THE WHITE HOUSE

WASHINGTON

September 20, 1983

MEMORANDUM FOR JOHN B. ROBERTS, III
ASSOCIATE DIRECTOR
OFFICE OF PLANNING AND EVALUATION

FROM: JOHN G. ROBERTS JGR
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Discussion with Department of Justice Attorneys Concerning Legal Opinions

Ralph Tarr of the Department of Justice inadvertently contacted me in the course of returning a call from you concerning a legal opinion being prepared by his office. When we established that he was looking for the "other" John Roberts, Ralph and I both became concerned from the nature of your inquiry that you may not be familiar with the attached memorandum for the White House Staff from the Counsel to the President, which also appears in the Standards of Conduct section of the White House Office Staff Manual. Pursuant to this memorandum, questions concerning legal opinions being prepared by the Department of Justice should be referred to the Office of the Counsel to the President.

The call from Ralph was hardly the first and I daresay will not be the last time our lines will cross. When you have a free moment, we should discuss means of reducing the confusion caused by our sharing of a noble name.

THE WHITE HOUSE

WASHINGTON

February 10, 1981

MEMORANDUM FOR THE WHITE HOUSE STAFF

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Communications with the Department of Justice

As we are all keenly aware, it is imperative that there be public confidence in the effective and impartial administration of the laws. To that end, after consultation between the President and the Attorney General, the following procedures have been established in regard to communications between the White House Staff and the Department of Justice.

1. All inquiries which concern or may concern particular pending investigations or cases being handled by the Department of Justice shall be directed to the Counsel to the President. If appropriate and necessary, the inquiry will then be transmitted to the Office of the Attorney General or the Deputy Attorney General.

2. All requests for formal legal opinions from the Department of Justice shall be directed to the Counsel to the President, who will direct such requests to the Office of the Attorney General or to the Assistant Attorney General -- Office of Legal Counsel.

3. All comments between the White House Office and the Department of Justice in regard to policy, legislation and budgeting should be handled directly between those parties concerned.

Your cooperation in observing these guidelines is most strongly urged. If you have any questions regarding these procedures, please contact this Office.

ID # 239086 CU

PE001

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

what now?

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) 1 1

Name of Correspondent: Ralph W. Tarr

Larry ✓

☐ MI Mail Report User Codes: (A) _____ (B) _____ (C) _____

Subject: System of Confidential Financial Reporting by Certain Executive Branch Employees and Officials

ROUTE TO:		ACTION		DISPOSITION		
Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CWHolland		ORIGINATOR DD	84/06/26			1 1
WATO2		Referral Note: A	84/06/27			1 1
		Referral Note: DDI	1 1			1 1
		Referral Note:	1 1			1 1
		Referral Note:	1 1			1 1
		Referral Note:				

ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: Copy of Jan 21 84 Memo from Olson ltr to David Martin attached

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

5/81

U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

JUN 25 1984

239086

MEMORANDUM FOR FRED F. FIELDING
Counsel to the President

Re: Ethics in Government Act

Attached is a copy of the letter that Ted Olson recently sent to David Martin, Director of the Office of Government Ethics, in response to Mr. Martin's letter of March 2, 1984. Mr. Martin's letter sought reconsideration of this Office's opinion concerning the scope of the President's power under the Ethics in Government Act to order a system of confidential financial reporting by certain Executive branch employees and officials.

In his haste to leave the country, Ted did not have a chance to transmit the attached to you and asked me to attend to it this week.

Ralph W. Tarr
Acting Assistant Attorney General
Office of Legal Counsel

Attachment

U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

JUN 21 1984

Honorable David H. Martin
Director
Office of Government Ethics
1717 H Street, N.W., Rm. 436
Washington, D.C.

Dear Mr. Martin:

This is in response to your letter of March 2, 1984 requesting our review of a legal memorandum ("March 2 Memorandum") regarding the requirements for confidential financial disclosure by certain Executive Branch employees and officials. The author(s) of the March 2 Memorandum have not been identified 1/, but the contents of the Memorandum have been endorsed in varying degrees by thirty-five Executive Branch agency legal officials. 2/

1/ We gather from some of the materials submitted with the March 2 Memorandum that the author may have been someone in the Office of the General Counsel of the National Aeronautics and Space Administration. We responded once before to an unsigned memorandum on this same subject from that office. See generally Memorandum for Richard A. Hauser, from Theodore B. Olson, June 30, 1983. The arguments in the March 2 Memorandum, while more detailed, are not materially different from those in the prior unsigned memorandum.

2/ The number thirty-five is attained by including thirteen separate legal officials within the Department of Defense as well as "concurrences" in various forms by numerous acting, deputy, associate or assistant general counsels of Executive Branch agencies and "independent" regulatory bodies. While we of course respect the competence, integrity and good faith of the various legal officials who concurred in the March 2 Memorandum, we cannot resolve difficult legal questions on the basis of a referendum. See 28 U.S.C. §§ 511-513; Executive Order No. 12146 (July 19, 1979), 44 Fed. Reg. 42657; and 28 C.F.R. § 0.25 (all describing the role of the Attorney General in resolving legal disputes).

The principal legal conclusion articulated by the March 2 Memorandum is contrary to the previously expressed legal views of this Office. The legal officers who have participated in this venture 3/ apparently wish us to reconsider again our views on the subject.

THE ISSUE

Title II of the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (the Act), requires certain high level and policy officials in the Executive Branch to make annual public disclosure of personal financial information regarding their income, assets, investments, financial affiliations, liabilities, gifts and reimbursements. At issue here is the meaning of Section 207(a) of the Act which provides in pertinent part as follows:

> The President may require officers and employees in the executive branch . . . not covered by this title to submit confidential reports in such form as is required by this title.

In short, this provision allows the President to require lower level Executive officials to submit confidential financial disclosure statements "in such form as is required by this title."

We have opined on two previous occasions that the phrase "in such form as is required by this title" means that if the President exercises his discretion to require any Executive Branch officers or employees to submit confidential reports under this provision, those reports must contain essentially the same information required for public disclosure by other officials under the same title of the Act. The alternative interpretation advanced by the March 2 Memorandum is that the quoted phrase grants the President "discretion to determine what information should be required in confidential statements as long as he does not require more information than is

---

3/ We attach some significance to the fact that the Office of Government Ethics has not endorsed the legal conclusions contained in the March 2 Memorandum. In fact, various persons in your Office have advised us orally in the past that they do not disagree with the conclusions of this Office on the legal issues discussed in this letter.

contained in the public disclosure reports." March 2 Memorandum at 39. 4/

After having reviewed the statute and its legislative history in exhaustive detail on yet another occasion and having subjected this issue to close analysis by several different lawyers in this Office, we remain convinced that our initial interpretation of the statute is the correct one. The alternative, while superficially appealing, and certainly more convenient for the Executive Branch, ascribes to the statutory language a meaning that is both incongruous with the words used by Congress and lacking adequate support in the legislative history.

We are not unmindful that Congress could have expressed its intentions more clearly and that the legislative history of this enactment is, as is frequently the case, not a model of clarity. We are also keenly aware that a broad, rigid and indiscriminate imposition of the statute's requirements would create unpleasant and perhaps unnecessary administrative burdens. Moreover, even a modest and reasonable application of the statute as we have interpreted it will apparently require a great deal more paperwork, inconvenience, expense and administrative burden than is necessary from the standpoint of the agencies that have considered the same issue. Nevertheless, because the alternative interpretation cannot in our opinion be squared in good faith with the statute or its legislative history, and because we feel that we cannot engage in Executive Branch revision of the statutory requirements to serve the interests of expediency, we must reaffirm our previous conclusion.

PRACTICAL CONSIDERATIONS

Before discussing the legislative history of Section 207(a) and the arguments made in the March 2 Memorandum, we would like to make several practical points that should be considered in applying Section 207(a).

4/ Addendum 2 (Department of Interior) to the March 2 Memorandum is inconsistent with this conclusion. In this addendum the Department of Interior sets forth a view that it should be permitted to collect more detailed information from certain employees in order to enhance its enforcement of the Surface Mining Act.

1. Section 207(a), as we interpret it, does not require the President or any federal agency to collect financial disclosure reports from anyone beyond those high-level employees listed in the Ethics Act. When Congress established the public disclosure system under the Ethics Act, it eliminated all then-existing financial disclosure requirements imposed by law or regulation, including the system of confidential reporting established by Executive Order 11222. 5/ See § 207(c). While Section 207(a) permits the President to reimpose confidential reporting requirements on lower level employees, he need not do so at all, and he certainly need not do so to an extent that will create unjustifiable burdens on federal agencies or employees. In our view, it is well within the discretion of the President, indeed it is his responsibility, to weigh all of the relevant considerations before extending the financial reporting requirements of the Ethics Act to any given class of employees.

2. Section 207(c) of the Act purports to supersede only "any general requirement under law or regulation with respect to the reporting of information required for purposes of preventing conflicts of interest or apparent conflicts of interest." § 207(c) (emphasis added). Because the primary purpose of Section 207(a) seems to be to permit the President to replace the general requirements superseded pursuant to Section 207(c), we would read the direction in Section 207(a) concerning the content of reports to apply only to "any general requirement under law or regulation." We accordingly would not read Section 207(a) to prohibit the President, or a Federal agency, from requesting from particular employees on an ad hoc basis information different from that required by the Ethics Act. For example, under this interpretation an agency could request an employee being investigated for a conflict of interest to provide financial information beyond that required by the Ethics Act. 6/

5/ In this regard we must again question Addendum II to the March 2 Memorandum which describes the financial reports collected by the Department of the Interior under the Surface Mining Act. In an Opinion dated April 11, 1980 (reconsidered at the request of the Solicitor of Interior on January 26, 1981), we advised that the reporting provisions of the Surface Mining Act were expressly repealed by Section 207(c) of the Ethics Act.

6/ Construing subsections 207(a) and (c) to complement one another also mitigates possible conflict between the statute and any inherent constitutional powers of the President to require accountability from Executive branch employees.

3. Similarly, we do not read Section 207(a) to prohibit the President, or the federal agencies, from requesting employees to certify that they understand and are in conformity with particular restrictions that apply to them by virtue of their federal employment. For example, the Department of the Interior could require annual certifications by employees covered by the Surface Mining Act that they understand that they are not permitted to have any stock or other financial interests in mining concerns. Conversely, an agency might require certain employees to certify their understanding that 18 U.S.C. § 208 requires their disqualification from certain types of matters, and that they will comply with such disqualification requirements in performing their official duties. This latter type of certification may be an effective way of preventing conflicts of interest for special government employees assigned to work on discrete projects, without requiring the broad financial disclosure that so many of the general counsels feel is too burdensome in this context.

4. Finally, as you well know, the Ethics Act itself provides for special, more flexible, treatment for special government employees. See generally § 201(d) (exempting employees who serve sixty days or less from any public reporting requirement), and § 201(i) (giving the Director of the Office of Government Ethics authority to waive reporting requirements for special government employees under certain circumstances).

While implementation of this statute as we understand its requirements would undoubtedly impose some burdens, there are alternatives to a rigid, inflexible and broad application. However, in the final analysis, if our interpretation is wholly unacceptable and if the burdens are intolerably severe, you may wish to seek a legislative amendment to the Act so that the relevant provision would read "in such form as the President may determine provided that he may not require more information than is required by this title." 7/

7/ While the Department of Justice is unlikely to oppose such legislation in principle, you should be aware that such proposed legislation may meet with some resistance in the Congress. The House Report on the 1983 amendments to the

(Footnote continued on next page)

LEGAL DISCUSSION

We do not intend to repeat all of the arguments and debate that has ensued about the meaning of this provision. We will attempt merely to respond to some of the major points made by the March 2 Memorandum.

A. Language and Legislative History

The author of the March 2 Memorandum ignores the language of the statute on the ground that it is "ambiguous on its face" and proceeds immediately to an analysis of the legislative history without ever looking back to the statutory language. Moreover, the outcome of the author's journey through the legislative history appears influenced by a concentration on finding and presenting only one aspect of that history, that which the author believes lends support to the conclusion that the President should have complete discretion to establish any number of confidential disclosure systems so long as these systems do not exceed in their intrusiveness the public disclosure system established for high-level political appointees. We believe that this approach and conclusion are fundamentally flawed.

As a general matter, we cannot abandon the statutory language "in such form as is required by this title" in favor of an interpretation that is essentially incompatible with

---

(Footnote continued)

Ethics Act discusses the issue considered in the March 2 Memorandum and states that:

> [T]he committee expects the President, in exercising the power provided in section 207 of the Act, will not reduce the scope or nature of the disclosure requirements. In fact, section 207 provides the President may require officers and employees to submit * * * reports in such form as is required by this title. That does not mean truncated or limited disclosure reports.

H.R. Rep. No. 89, Part. 2, 98th Cong., 1st Sess. 12 (1983) (emphasis added); see also id., at 11 (citing the February 1983 Office of Legal Counsel Opinion).

that language. While we agree that legislative history and policy considerations are important and useful tools in interpreting statutes, they do not permit us to ignore the text of the statute unless Congress unequivocally has stated it intends a given word or phrase to have a specific meaning. See generally Consumer Product Safety Comm'n v. GTE Sylvania, 447 U.S. 102, 108 ("Absent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive."). In this case we are aware of no such unequivocal statement of Congress, and we simply cannot reconcile the text of the statute with the position urged in the unsigned memorandum. Moreover, our review of the legislative history in its entirety leads us to conclude that Congress intended to impose the identical reporting obligations upon employees covered by the confidential and public disclosure systems.

At the risk of oversimplifying, the March 2 Memorandum observes that two discrete systems of confidential financial disclosure were recommended by the relevant Committees of the House of Representatives. 8/ The Post Office and Civil Service Committee recommended a confidential system for certain employees designated by the Director of the Office of Government Ethics, requiring the same information required on the public disclosure forms. Under this bill the Director

---

8/ See generally March 2 Memorandum at 3-23.

There were actually four different Committees of the House that considered and reported financial disclosure bills. See generally, 124 Cong. Rec. 30411 et seq. (discussing various provisions of the different committee bills at the time that a substitute bill (H.R. 13850) was taken to the floor). For our purposes, we need only focus on two of the committee bills.

The Senate Bill (S. 555) was silent on the subject of non-public disclosure by lower level employees. See discussion in March 2 Memorandum at 3-4. See also S. Rep. No. 170, 95th Cong., 1st Sess. 21-28, 42-46, 108-144; and 123 Cong. Rec. 21013-21019 (June 27, 1977). The Conference Report and the floor consideration of the Conference Report were similarly silent with respect to this point. See H. Cong. Rep. No. 1756, 95th Cong. 2d Sess. (1978); 124 Cong. Rec. 34526-34527, 36459-36469 (1978). Accordingly, the pertinent legislative history of Section 207(a) is derived from the House reports and floor debates.

also was given authority to relax by regulation specific reporting requirements applicable to employees filing public or confidential reports. (H.R. 6954). The Judiciary Committee recommended a system in which the President had broad discretion 1) to designate the employees who should file confidential reports and 2) to determine what information should be contained in such reports. (H.R. 1). This second element of discretion was recommended by the committee over objections to the effect that the bill would permit the President to impose overly intrusive and burdensome confidential disclosure requirements on lower level employees. See H.R. Rep. No. 800, 95th Cong., 1st Sess. 100 (1977).

A single compromise bill (H.R. 13850), in the nature of a substitute, was taken to the House floor. The substitute bill followed the form of the Judiciary Committee's H.R. 1 in many respects, but it also contained some new provisions which presumably answered the objections of dissenters and adopted positions recommended by the other interested committees. The limiting language of Section 207(a) concerning confidential reporting, "in such form as is required by this [title]," first appeared in the substitute bill presented on the House floor. Representative Schroeder, a supporter of the substitute and the Chairwoman of the Post Office and Civil Service subcommittee that reported H.R. 6954, explained this provision of the substitute as follows:

> Seventh, there is provision for confidential filing by lower level personnel, but it must be done, as the Post Office and Civil Service Committee's bill required, according to the same form as public filings will be.

124 Cong. Rec. 30419 (1978). 9/ As noted previously, the Post Office and Civil Service Committee's bill required the same information on public and confidential reports.

As the March 2 Memorandum observes in detail, members of Congress did express sentiments, both in committee and on the floor, to the effect that the President should not be permitted

---

9/ Representative Schroeder made this remark in the context of "point[ing] out some of the good provisions of the substitute which came from the work of [the Post Office and Civil Service] committee as shown in H.R. 6954, Part I, the bill we reported and one of the three we have passed over for the substitute." 124 Cong. Rec. 30419 (1978).

to require more intrusive and burdensome disclosure in the confidential disclosure system than Congress had mandated for the public disclosure system. See March 2 Memorandum at 3-23. The March 2 Memorandum concludes that the most sensible reading of this legislative history is that Congress intended to place only an upper limit on the information that could be required of lower level officials in the confidential system. The deficiency in this conclusion is that while the language of the statute and its history support the view that such an upper limit was intended, they fail to support the proposition that no lower limit was intended. Standing alone or viewed as part of the entire history, the fact that some Members of Congress wanted to place a limit on the President's discretion to seek personal information from government employees supports only the conclusion, when coupled with the language ultimately adopted, that the confidential system could not be allowed to be more intrusive than the public system. It does not support the conclusion that the President was given discretion to collect less information in the confidential disclosure system than in the public system.

The legislative history in its entirety in fact reflects a desire for a system that would impose equal and reasonably uniform burdens on all employees required to file reports. Congress had decided what categories of information would be material in evaluating potential conflicts of interest and seemed to want to impose those requirements on some officials and leave to the President whether to impose essentially the same burdens on others. The March 2 Memorandum does not explain, indeed it does not even cite, the statement of Representative Schroeder relating the language of Section 207(a) in the substitute to the view of the Post Office and Civil Service Committee that there should be essentially the same disclosure requirements in the public and confidential systems. Our interpretation of the statute is compatible not only with the legislative history relied upon in the March 2 Memorandum, but also with the language of the enactment itself and the statement of Representative Schroeder concerning the views of her Committee and its role in the compromise that led to the enactment of Section 207(a) in its present form.

In addition to its argument based upon the legislative history, the March 2 Memorandum makes numerous other subsidiary arguments to support its conclusion. We will respond to those briefly.

The March 2 Memorandum's argument that Congress could have specifically referred to "the long-form disclosure requirement" if it wished to, especially since it did in

other cases, does not advance its conclusion since the same logic is even more true of the alternative interpretation of the statute. Congress surely would have said so if it intended to grant complete discretion to the President except as limited by the standard of the maximum amount and types of information required of the higher officials. Congress in fact set such a limit in Section 202(a) of the Act where it gave the Director of the Office of Government Ethics authority to require disclosure of gifts to dependent children "if the information required to be disclosed does not exceed that which must be reported by the spouse of a reporting individual under this title." Section 202(a) (emphasis added). The argument that Congress could have expressed itself more clearly had it intended a certain result is not particularly strong for either conclusion in the facts of this case, but it is more weighty in favor of the OLC conclusion in light of the linguistic awkwardness of reaching the alternative conclusion urged in the March 2 Memorandum.

The purpose behind a reporting system that seeks essentially the same categories of information from all reporting employees--a purpose that the March 2 Memorandum is entirely unable to discern--is apparently the goal of a comprehensive, uniform system. As unpleasant as it might be to fill out these forms, they seek only certain basic financial information such as sources and amounts of income, investments and liabilities, the sources and amounts of gifts and reimbursements, and the identity of financial affiliations. Although it is possible to disagree with the wisdom of the result, it is entirely reasonable for Congress to have assumed that these are precisely the categories of information that should be disclosed to avoid potential conflicts of interest by employees without imposing unjustifiable burdens on the privacy of those employees.

The March 2 Memorandum argues that its interpretation must be correct because it is the most "reasonable" in terms of its effect on the Executive Branch. The word "reasonable" in the context of the March 2 Memorandum is implicitly translated into "least burdensome" on the Executive Branch. While this would be a convenient theory upon which to predicate statutory interpretation, it ignores the language of the statute itself and overstates the significance of the judicial authorities upon which it relies. In most of the cases cited, a literal interpretation of the statute in question would have been nonsensical, entirely impracticable, or manifestly inconsistent with the legislative history. In matters of ethics, but in other areas as well, Congress has not been motivated strictly by the ease of application of the statutory requirements or

their convenience for the Executive. Here, for the reasons enumerated at the outset of this letter, the burden on the Executive, especially as perceived by the Congress, may not be as great as it has been portrayed by those anxious to avoid the requirement.

We certainly agree that this Administration has been committed to addressing and reducing unnecessary paperwork burdens and to reducing the oppressive force of such burdens on those who would work for or with the government. Sympathy with this policy, however, does not allow us to stretch legislative intent to suit those goals unless Congress has permitted such a range of options in the statute. Similarly, while Congress did intend a more flexible treatment for special government employees, it made specific provision for their situation in the Act itself. See discussion at 5, supra. These provisions can surely be used to mitigate some of the harsher aspects of the Act with respect to special government employees, but they are not an excuse to rewrite the Act itself--even if only with respect to such special government employees.

Finally, the March 2 Memorandum finds it "difficult to believe that Congress wished to exempt [certain officials] from the requirements [of the financial disclosure statute], but at the same time left the door open to imposition of the very same requirements through an executive order." In fact, Congress did this very thing, even under the analysis of the March 2 Memorandum. It left the "door open" to the President to impose the reporting requirements on employees not covered by the public disclosure system.

CONCLUSION

While it would certainly be preferable to read the statute in the manner suggested, we are unable to conclude that it is amenable to that interpretation. We have reviewed the statute and its legislative history repeatedly, but we cannot accept the tendered legal analysis, irrespective of the lack of popularity of our conclusions. The statute requires that any general system of financial reporting imposed by the President require the same information as is required in the public reporting system established by the Act.

Sincerely,

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

U.S. Department of Justice
Office of Legal Counsel

Washington, D.C 20530

July 12, 1984

Mr. John G. Roberts, Jr.
Associate Counsel to the President
The White House
Washington, D.C. 20500

Dear John:

Larry Simms asked me to send you a copy of the enclosed enrolled bill comment, prepared by this Office, which recommends that the President include the attached language in his signing statement on the Deficit Reduction Act. The area of specific concern to us is the greatly increased authority of the Comptroller General to review and decide bid protests. We are sending this material to you in advance so that you will be aware of the issue when the enrolled bill report comes over from OMB.

Sincerely,

Todd

Todd D. Peterson

U.S. Department of Justice
Office of Legal Counsel

Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

JUL 2 1984

MEMORANDUM TO ROBERT A. McCONNELL
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS

Re: Unconstitutional Assignment of Executive Power to Comptroller General in H.R. 4170

This responds to Mr. Perkins' memorandum of June 27, 1984 to this Office as well as other interested entities within the Department on this subject. Subsequent to our receipt of Mr. Perkins' memorandum, we have been informed informally by Mr. Logan of your office that a veto of this bill, entitled the "Deficit Reduction Act of 1984," would be highly unlikely for programmatic reasons. Because of our serious concern that the President may sign a bill that unconstitutionally delegates to the Comptroller General, an officer of Congress, the power to execute the law, we wanted to communicate directly to you our concern and recommendation regarding an appropriate signing statement if it is indeed impracticable to secure a presidential veto of this bill.

As you are aware, the Administration, through a letter signed by you and addressed to Chairman Brooks of the House Committee on Government Operations on April 20, 1984, formally communicated its views regarding the unconstitutionality of several provisions in H.R. 5184. We are presently in the process of reviewing the extent to which those unconstitutional provisions in H.R. 5184 have in fact been carried over into H.R. 4170. Although that review can be completed quickly, it will take somewhat longer for us to consider carefully what an appropriate Executive Branch position ought to be with respect to implementing this legislation once it is enacted into law. At the present time, we can identify at least three areas where potential constitutional problems are raised by the proposed bill. First, § 2741 prohibits an agency from awarding or going forward with performance of a contract if a protest has been submitted to the Comptroller General by an interested party, unless the head of the procuring agency specifically

makes certain written findings. A similar provision was contained in § 204(b)(2) of H.R. 5184. Second, § 2741 also would permit the Comptroller General to require the contracting agency to pay costs, attorneys fees, and bid preparation expenses to a successful protestor. Third, the procedure established by § 2741 purports to require the contracting agency to disclose "all relevant documents" with respect to a protested procurement, including, presumably, documents that may be privileged. These provisions interfere with the Executive's ability to execute the law and thrust an arm of Congress into the middle of the Executive's constitutional business.

One possible response to these provisions would be an appropriate direction to all Executive Branch agency heads to ignore the questionable provisions until such time as they are held constitutional by a court. Such a directive from the President would not be without clear precedent, because in 1955 President Eisenhower instructed the Secretary of Defense to ignore a provision in an enrolled bill which granted to a committee of Congress power much like that granted to the Comptroller General here. President Eisenhower stated that that provision "will be regarded as invalid by the Executive Branch of the Government . . . unless otherwise determined by a court of competent jurisdiction." Public Papers of the President: Dwight D. Eisenhower 689 (1955).

Whether an instruction like the 1955 instruction by President Eisenhower to his subordinates should be issued in this matter is an issue worthy of careful thought and deliberation. Because of the short time frame in which to consider and resolve this problem in the context of an enrolled bill, we have attached proposed language for a presidential signing statement which essentially makes the constitutional point but indicates that precise instructions as to how the Executive Branch will treat the unconstitutional provisions will be forthcoming from the Attorney General.

Our transmission of this proposed language to be included in a presidential signing statement should not be taken as an indication that the Department should not recommend a veto of this legislation. These particular provisions of this bill represent the culmination of an effort, strongly resisted by this Department over many years, to grant to the Comptroller General power not only to execute the laws of the United States but to supervise directly the execution of the law by Executive Branch agencies who are presently, and must constitutionally be, subordinate only to the President, not the Comptroller General, in their execution of the law. A presidential veto of this bill

on constitutional grounds would most assuredly send an unmistakable message to Congress regarding this President's position on legislation encroaching directly on Executive power. We assume a threat to veto it before it is in fact enrolled might have a similar effect, and we would urge your Office to explore that possibility. We believe it important that your Office, in the time available, attempt to assure itself and this Department that a presidential veto is not worth exploring further.

Larry L. Simms
Deputy Assistant Attorney General
Office of Legal Counsel

Attachment

cc (w/attach.): Richard Willard
Assistant Attorney General
Civil Division

Charles Myers
Civil Division

Terry Samuels
Justice Management Division

John Filippini
Antitrust Division

PROPOSED LANGUAGE FOR PRESIDENTIAL SIGNING STATEMENT
ON H.R. 4170

In signing this important legislation, I must vigorously object to certain provisions that would unconstitutionally attempt to delegate to the Comptroller General of the United States, an officer of Congress, the power to perform duties and responsibilities that in our constitutional system may be performed only by officials of the Executive Branch. This Administration's position on the unconstitutionality of these provisions was clearly articulated to Congress by the Department of Justice on April 20, 1984. I am instructing the Attorney General to inform all Executive Branch agencies as soon as possible with respect to how they may comply with the provisions of this bill in a manner consistent with the Constitution.