to require disclosure of records not covered by a specific exemption in the Act, where to order disclosure would irreparably invade personal privacy or cause the Government to violate an agreement with a private party that non-commercial and non-financial⁸ information provided by him

will be kept confidential.⁹ There do not appear to be such equitable grounds for non-disclosure present in the instant case and I would not therefore reach the difficult question of statutory construction of the District Court's power in such circumstances.

The Act itself merely provides: "On complaint, the district court * * * has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant."¹⁰ It does not in terms require that such jurisdiction be exercised in all cases. The legislative history pulls in opposite directions on this question; the Senate Report states:

It is the purpose of this [Act] to * * * establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language. * * * It is essential that agency personnel, and the courts as well, be given definite guidelines in setting information policies. Standards such as "for good cause" are certainly not sufficient.¹¹

The House Report, on the other hand, relates that under the Act:

The Court will have authority *whenever it considers such action equitable and appropriate* to enjoin the agency from withholding its records and to

8. The fourth exemption of the Freedom of Information Act exempts from disclosure "commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552 (b) (4) (Supp. V, 1970).

9. Davis, *The Information Act: A Preliminary Analysis*, 34 U.Chi.L.Rev. 761, 767, 787, 791, 802 (1967).

10. 5 U.S.C. 552(a) (3) (1967). In *Hecht Co. v. Bowles*, 321 U.S. 321, 64 S.Ct. 587, 88 L.Ed. 754 (1944), the statute involved directed that upon complaint of the administrator of the Emergency Price Control Act an injunction "shall be granted." Nevertheless the Supreme Court held that the District Court could decline to issue an injunction if equitable considerations indicated that to be the appropriate result. Contrarily, in *United Steelwork-*

ers v. United States, 361 U.S. 39, 80 S.Ct. 1, 4 L.Ed.2d 12 (1959), the Court impliedly held that under a statute which provided that the District Court "shall have jurisdiction" to enjoin an industry-wide strike causing a national emergency, the trial judge had no equitable discretion to refuse to issue an injunction. (That conclusion was made explicit in the concurring opinion of Justices Frankfurter and Harlan.) The accommodation of these two precedents and their application to the statutory scheme of the Freedom of Information Act are, in my view, best accomplished in the context of a case where the issue is presented by the facts and argued by the parties.

11. S.Rep.No.813, 89th Cong., 1st Sess. 3 (1965).

order the production of agency records improperly withheld.¹²

And a noted commentator has expressed the view that the denial of relief on equitable grounds is an appropriate course in certain circumstances.¹³

There is, no doubt, force to the majority's opinion that the thrust of the Act is to limit the grounds for agency withholding to the exemptions therein stated, and that the discretion of the court in enforcing the Act should thus be similarly curtailed. Nevertheless, because of the conflicting legislative history and the difficulty in determining congressional intent on this matter, I believe that pursuant to sound principles of judicial decision making, decision of this issue can and should await the case where it is squarely raised. I therefore express no view as to the correctness of the majority's suggestion that the courts are generally without equitable power to decline to order production of agency records in cases not specifically covered by exemption.

III.

Part III of the court's opinion is a summary of the laudable objectives of the Freedom of Information Act of assuring public access to information necessary to making informed decisions on public issues, but I respectfully suggest it is nevertheless unessential to our decision here. Since it forms part of the court's opinion, however, I think it should be made clear that neither the public nor the Congress is being denied *the facts* here in regard to the supersonic transport, and therefore recourse to legal action under the Freedom of Infor-

mation Act as a practical matter was simply unnecessary.

Each of the persons who were asked by Dr. DuBridge to form the *ad hoc* panel to prepare the Report for the President could be called before the appropriate congressional committee and asked for his views on any aspect of the SST program. There is no reason why the views of these scientists and engineers cannot be made available to the Congress and to the public. The only matter about which they should not be asked is exactly what advice they gave the President. Furthermore, almost two years have gone by since they expressed their views to the President, and the opinions which they might now give to the Congress or to the public, in the light of additional information obtained, might be somewhat different from their best advice at the time they helped formulate the Garwin Report. Even without an appearance before a congressional committee any one of several of these scientists or engineers could be interviewed by the press or on TV, invited to write an article for a magazine or newspaper, or participate in public discussion in any form, in order to enlighten the public. There would be nothing improper in a public expression of individual opinion, so long as exactly what the person advised the President was not explicated.

As a matter of recorded fact, Dr. Richard Garwin, who chaired the panel, has done just that. He has appeared before *three* different congressional committees,¹⁴ and has been publicly reported as stating that he had "said everything I have to say" in lengthy critical testimony about the SST before the three committees, although he appears to have

12. H.R.Rep.No.1497, 89th Cong., 2d Sess. 9 (1966).

13. Davis, *supra*, note 9.

14. Hearings on H.R. 17755 Before the Subcomm. of the Senate Committee on Appropriations, 91st Cong., 2d Sess., pt. 2, at 1621 (1970); Hearings on Supersonic Transport Development Before the Subcomm. on Economy in Government

of the Joint Economic Comm., 91st Cong., 2d Sess., pt. 4, at 904, 908 (1970); Hearings on Department of Transportation Appropriations Before the Subcomm. on Dept. of Transportation and Related Agencies Appropriations of the House Comm. on Appropriations, 91st Cong., 2d Sess., pt. 3 (Testimony of Members of Congress and Interested Individuals and Organizations) at 980 (1970).

carefully refrained from discussing the Garwin Report itself.¹⁵

Thus it appears that alternate means of obtaining the facts in regard to the SST, other than a lawsuit to compel production of the Garwin Report, are available both to the public and to Congress.¹⁶ This hints at the possibility that what the appellants are seeking here is really the *advice* given the President of the United States by his subordinates, rather than the *facts* in regard to the SST program on which the public and the Congress can form an intelligent judgment. Viewed in this light, the issues may take on a different aspect from those framed by the appellants.



UNITED STATES of America

v.

Wilkin D. LUMPKIN, Appellant.
No. 24410.

United States Court of Appeals,
District of Columbia Circuit.

Argued April 14, 1971.

Decided June 21, 1971.

Defendant was convicted in the United States District Court for the District of Columbia, John H. Pratt, J., of armed robbery and assault with a dangerous weapon, and he appealed.

15. Dr. Garwin, at least, was interviewed by the Saturday Review, The Washington Post, and very likely a number of other media representatives. See Sutton, Is the SST Really Necessary, Saturday Review, 15 Aug. 1970, at 14; Washington Post, 21 Dec. 1970, § A, at 2.
2. According to the latter report:

Garwin said he still did not feel free to discuss the study [made by the *ad hoc* panel at the request of the OST] itself, but he emphasized that he "said everything I have to say" about the SST in the course of critical testimony this year before three congressional committees.

The Court of Appeals, MacKinnon, Circuit Judge, held that evidence that defendant and two other men entered store together, that they conversed together until other customers left the store, that defendant did not lie on the floor when one of the codefendants, with a gun, announced a "stick-up" and said "To the floor.", and that defendant moved from near the door to near the cash register after a codefendant ordered store employee to open it was sufficient to support defendant's conviction for armed robbery and assault with a dangerous weapon, and conflicting testimony of defendant and his codefendants whereby they all sought to establish that defendant and one of his codefendants were innocent bystanders did not destroy the permissible inference of defendant's guilt.

Affirmed.

Bazelon, Chief Judge, concurred in the result.

1. Criminal Law ⇨59(5)

Mere presence at scene of crime is not sufficient to convict one of aiding and abetting; what is required is evidence that the accused knowingly associated himself in some way with the criminal venture, that he participated in it as something that he wished to bring about, and that he sought by his action to make it succeed. D.C.C.E. § 22-105.

2. Assault and Battery ⇨92

Robbery ⇨24(1)

Evidence that, inter alia, defendant and two other men entered store togeth-

These reports of Dr. Garwin's interviews with the press were quoted and discussed on the Senate Floor. See 116 Cong.Rec. S 20921, S 20932 (daily ed. 21 Dec. 1970).

16. Of course these considerations would not apply to personal advisors to the President such as members of the White House staff, who traditionally do not appear before Congress. But, as the court's opinion indicates, Dr. Garwin and his confreres, operating under the direction of the OST, are not thus restricted.

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LEVEL 2 - 2 OF 5 CASES

Gary A. SOUCIE et al., Appellants v. Edward E. DAVID, Jr.,
Director, Office of Science and Technology, et al.

SOUCIE v. DAVID

No. 24573

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT

448 F.2d 1067; 2 ERC (BNA) 1626; 1 Media L. Rep. 2435; 1 ELR
20147; 145 U.S. App. D.C. 144

December 7, 1970, Argued
April 13, 1971, Decided

OPINION:

... [*1072] statutory exemption. n11 Only if the Act seems to require disclosure, and if the Government makes an express claim of executive privilege, will it be necessary for the court to consider whether the disclosure provisions of the Act exceed the constitutional power of Congress to control the actions of the executive branch. n12

-----Footnotes-----

n8 See United States v. Reynolds, 345 U.S. 1, 7-8, 73 S. Ct. 528, 532, 97 L. Ed. ...

... [*1072] 66 Yale L.J. 477 (1957); Davis, The Information Act: A Preliminary Analysis, 34 U.Chi.L.Rev. 761, 763-765 (1967). As the concurring opinion points out, the power of Congress to compel disclosure of agency records to the public is no greater than its power to compel disclosure to Congress itself. Since 1789, Congress has frequently exercised the latter power in statutes requiring executive officers to transmit information to Congress. See, e. g., Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65, as amended, 31 U.S.C. § 1002 (Supp. V, 1970) (Sec'y of Treasury must give certain information to either house of Congress on request); Act of May 29, 1928, ch. 901, § 2, 45 Stat. 996, as amended, 5 U.S.C. § 2954 (Supp. V, 1970) (each executive agency must disclose certain information to Gov't Operations Committees of House and Senate on request). However, courts have never been asked to rule on the scope of executive privilege in the context of ...

... [*1072] subordinate official who is before the court." Williams v. Fanning, 332 U.S. 490, 493, 494, 68 S. Ct. 188, 189, 92 L. Ed. 95 (1947).

-----End Footnotes-----

I

Congress passed the Freedom of Information Act in 1966 to strengthen the [*1073] disclosure requirements of the Administrative Procedure Act (APA). Each federal agency subject to the APA must now make its records, with certain specific exceptions, ...

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... [*1073] agency, but merely staff to the President. n16 On that theory, the only "authority" controlling the Garwin Report is the President, and the trial court held that the President is not subject to the disclosure provisions of the APA. We need not determine whether Congress intended the APA to apply to the President, n17 and whether the Constitution would permit Congress to require disclosure of his records, n18 for we have concluded that the OST is a separate agency, subject to the requirements of the Freedom of Information Act, and that the Garwin Report is a record of that agency.

- - - - -Footnotes- - - - -

n16 Compare International Paper ...

... [*1073] FPC is not a separate agency) (unreported; typewritten opinion filed in this action in the District Court, Civ. No. 1571-70, D.D.C.).

n17 The statutory definition of "agency" specifically excludes Congress and the courts of the United States, but does not specifically exclude the President. 5 U.S.C. @ 551(1) (Supp. V, 1970).

n18 See Mississippi v. Johnson, 71 U.S. (4 Wall.) ...

... [*1074] Rep.No. 1635, supra, at 5; Hearings, supra, at 10-11, 13-15.

- - - - -End Footnotes- - - - -

A reorganization plan proposed by the President can take effect only if both houses of Congress acquiesce, i. e., if neither house passes a resolution disapproving the plan within a fixed period of time. n23 The congressional understanding of a proposed plan is therefore entitled to considerable weight in determining its effect. The one house of Congress that explicitly considered the plan creating the OST n24 clearly contemplated that the OST would function as a distinct entity and not merely as part of the President's staff. The House Committee on Government Operations stated: n25

Heretofore, the Congress has not been able to obtain adequate information on Government-wide science matters because the President's Special Assistant for Science has been unavailable for questioning by congressional committees due to his confidential relationship with the President. We express no opinion here on the merits [*1075] of this reasoning but this committee's position on excessive invocation of executive privilege is well known. With the creation of the new office the Director will become available to Congress and provide us with more information than we now obtain.

- - - - -Footnotes- - - - -

n23 Reorganization Act of 1949, ch. 226, @ 6, 63 Stat. 205, as amended, 5 U.S.C. @ 906 (Supp. V, 1970).

...

... [*1075] subjects of the greatest national importance.

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-Footnotes-

n26 108 Cong.Rec. 8473 (1962) (statement of Rep. Holifield). See also id. at 8472 ("I think the very fact that this makes the scientific program more answerable to the Congress in itself justifies the establishment of this Office * * *") (remarks of Rep. Holifield).

-End Footnotes-

If the OST's sole function were to advise and assist the President, that might be taken as an indication that the OST is part of the President's staff and not a separate agency. In addition to that function, however, the OST inherited from the National Science Foundation the function of evaluating federal programs. When Congress initially imposed that duty on the Foundation, it was delegating some of its own broad power of inquiry n27 in order to improve the information on federal scientific programs available to the legislature. When the responsibility for program evaluation was transferred to the OST, both the executive branch and members of Congress contemplated that Congress would retain control over information on federal programs accumulated by the OST, despite any confidential relation between the Director of the OST and the President -- a relation that might result in the use of such information as a basis ...

... [*1075] fundamental personal liberties. See, e. g., Watkins v. United States, 354 U.S. 178, 187, 198, 77 S. Ct. 1173, 1 L. Ed. 2d 1273 (1957). Congress has often delegated portions of its investigatory power to administrative agencies. See 1 K. Davis, Administrative Law Treatise @@ 3.01-3.14 (1958, Supp.1970).

n28 See Hearings, supra note ...

... [*1076] court has held that the Act's grant of "jurisdiction to enjoin" improper withholding of agency records leaves district courts with discretion to deny relief on general equitable grounds, even when no exemption is applicable. n34 But Congress clearly has the power to eliminate ordinary discretionary barriers to injunctive relief, and we believe that Congress intended to do so here. n35

-Footnotes-

n34 Consumers Union of the United States, Inc. v. Veterans Administration, 301 F. Supp. 796, 806-808 (S.D.N.Y.1969); see General Services Administration v. ...

... [*1076] Price Control Act is discretionary). See Note, Judicial Discretion and the Freedom of Information Act: Disclosure Denied: Consumers Union v. Veterans Administration, 45 Ind.L.J. 421 (1970). It is well established that Congress may modify the usually strict standards for equitable relief in providing for injunctions in aid of important federal policies. See, e. g., Virginian Ry. v. System Fed'n. ...

... [*1077] public interest in freedom of information and countervailing public and private interests in secrecy. Since judicial use of traditional equitable principles to prevent disclosure would upset this legislative

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resolution of conflicting interests, we are persuaded that Congress did not intend to confer on district courts a general power to deny relief on equitable grounds apart from the exemptions in the Act itself. n39 There may be exceptional circumstances in which a court could fairly conclude that Congress intended to leave room for the operation of limited judicial discretion, but no such circumstance appears in the present record of this case.

- - - - -Footnotes- - - - -

n36 5 U.S.C. @ 1002 (1964).

n37 5 ...

... [*1077] denied, 398 U.S. 965, 90 S. Ct. 2176, 26 L. Ed. 2d 549 (1970).

n39 One statement in the report of the Senate Committee on the Judiciary specifically supports the conclusion that Congress intended to eliminate equitable discretion. S.Rep.No.813, 89th Cong., 1st Sess. 3 (1965) ("It is essential that agency personnel, and the courts as well, be given definitive guidelines in setting information ...

... [*1077] withholding its records and to order the production of agency records improperly withheld.") (Emphasis added.) However, the House report was published after the Senate had passed its bill. Since only the Senate report was considered by both houses of Congress, the Senate Committee's reading of the Act is a better indication of legislative intent when the two reports conflict. See Consumers Union of the United States, Inc. v. Veterans Administration, 301 F. Supp. 796, ...

... [*1078] 2d 361 (1967).

n43 Ackerly v. Ley, 137 U.S.App.D.C. 133, 138, 420 F.2d 1336, 1341 (1969).

- - - - -End Footnotes- - - - -

The OST is specifically authorized by Congress to evaluate federal scientific programs in order to provide Congress and the President with better information. Its evaluations may be useful to the President, the Congress, and other agencies with the power to make science policy. Nevertheless, the evaluations themselves may not reflect the internal policy deliberations that the "internal communications" privilege is designed to protect. The Garwin Report may contain some policy ...

... [*1080] 421 F.2d 930, 933 (9th Cir), cert. denied, 398 U.S. 965, 90 S. Ct. 2176, 26 L. Ed. 2d 549 (1970).

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III

Congress passed the Freedom of Information Act in response to a persistent problem of legislators and citizens, the problem of obtaining adequate information to evaluate federal programs and formulate wise policies. Congress recognized that the public cannot make intelligent decisions

448 F.2d 1067, *1080; 2 ERC (BNA) 1626;
1 Media L. Rep. 2435; 145 U.S. App. D.C. 144

without such information, and that governmental institutions become unresponsive to public needs if knowledge of their activities is denied to the people and their representatives. The touchstone of any proceedings under the Act must be the clear ...

... [*1080] information is especially great in the field of science and technology, for the growth of specialized scientific knowledge threatens to outstrip our collective ability to control its effects on our lives. The OST itself was created to help alleviate this problem; Congress intended that the OST would provide better information and coordination with respect to federal activities in the scientific field. It would defeat the purposes of the OST, as well as the purposes of the Act, to withhold from the public factual information on a federal scientific ...

CONCUR:

... [*1081] upon to make a recommendation in the matter. Such a process would be self-defeating. It is the President, not the White House staff, the heads of departments and agencies, not their subordinates, the judges, not their law clerks, and members of Congress, not their executive assistants, who are accountable to the people for official public actions within their jurisdiction. Thus, whether the advice they receive and act on is good or bad there can be no shifting of ultimate responsibility. n2

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n2 Rogers, The ...

... [*1081] refusal of the Assistant to the President was justified or not -- "* * * while his [Mr. Reuss'] right as a citizen to obtain the Report under the Act is equal to that of appellants, his right as a Congressman is presumably greater" (footnote 6). Obviously Congress could not surmount constitutional barriers -- if such exist in this or any other given case -- by conferring upon any member of the general public a right which Congress, neither individually nor collectively, possesses. Water does not naturally rise higher than its source.

Recognition of the necessity, on both grounds cited above, of preserving the confidentiality of certain papers and deliberations has come from all three branches of our Government. A few examples demonstrate the universality and antiquity of the principles involved here.

While the constitutional privilege has been asserted most frequently in our history by the executive against the demands of the legislature, yet the Congress itself has always recognized a privilege for its own private papers and deliberations. Not only is there no provision or procedure for a demand by a [*1082] private citizen for access to any papers deemed confidential, but no court subpoena is complied with by the Congress or its committees without a vote of the house concerned to turn over the documents willingly in response to the request of the court, thus properly preserving the co-equal separate status of that branch of the Government. For example,

448 F.2d 1067, *1082; 2 ERC (BNA) 1626;
1 Media L. Rep. 2435; 145 U.S. App. D.C. 144

No ...

... [*1082] contend that a Congressman -- who is both citizen and Member of the House of Representatives -- could not have access to a document in the executive branch, and yet another citizen could gain access on the strength of a statute enacted by Congress. Thus, if the exemptions to the Freedom of Information Act are found not to permit withholding of the information sought here, the executive [*1083] may still assert a constitutional privilege on the ground that Congress may not compel by statute disclosure of information which it would not be entitled to receive directly upon request.

Part II of the court's opinion also expresses the view that Congress, in providing for de novo court review of agency refusals to disclose information, intended to require the courts to enjoin withholding of any agency record not exempted by the Act and not protected by a constitutional privilege.

Congress, the opinion states, "did not intend to confer on district courts a general power to deny relief on equitable grounds apart from the exemptions in the Act itself." This quoted statement and related discussion relate to an issue which is ...

... [*1084] information necessary to making informed decisions on public issues, but I respectfully suggest it is nevertheless unessential to our decision here. Since it forms part of the court's opinion, however, I think it should be made clear that neither the public nor the Congress is being denied the facts here in regard to the supersonic transport, and therefore recourse to legal action under the Freedom of Information Act as a practical matter was simply unnecessary.

Each of the persons who were asked by Dr. DuBridge to ...

... [*1084] hoc panel to prepare the Report for the President could be called before the appropriate congressional committee and asked for his views on any aspect of the SST program. There is no reason why the views of these scientists and engineers cannot be made available to the Congress and to the public. The only matter about which they should not be asked is exactly what advice they gave the President. Furthermore, almost two years have gone by since they expressed their views to the President, and the opinions which they might now give to the Congress or to the public, in the light of additional information obtained, might be somewhat different from their best advice at the time they helped formulate the Garwin Report. Even without an appearance before a congressional committee any one of several of these ...

... [*1085] 904, 908 (1970); Hearings on Department of Transportation Appropriations Before the Subcomm. on Dept. of Transportation and Related Agencies Appropriations of the House Comm. on Appropriations, 91st Cong., 2d Sess., pt. 3 (Testimony of Members of Congress and Interested Individuals and Organizations) at 980 (1970).

n15 Dr. Garwin, at least, was interviewed by the Saturday Review, The Washington Post, and very likely a number of other media representatives. See Sutton, Is the SST Really Necessary, ...

... [*1085] daily ed. 21 Dec. 1970).

448 F.2d 1067, *1085; 2 ERC (BNA) 1626;
1 Media L. Rep. 2435; 145 U.S. App. D.C. 144

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Thus it appears that alternate means of obtaining the facts in regard to the SST, other than a lawsuit to compel production of the Garwin Report, are available both to the public and to Congress. n16 This hints at the possibility that what the appellants are seeking here is really the advice given the President of the United States by his subordinates, rather than the facts in regard to the SST program on which the public and the Congress can form an intelligent judgment. Viewed in this light, the issues may take on a different aspect from those framed by the appellants.

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n16 Of course these considerations would not apply to personal advisors to the President such as members of the White House staff, who traditionally do not appear before Congress. But, as the court's opinion indicates, Dr. Garwin and his confreres, operating under the direction of the OST, are not thus restricted.

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To: Marvin

FR: Adam

Re: My material/Notes on Gov Ops Request

Date: August 26, 1994