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JV

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Name of Correspondent: Theodore B. Olson

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Subject: Authority of Comptroller of the Currency
to Appear in Court in Opposition to the
Position of the United States

ROUTE TO:

ACTION

DISPOSITION

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response Code	Completion Date YY/MM/DD
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C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet
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S - For Signature
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U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

MAR 20 1984

218444 *al*

MEMORANDUM FOR
J. PAUL MCGRATH
- ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

and

PETER WALLISON
GENERAL COUNSEL
DEPARTMENT OF THE TREASURY

Re: Authority of Comptroller of the Currency to
Appear in Court in Opposition to the Position of
the United States

In the course of providing advice to the Civil Division regarding the appropriate relationship between their litigation of cases involving Executive Branch agencies and the Chief Counsel for Advocacy of the Small Business Administration, we had occasion to consider the constitutionality and proper interpretation of a provision of the Bank Merger Act of 1960 as amended, 12 U.S.C. § 1828(d)(7)(D), under which the Comptroller of the Currency "may appear as a party of its own motion and as of right, and be represented by its counsel," in antitrust actions brought by the Attorney General. After discussing the history of that provision at some length and analyzing the substantial constitutional issues it raises as it has been interpreted since its enactment in 1966, see

Assistant Attorney General Willard from
n of February 27, 1984 Re: December 2, 1983
Counsel for Advocacy, Small Business
ding Litigating Authority (copy attached),
cluded that that provision had to be
ze the Comptroller to present his views
brought by the Attorney General only to
views are not inconsistent with those
orney General on behalf of the United States."

DGH -

NO RESPONSE

NECESSARY

John



Office of the
Assistant Attorney General

Washington, D.C. 20530

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218444 *all*

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We were fully aware when this opinion was issued that the legal position taken with respect to the power of the Comptroller of the Currency was inconsistent with current practice under which the Comptroller actively opposes the position asserted in litigation brought by this Department in the name of the United States. Under our reading of the law, the Comptroller should be instructed to cease this practice.

As our February 27 memorandum points out, the Comptroller is subject "in all his duties to the 'general directions' of the Secretary of the Treasury . . . ," February 27 memorandum at 25, quoting memorandum from the Acting Attorney General to the President, Re: "Removal of the Comptroller of the Currency" (January 24, 1966) at 2. We trust that in this instance the Antitrust Division and the Office of General Counsel of the Department of the Treasury, acting as the Secretary's lawyer, could work out a satisfactory arrangement to prevent any future appearances by the Comptroller before the courts in opposition to the position being presented by this Department while at the same time permitting the Comptroller adequate opportunity to present his views to this Department prior to the bringing of an action by the Antitrust Division. If our Office can be of any assistance as your efforts to do so move forward, please do not hesitate to contact us.

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

cc (w/attachment): Fred F. Fielding
Counsel to the President

Attachment



Office of the
Assistant Attorney General

Washington, D.C. 20530

FEB 27 1984

MEMORANDUM FOR
RICHARD K. WILLARD
ACTING ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

Re: December 2, 1983 Memorandum from Chief Counsel
for Advocacy, Small Business Administration,
regarding Litigating Authority

This responds to your memorandum of December 12, 1983 in which you forwarded for our review Chief Counsel Swain's December 2, 1983 letter to the Assistant Attorney General for the Civil Division regarding the Chief Counsel's litigating authority under § 612(b) of the Regulatory Flexibility Act. 1/ In his December 2 letter, Chief Counsel Swain enclosed a memorandum prepared within the Small Business Administration (hereinafter "SBA Memorandum") which disputes the conclusion of our May 17, 1983 memorandum 2/ that, while § 612(b) of the Act does give the Chief Counsel "authority to participate in litigation as an amicus in certain circumstances . . . , that authority must be construed in a manner that is consistent with the President's constitutional obligation to 'take care that the laws be faithfully executed,' Art. II, § 3, by supervising the discharge of executive functions by executive

1/ Section 612(b) of title 5 provides that:

The Chief Counsel for Advocacy of the Small Business Administration is authorized to appear as amicus curiae in any action brought in a court of the United States to review a rule. In any such action, the Chief Counsel is authorized to present his views with respect to the effect of the rule on small entities.

2/ Memorandum from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, to J. Paul McGrath, Assistant Attorney General, Civil Division, re: "Amicus Curiae Role of the Small Business Administration's Chief Counsel for Advocacy under the Regulatory Flexibility Act" (May 17, 1983)(hereinafter "May 17 OLC Memorandum").

officers who serve at his pleasure." May 17 OLC Memorandum at 1-2 (footnote omitted). Specifically, we concluded that:

[T]he litigation authority granted to the Chief Counsel by § 612(b) is limited to litigation challenging rules promulgated by independent agencies, and then, only if the Attorney General, or any other Executive Branch officer, has not already taken a position in the litigation on behalf of the United States, which is inconsistent with that which the Chief Counsel seeks to present. In litigation involving Executive Branch agencies, the Chief Counsel's authority to present his views to the court is limited to the presentation of views which would not conflict with those presented by the defendant agency. Thus, we believe that to the extent that the Chief Counsel interprets § 612(b) as a broad grant of litigating authority which Congress intended him to exercise independently of the President, or his delegee, the Attorney General, that grant of authority would be unconstitutional.

Id. at 2-3 (footnotes omitted).

In disputing our conclusion, the SBA Memorandum argues that § 612(b) expressly authorizes the Chief Counsel to monitor agency compliance with the Regulatory Flexibility Act by participating as an amicus in proceedings to review agency rules, apparently without regard to the defendant agency's status as an independent or Executive Branch agency. In support of its argument, the SBA Memorandum asserts two general propositions: first, that "the Chief Counsel's authority to appear as amicus curiae in proceedings to review agency rules is not limited by the doctrine of separation of powers [, and that his] authority [under the Act] does not interfere with the Executive's accomplishment of his constitutional function, but at most is an advisory voice in legal proceedings which raise issues relevant to small businesses[,]" SBA Memorandum at 2; and second, that Executive Order 12146 3/ does not apply to the Chief Counsel's

3/ Executive Order 12146 provides:

1-401. Whenever two or more Executive agencies are unable to resolve a legal dispute between
(Continued)

role under the Regulatory Flexibility Act because it has been superseded by the Act. Id. at 13. We will respond to each of these arguments as presented in the SBA Memorandum.

I. Executive Order 12146

Although the SBA Memorandum concludes with its argument regarding Executive Order 12146, we will address that argument briefly at this point before turning to the statutory and constitutional issues raised in the Memorandum's first argument. SBA's argument in support of the Chief Counsel's interpretation of his authority under § 612(b) is that Executive Order 12146 was "superseded" by the enactment of the Regulatory Flexibility Act, "since an executive order cannot repeal a subsequently passed statute," and that therefore it is not applicable to the Chief Counsel's disputes with Executive Branch agencies. SBA Memorandum at 13. First, an executive order, having "the force of public law," 4/ cannot be superseded sub silentio. 5/

3/ Continued

them, including the question of which has jurisdiction to administer a particular program or to regulate a particular activity, each agency is encouraged to submit the dispute to the Attorney General.

1-402. Whenever two or more Executive agencies whose heads serve at the pleasure of the President are unable to resolve such a legal dispute, the agencies shall submit the dispute to the Attorney General prior to proceeding in any court, except where there is specific statutory vesting of responsibility for a resolution elsewhere.

44 Fed. Reg. 42657 (1979), reprinted in 28 U.S.C. § 509 note (Supp. V 1981)(emphasis added).

4/ Jenkins v. Collard, 145 U.S. 546, 560-61 (1891). See also Farkas v. Texas Instrument, 375 F.2d 629, cert. denied, 389 U.S. 977 (1967). See generally H.R. Comm. on Government Operations, 85th Cong., 1st Sess. 5: EXECUTIVE ORDERS AND PROCLAMATIONS: A STUDY OF A USE OF PRESIDENTIAL POWERS (Comm. Print 1957).

5/ 2A SUTHERLAND STATUTORY CONSTRUCTION § 51.02 (4th ed. 1973).

The SBA Memorandum pointed to no evidence in the text of the legislative history of § 612(b) which would support such a contention; and indeed, we have found no evidence that Congress even focused on Executive Order 12146 during its consideration of the Act. Nor should we unnecessarily impute to Congress the intent to interfere, in a manner that potentially violates the constitutionally-mandated separation of powers, with the President's constitutional authority to supervise the performance of executive functions by his subordinates -- as Executive Order 12146 was intended to do.

However, the question of public laws superseding or repealing one another only arises in circumstances in which the laws are inconsistent, or otherwise incompatible, with each other. As we demonstrated in our May 17 Memorandum, and reiterate below, Executive Order 12146 and § 612(b) of the Regulatory Flexibility Act are not necessarily inconsistent. The construction that this Office has given the provision 6/ is entirely consistent with the literal mandates of the Executive order, as well as the constitutional imperatives which inhere in that order. Moreover, we believe that established principles of statutory construction, which counsel that statutes should be construed whenever possible so as to preserve their constitutionality 7/ and so as to harmonize with other laws, 8/ strongly support the construction of § 612(b) that has been articulated by this Office.

To the extent that the SBA "forces" an inconsistency between the Regulatory Flexibility Act and Executive Order 12146 by construing § 612(b) to grant the Chief Counsel authority to litigate independently of the President, the issue becomes one of whether the Act "supersedes" the Executive Order as a matter of legislative intent, viewed in the context of relevant constitutional considerations. The question whether Congress intended to exempt the Chief Counsel from the mandates of Executive Order 12146 is not a difficult one. As we pointed

6/ See 2, supra. See generally May 17 OLC Memorandum.

7/ See 2A SUTHERLAND STATUTORY CONSTRUCTION, supra at § 45.11.

8/ Id. at §§ 51.02, 53.

out in our May 17 Memorandum, the legislative history regarding § 612(b) of the Act is relatively sparse. However, we do know that Congress established the Office of Advocacy as an Executive Branch office within the Small Business Administration, itself an Executive Branch agency which operates "under the general direction and supervision of the President," 15 U.S.C. § 633(a), to be headed by a Chief Counsel for Advocacy "who shall be appointed from civilian life by the President, by and with the advice and consent of the Senate." 15 U.S.C. § 634a. Moreover, as we noted further in our May 17 Memorandum, at 8, the Chief Counsel, "performing 'no duty at all related to either the legislative or judicial power,' Humphrey's Executor v. United States, 295 U.S. [602,] 627 [(1935),] is 'merely one of the units in the [E]xecutive department, and hence, inherently subject to the exclusive and illimitable power . . . of the Chief Executive, whose subordinate and aid he is.' Id. In short, the Chief Counsel serves at the pleasure of the President." 9/

This being the case, Congress could not by statute except the Chief Counsel, whom it has established as an officer within the Executive Branch, from the President's supervisory authority. To permit Congress to do so would constitute a gross interference by the Legislative Branch in the affairs of the Executive Branch, and a serious undermining of the constitutional principles of the separation of powers. See generally Memorandum from Assistant Attorney General Olson, Office of Legal Counsel, to John Fowler, General Counsel, Department of Transportation re: "Statutory Requirement for the FAA Administrator to Provide Certain Budget Information and Legislative Recommendations Directly to Congress" (November 5, 1982); Inspector General Legislation, 1 O.L.C. 16 (1977). As we stated in our May 17 Memorandum, the President, in the exercise

9/ The SBA Memorandum at 9 supports this conclusion:

[T]he President maintains absolute authority to remove the Chief Counsel without cause. The Chief Counsel is an executive agency official who serves at the pleasure of the President; it is axiomatic that the President can remove the Chief Counsel at will. Myers v. United States 272 U.S. 52.

of his supervisory authority over Executive Branch officers who serve at his pleasure, has required, through the operation of Executive Order 12146, that all unresolved legal disputes among such officers be submitted to the Attorney General for resolution "prior to proceeding in any court." Executive Order 12146, § 1-402.

Thus, we believe that to construe a statute in such a manner that it conflicts with a lawful exercise by the President of his supervisory authority over his subordinates is to infer that Congress intended such an unconstitutional result. However, in view of the general principles of statutory construction counseling the propriety of "presum[ing] that the legislature acted with integrity and with an honest purpose to keep within constitutional limits," 10/ we must presume that Congress intended a construction of § 612(b) that does not offend the separation of powers. 11/

We would add as a final observation under this section that the SBA Memorandum appears to focus too intently on Executive Order 12146's status as a "mere" Executive order. As we have attempted to demonstrate, Executive Order 12146 is a dispute resolution process mandated by a solemn act of the President to enable him to supervise more effectively the affairs of the Executive Branch and thereby to enhance the performance of his constitutional obligation faithfully to execute the laws. The constitutional impediments to the Chief Counsel's independent participation in litigation against Executive Branch agencies exist without regard to the Executive Order. The President is constitutionally charged with supervising the Executive Branch and may do so through a variety of mechanisms--with respect to legal affairs, he has implemented Executive Order 12146. However, his authority does not flow from the Executive Order; rather the President's authority is derived from the Constitution itself.

10/ 2a SUTHERLAND STATUTORY CONSTRUCTION, supra at § 45.11.

11/ Should we assume that Congress in fact did intend a result which would interfere with the President's supervisory authority over his subordinates, we must take the position, as discussed above, that Congress could not constitutionally do so.

II. Constitutional Principles

In support of the argument that the Chief Counsel's authority under § 612(b) "is not limited by constitutional principles," SBA Memorandum at 1, the SBA Memorandum makes two primary points: first, that the Chief Counsel's authority as construed in the SBA Memorandum is "consistent with the litigation authority granted other executive agencies," id. at 2, and, second, that § 612(b) "does not violate the separation of powers standard enunciated in Nixon v. Administrator of General Services [433 U.S. 425 (1977)]." Id. at 8.

A. The Proper Separation of Powers Standard

The second component of the SBA's constitutional argument, which we address here first, is that our May 17 Memorandum relies on a far too rigid concept of the separation of powers. The SBA Memorandum looks to the more "flexible" standard enunciated in Nixon v. Administrator of General Services, 433 U.S. at 443, i.e., whether the action by the coordinate Branch

prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.

(citation omitted).

Before engaging in any separation of powers analyses as applied to a particular set of circumstances, it is important to understand and appreciate the interrelationship of the various separation of powers formulations as articulated by the Supreme Court in its numerous reflections on the principle. See, e.g., Humphrey's Executor v. United States, 295 U.S. at 629 ("each of the three general departments of government [must remain] entirely free from the control or coercive influence direct or indirect, of either of the others"); id. at 630 ("[t]he 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."); United States v. Nixon, 418 U.S. 683, 703, 707 (1974)("[i]n the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation

of its powers by any branch is due great respect from the others but the separate powers were not intended to operate with absolute independence."); Nixon v. Administrator of General Services, supra. In each of these formulations inheres the principle that the constitutional separation of powers mandates that the President retain effective control over all matters concerning the performance of the Executive Branch's constitutionally assigned functions in order to discharge properly his constitutional obligation to faithfully execute the laws. This means, applying the more recent Nixon v. Administrator of General Services standard, 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." 433 U.S. at 443.

Applying this standard to the Chief Counsel's participation as an amicus in judicial proceedings to review rules promulgated by Executive Branch agencies, we must conclude that the disruption caused to the Executive process by such participation significantly outweighs any underlying purpose that Congress may have had in providing an Executive Branch official, namely, the Chief Counsel, this particular vehicle for monitoring compliance by Executive Branch agencies with the Regulatory Flexibility Act. We would reach this conclusion even if we were to assume that Congress's intent was that Executive Branch agencies are embraced by the Chief Counsel's § 612(b) litigating authority.

First, the fact that the President "maintains absolute authority to remove the Chief Counsel without cause," SBA Memorandum, supra at 9, strongly supports the President's authority to supervise and control the Chief Counsel in the performance of his executive functions, including the enforcement of the Regulatory Flexibility Act. Contrary to the suggestion in the SBA Memorandum, the fact that he can be removed without cause, i.e., merely upon the President's disapproval, does not provide him with greater freedom to violate the unity and integrity of the Executive.

Second, the fact that § 612(b) does not direct the Chief Counsel to participate as an amicus but rather, according to the Chief Counsel, vests him with the discretion to do so, does not in any degree reduce the capacity for interference with the Executive process if we were to construe the provision as the Chief Counsel urges us to do. The President, through Executive Order 12146, has established a dispute resolution

mechanism for legal disputes within the the Executive Branch which is available to the Chief Counsel, and through which the President has required his subordinates to resolve legal disputes among themselves. The ultimate discretion lies in the President, not the Chief Counsel, who is a mere subordinate of the President.

B. Litigation Authority of Other Executive Agencies

The SBA Memorandum at 3 states:

In light of the numerous instances of litigating authority delegated to executive agencies, and previous considerations of the constitutional and other issues raised, it is surprising that the Department now voices its concern that a delegation of authority to an executive agency official violates the doctrine of separation of powers.

The Memorandum then notes that the Department's Compendium on Litigation Authority lists "a minimum of 29 statutes which enable 15 executive agencies to litigate independently of the Attorney General in varying degrees." Id. at 3 (footnote omitted).

In making such an observation, the SBA Memorandum fails completely to distinguish between "executive" agencies which are completely independent of the President's supervision and control, and those agencies which, because they perform some functions which are exclusively executive in nature, are necessarily subject to the President's supervision and control (hereinafter "Executive Branch agencies"). Thus, the delegation of litigating authority to two officials simultaneously, both of whom are subordinates of the President, is fundamentally distinct from the delegation of authority to an official of the Executive Branch to challenge in court the actions of an agency which is not itself subject to the President's supervision and control. Recognizing such a distinction is crucial to an understanding of the constitutional values at stake in determining whether Congress may confer litigating authority in any particular situation. Simply put, agencies which perform primarily executive functions, and therefore may "be characterized as an arm or eye of the executive," Humphrey's Executor v. United States, 295 U.S. at 628, are "inherently subject to the exclusive and illimitable power of removal by the Chief Executive,

whose subordinate and aid [the heads of such agencies are]." Id. at 627. Independent agencies, on the other hand, perform primarily quasi-legislative or quasi-judicial functions, "duties [which] are performed without executive leave and, in the contemplation of the statute, must be [performed] free of executive control[.]" id. at 628, the heads of which are not freely removable by the President, but only for cause. As we noted in our May 17 Memorandum, the trilogy of Myers v. United States, 272 U.S. 52 (1926), Humphrey's Executor v. United States, and Wiener v. United States, 357 U.S. 349 (1958), illuminates the "sharp line of cleavage between officials who [are] part of the Executive establishment and [are] thus removable by virtue of the President's constitutional powers," 357 U.S. at 353, and those who are members of an independent body required to exercise its judgment without hinderance from the Executive. See also Memorandum from Assistant Attorney General Olson, re: "Statutory Requirement for the FAA Administrator to Provide Certain Budget Information and Legislative Recommendations directly to Congress," supra.

When this distinction is properly understood, it becomes clear that, contrary to the assertion in the SBA Memorandum at 3, it is not merely the "delegation of authority to an executive agency official [that] violates the doctrine of separation of powers"; rather it is such a delegation, by statute, to an Executive Branch agency of authority to litigate independently of the President's supervision and control which violates the principle. The constitutional issues raised by such a delegation are particularly heightened in circumstances in which the litigating authority is to be exercised in an adversary posture to another Executive Branch agency.

The particular examples of such "delegations of authority" cited in the SBA Memorandum include the Environmental Protection Agency's authorization to enforce the Clean Air Act 12/ against federal agencies, the authorization of "interested persons or agencies" to participate in proceedings before the court involving the Antitrust Procedures and Penalties Act, "in any . . . manner [or] extent which serves the public interest as the court may deem appropriate," 13/ and the Advisory Council on Historic Preservation's authorization to

12/ See 42 U.S.C. § 7418 (Supp. V 1981).

13/ 15 U.S.C. § 16(f)(3).

review agency actions which might affect properties listed on the Register of Historic Places and to be represented by counsel "in courts of law whenever appropriate, including enforcement of agreements with Federal agencies to which the Council is a party" 14/

1. The Environmental Protection Agency

With respect to the Environmental Protection Agency's authority under the Clean Air Act, this Office has consistently taken the position that EPA's "authority" over Executive Branch agencies pursuant to certain environmental legislation must be construed in a manner that is consistent with the mandates of Article II and Article III. As we pointed out in our May 17 Memorandum at 7, Article II charges the Chief Executive with "[tak[ing] care that the laws be faithfully executed . . . which necessarily encompasses the authority to exert general administrative control of those [officers] executing the laws." [Myers v. United States,] 272 U.S. at 164." To permit an executive officer subject to his supervision and control to thrust the Executive into the untenable position of speaking with two conflicting voices, seeking determination by the Judicial Branch of matters wholly within his domain, would constitute an abdication by the President of his Article II responsibilities, as well as raise the question of whether the Article III case or controversy requirement has been met. See generally id. Thus, legislation purporting to grant such authority to Executive Branch officers must be construed so as to avoid such constitutional infirmities. 15/ Therefore, we have construed such statutes, including the Clean Air Act,

14/ 16 U.S.C. § 470m(b).

15/ See May 17 OLC Memorandum at 9-10:

It is axiomatic that as an officer subject to the control of the President, the Chief Counsel is a part of the Executive Branch and, therefore, cannot act independently of the Executive and his delegees. Nor can Congress grant him the power to do so. '[T]o hold otherwise would make it impossible for the President, in case of political or other differences with the Senate or Congress, to take care that the

15/ Continued

as authorizing the heads of such agencies to "enforce" ^{16/} the Act's requirements against Executive Branch agencies through the various means at their disposal within the Executive Branch, and ultimately, if necessary, by appealing to the President's supervisory authority over such agencies:

The question whether Congress has power to prevent the President from exercising supervisory power for the purpose of resolving intragovernmental disputes is, of course, a constitutional question. There is no doubt that Congress has power to insulate certain classes of officers from Presidential control. We may assume that Congress can limit

15/ Continued

laws be faithfully executed.' Myers v. United States, 272 U.S. at 164. As early as 1855, Attorney General Cushing wrote:

[If] an executive act is, by law, required to be performed by a given Head of Department . . . the general rule [is] . . . that the Head of the Department is subject to the direction of the President. I hold that no Head of Department can lawfully perform an official act against the will of the President; and that will is by the Constitution to govern the performance of all such acts. If it were not thus, Congress might by statute so divide and transfer the executive power as utterly to subvert the Government, and to change it into a parliamentary depotism, like that of Venice or Great Britain, with a nominal executive Chief utterly powerless.

7 Op. A.G. 453, 469-70 (1855).

16/ See SBA Memorandum at n.8.

the President's power to require these officers to settle disputes among themselves or with others. It is equally obvious, however, that most of the officers who are subject to the relevant environmental statutes do not fall in this category; and with respect to EPA itself, quite apart from the question whether it would be constitutional for Congress to make EPA an independent agency, it seems to us that EPA is not independent. There is nothing of a general nature either in the executive order that created the agency in the first place or in any of the relevant organic legislation, to our knowledge, that suggests that EPA is not subject to Presidential control. Thus, the question is whether the specific grant of power to the Administrator to initiate civil actions against other federal officers must, in the absence of any other indication of congressional intent, be construed as conferring independent status upon him. Such a construction would be strained, in our opinion; and it might be unconstitutional. Myers is still good law. If it is true, as Justice Frankfurter said in Weiner v. United States, 357 U.S. 349 (1958), that there is a sharp line of cleavage between those officers who may be insulated from Presidential control and those who may not, it seems to us that the Administrator falls rather clearly on the Presidential side of the line. It is true that he performs a number of quasi-legislative functions, but our understanding is that he is primarily a civil law enforcement officer, and this is certainly true with respect to his power to bring court cases to enforce the environmental legislation. Our conclusion is that he, as well as the great majority of officers he is entitled to sue for these purposes, are fully subject to Presidential control, and therefore, the President has the power and the duty to supervise their conduct and to review any significant disputes that arise among them.

Memorandum from Assistant Attorney General John Harmon, Office of Legal Counsel, to Michael J. Egan, Associate Attorney General, re: "EPA Litigation Against Government Agencies" (June 23, 1978) at 4-5 (emphasis added). We would add that

this position is the publicly stated position of this Administration which has been officially communicated to Congress after legislative clearance by the Office of Management and Budget. 17/

2. The Antitrust Procedures and Penalties Act

The Antitrust Procedures and Penalties Act (the "Tunney Act") provides, inter alia, 18/ that a court, in making a determination

17/ See Letter to the Honorable John D. Dingell from Assistant Attorney General McConnell (re: Department of Justice policy on suing or bringing environmental enforcement actions against federal facilities) (October 11, 1983) at 1-2:

It is generally the policy of the Department of Justice, under this Administration as well as prior administrations, that [disputes between agencies whose heads] serve at the pleasure of the President should be resolved internally. If the dispute is legal in nature, it is the policy to proceed as required by Executive Order No. 12146. If the dispute is a matter of conflicting policies or priorities, the practice is to resolve the dispute through existing mechanisms, including the cabinet councils, if necessary. The Department believes that to involve the Judicial Branch in disputes between components of the Executive Branch would constitute a waste of judicial resources and taxpayers' money, as well as result in substantial delays in reaching appropriate and workable resolutions to such disputes. In addition, it is within the authority of the Executive to resolve such disputes internally as a part of its Article II duty to 'take care that the laws [are] faithfully executed.' Finally, there is a serious question whether such disputes would, in any event, satisfy Article III's justiciability requirements.

18/ The Act, 15 U.S.C. §§ 16(b)-(g), generally establishes detailed procedures for public disclosure of the terms, bases and effects of any proposed consent judgment negotiated in settlement of a civil antitrust complaint brought by the United States, and requires the court with jurisdiction over the action to determine, as a prerequisite to entry of the consent judgment, that the judgment is in the public interest.

whether a consent decree proposed by the United States is in the public interest, may

authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae, intervention as a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate[.]

15 U.S.C. § 16(f)(3). Although the legislative history of the Act is voluminous, the history makes little reference to Congress's intended meaning of "agencies" in this provision. We do know that the Department of Justice opposed the bill which ultimately was enacted as the Antitrust Procedures and Penalties Act on several grounds, including the Act's authorization of "interested persons or agencies" to participate in a determination before the court of whether a consent decree proposed by the United States is "in the public interest." See Consent Decree Bills: Hearings Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, House of Representatives, 93rd Cong., 1st Sess. 1 (1973); The Antitrust Procedures and Penalties Act: Hearings Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, 93rd Cong., 1st Sess. 1 (1973). In hearings before the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary, former Deputy Assistant Attorney General Wilson of the Antitrust Division stated:

[A]t some point or other, Mr. Chairman, it seems to me that some official of the United States must be charged with enforcing the antitrust laws and that is presently the Attorney General of the United States. That certainly does not mean that, in speaking for the United States, the Attorney General should not exercise an informed judgment, informed as to all of the comments of all interested parties, as to whether or not the court action he is proposing to take in a particular antitrust suit is indeed in the public interest.

What I am saying ultimately is that some official, now the Attorney General, must have the authority to speak for the United States in antitrust matters.

House Hearings, supra at 67-68 (emphasis added). Assistant Attorney General Kauper of the Antitrust Division presented a similar objection to the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary:

Broadly speaking, Congress has charged the Justice Department--the Attorney General--with the duty to protect the public interest in antitrust cases.

* * *

Congress has determined . . . that this crucial law enforcement role should be vested in the chief law enforcement officer of the land--appointed subject to the advice and consent of the Senate--and accountable to the President. This is recognized by the courts, which have said that it is the "United States which must alone speak for the public interest" in antitrust matters.

Senate Hearings, supra at 91 (footnotes omitted).

Although the specific issue of whether an Executive Branch agency could constitute an "interested agency" for purposes of § 16 (f)(3) apparently was not raised prior to the Act's enactment, nor does the Antitrust Division have any record of the issue having been raised pending an actual consent judgment, 19/ we must

19/ In United States v. American Tel. and Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), sum. aff'd, 103 S. Ct. 1240 (1983), the Department of Defense filed comments objecting to aspects of the proposed consent decree apparently without first seeking leave of the Court, seeking to resolve its differences with the Department of Justice, or seeking permission of the Department

19/ Continued

assume, as we do with all statutory enactments, that Congress intended the Act to be construed in a manner that is consistent with relevant constitutional principles. This being the case, using the analyses outlined in our May 17 Memorandum and reiterated in our discussion above of the Clean Air Act, we must conclude that the "interested agencies" to which § 16(f)(3) refers are agencies independent of the President's supervision and control. 20/ See n.23, infra. To the extent that Executive Branch agencies seek to present their views to the court, the views must not conflict with those presented by the Attorney General on behalf of the United States.

19/ Continued

of Justice to present its views. However, in responding to the Department of Defense's comments, Judge Greene stated:

Since the subjects covered in this section of the opinion concern intra-governmental matters, the Court assumes that accommodations can be worked out between the Department of Justice and the Department of Defense without the need for specific modifications of the decree. However, the Department of Defense will be afforded an opportunity, following the submission of the reorganization plan, to submit further comments to the Court, should it be dissatisfied with the arrangements made by AT & T and the Department of Justice.

552 F. Supp. at 209 n.329. Although the Justice Department apparently did not object to the Department of Defense's participation, it maintained that the proceeding was not a Tunney Act proceeding, and that therefore, Defense's participation was not pursuant to § 16(f)(3).

20/ This result is mandated by our prior analyses because an amicus appearance in a consent judgment hearing pursuant to § 16(f)(3) is analytically indistinct, for purposes of our separation of powers and litigation authority analyses, from participation as a party in full scale litigation proceedings. See May 17 OLC Memorandum at n.9; Memorandum from Assistant Attorney General Olson to the Attorney General, re: "Authority of the Equal Employment Opportunity Commission to Participate as Amicus Curiae in Williams v. City of New Orleans" (March 24, 1983).

3. Advisory Council on Historic Preservation

In support of its argument that the Advisory Council on Historic Preservation has "independent" litigating authority, the SBA Memorandum points to 16 U.S.C. § 470m(b), which authorizes the Executive Director of the Council to

appoint such . . . attorneys as may be necessary to assist the General Counsel, represent the Council in courts of law whenever appropriate, including enforcement of agreements with Federal agencies to which the Council is a party, assist the Department of Justice in handling litigation concerning the Council in courts of law, and perform such other legal duties and functions as the Executive Director and the Council may direct.

However, this Office has consistently taken the position that in view of its primary role as "an advocate, advisor, and educator in matters relating to historic preservation, with certain ancillary responsibilities as 'watchdog' over federal agencies whose activities affect historic properties," 21/ the Council is a part of the Executive Branch and was not intended to operate independently of the President's supervision and control. In view of the Council's status as an Executive Branch agency, we recently opined that "neither the text nor the legislative history of the 1980 amendments [to the National Historic Preservation Act, 16 U.S.C. § 470f, 22/] supports an argument that Congress intended to

21/ Memorandum from Assistant Attorney General Olson, to Fred F. Fielding, Counsel to the President, re: "Removal of Members of the Advisory Council on Historic Preservation" (March 1, 1982) at 7.

22/ The 1980 amendments to the Act added, inter alia, the "including enforcement of agreements with Federal agencies to which the Council is a party" language to § 470m(b) to which the SBA Memorandum points as yet another example of "delegated [litigating] authority" to "Federal agencies."

convert the Advisory Council into an agency with enforcement powers over other Federal agencies." Memorandum from Deputy Assistant Attorney General Tarr to Michael J. Horowitz, Counsel to the Director, Office of Management and Budget, and John M. Fowler, General Counsel, Advisory Council on Historic Preservation re: "Authority of Advisory Council on Historic Preservation to Issue Regulations Implementing § 106 of the National Historic Preservation Act" (October 28, 1983) at 36. After an exhaustive analysis of the provision, we determined that the phrase regarding the Council's "enforcement" authority over "Federal agencies" in § 470m(b) is an "obscurely worded provision, in a section of the Act dealing generally with administrative matters, [which] may not be construed to confer authority on the Advisory Council or any of its officers to initiate or participate as a party in lawsuits independent of the Department of Justice," noting that the section "explicitly recognize[d] the Department of Justice's paramount responsibility for the conduct of litigation to which the United States is a party, in connection with which Advisory Council attorneys are authorized to 'assist.'" See 28 U.S.C. § 519." Id. at n.41. 23/

4. The Special Prosecutor Act

Finally, as regards the Special Prosecutor Act, 28 U.S.C. §§ 49, 591-598 (Supp. V 1981), the Department of Justice has expressed serious reservations regarding the constitutionality of the Act, particularly with regard to the Act's provisions for the appointment and removal of the Special Prosecutor. See generally Statement of Rudolph Giuliani, Associate Attorney General, before the Subcommittee on Oversight of Government Management of the Senate Committee on Governmental Affairs, concerning "Special Prosecutor Provision of the Ethics in Government Act of 1978" (May 22, 1981). However, the Department has expressed the view that the Act's restrictions on the President's traditional powers of appointment and removal may

23/ The legal analysis underlying our opinion regarding the Council is the same as that underlying our analysis of the EPA's authority under the Clean Air Act:

Nor may [§ 471m(b)] be construed to confer authority on the Advisory Council to take

23/ Continued

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be justified, if at all, only by reference to the extraordinary purpose underlying the Act to safeguard the criminal justice process involving certain high level Executive Branch officials by insulating from Presidential control the prosecutor who is investigating such officials. Id. Such circumstances are highly distinctive, and are unlikely ever to be presented within the context of actions initiated by the Chief Counsel, assuming the Chief Counsel were to be granted statutory authority to bring suit.

23/ Continued

a position in litigation, as a party or otherwise, adverse to another Executive branch agency represented by the Department of Justice. A legislative scheme in which disputes between Executive branch agencies were to be settled in some forum other than one responsible to the President -- in this case state or federal court -- would raise a number of serious problems under both Article II and, potentially, Article III of the Constitution. See Memorandum Opinion for the Acting Assistant Attorney General, Tax Division, April 22, 1977, 1 Op. Off. Legal Counsel 79, 83 (1977) (dispute between Internal Revenue Service and Postal Service not justiciable). Compare United States v. I.C.C., 337 U.S. 426 (1949). Therefore, it would not be constitutionally "appropriate" for the Advisory Council to seek or support judicial enforcement action against another Executive branch agency. . . . In order to avoid a constitutional question, we must construe this [language in § 471m(b)] to recognize only the possibility that the Advisory Council might participate in a lawsuit brought against a private party or non-federal entity to prevent a violation of the Act from taking place, where for one reason or another the Department of Justice is unwilling or unable to do so.

Id.

5. "Actual instances of conflict": St. Regis Paper Co., Tennessee Valley Authority, and the Comptroller of the Currency

After identifying the statutes discussed above as statutes which contemplate intra-Executive Branch litigation, none of which are of assistance to the SBA in making its point, the Memorandum cites several "actual instances of conflict between Executive Branch agencies and departments" to "illustrate the compatibility of such conflict with fulfillment of the Executive's constitutional function." SBA Memorandum at 5.

(a) St. Regis Paper Company v. United States of America

The first instance of "actual conflict" is that of St. Regis Paper Co. v. United States, 368 U.S. 208 (1961), in which "the Solicitor General assumed the unusual position of arguing two sides of a case where executive branch departments took opposing viewpoints on an issue." SBA Memorandum at 5. Using this case as an illustration of Assistant Attorney General Harmon's statement in his June 23, 1978 Memorandum to Associate Attorney General Egan that "[w]e can cite no authority for the proposition that the President must resolve internal legal disputes that come to his attention," and suggesting that the President could determine that some more difficult questions "should best be left to the courts," 24/ the SBA Memorandum at 5 & n.13 concludes:

[T]he management of the legal issue in the [St. Regis] case refutes the Department's contention that the Executive would be paralyzed in fulfilling his constitutional function if Executive Branch resources were employed to both prosecute and defend the same lawsuit. . . . By the Department's own admission there is nothing unconstitutional about the occurrence of dueling executive branch voices in court. The Executive's ability to resolve disputes between his subordinates before they proceed to court is what enables him to fulfill his constitutionally assigned function.

24/ Memorandum to Associate Attorney General Egan, re: "EPA Litigation Against Government Agencies," supra at 3-4.

There are several difficulties with the SBA Memorandum's analysis. First, the St. Regis case involved a challenge by the St. Regis Paper Company to an order issued by the Federal Trade Commission requiring it, inter alia, to produce copies of certain reports submitted by it to the Bureau of the Census. The Solicitor General, representing the United States, brought an action at the request of the Commission, pursuant to § 9 of the Federal Trade Commission Act, 25/ seeking a mandatory injunction to compel compliance with all of the Commission's orders. In his brief, Solicitor General Cox acknowledged the "difficult and conflicting considerations of law and policy with much merit on either side" of the question whether copies retained by the filing party of certain confidential reports filed with the Census Bureau are privileged against compulsory disclosure. Brief for the United States, No. 47, filed October 27, 1961, at 10. However, after presenting the arguments on both sides of the issue, as advanced by the Federal Trade Commission and the Antitrust Division of the Department of Justice on the one hand, and by the Department of Commerce and the Bureau of the Budget on the other, the Solicitor General argued on behalf of the United States that should the Court reach the question, "[t]he Solicitor General is of the view that . . . the statutory privilege should extend to the retained copies but not to the underlying data in the companies' books and records upon which the reports are based." Id. Although St. Regis involved the presentation of conflicting interpretations of the statute at issue by a member of the Executive Branch, the Solicitor General, representing the United States, did not both prosecute and defend the same lawsuit. To the contrary, the Chief Executive upheld his constitutional responsibility to execute faithfully the laws by determining the proper construction of the statute at issue and arguing for that construction on behalf of the United States.

25/ Section 9 of the Federal Trade Commission Act, 15 U.S.C. § 49, provides that:

[U]pon the application of the Attorney General of the United States, at the request of the Commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the Commission made in pursuance thereof.

The second major difficulty with the argument advanced above in the SBA Memorandum is that it misconstrues Assistant Attorney General Harmon's statement regarding the dearth of authority for the proposition that the President must resolve internal legal disputes that come to his attention. The fact that there is no direct authority for such a proposition does not preclude its following, logically, from the fundamental values of a "unitary and uniform" Executive which are inherent in the Constitution, 26/ as Mr. Harmon further concluded:

[W]hatever the extent of the President's general supervisory obligation, he may have a special obligation to review decisions or actions that have given rise to conflict within the Executive Branch. He must take action in such cases if the intentions of the Framers are to be fulfilled.

Memorandum to Associate Attorney General Egan re: "EPA Litigation Against Government Agencies," supra at 4.

The third major difficulty with the SBA's argument is that it fails to account for the Article III case or controversy requirement in its analysis of the "dueling executive branch voices in court." See SBA Memorandum at n.13. To the extent that internal legal disputes remain capable of resolution by administrative or Presidential fiat, there exists a serious question whether the dispute presents issues "of a type which are traditionally justiciable," partaking of "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends." Memorandum for Associate Attorney General Egan, re: "EPA Litigation Against Government Agencies," supra at 6-7. See generally United States v. I.C.C., 337 U.S. 426, 431 (1949) (citing the "established principle that a person cannot create a justiciable controversy against himself."). As early in our constitutional history as 1792, the Court held that it would not decide matters that remain subject to the President's revision. See Hayburn's Case, 2 Dall.(U.S.) 409 (1792).

26/ See Myers v. United States, 272 U.S. at 135.

(b) Tennessee Valley Authority

The second "actual instance" of intra-Executive Branch conflict cited by the SBA Memorandum involves the Tennessee Valley Authority ("TVA"). With respect to the TVA, the Department is fully aware of TVA's past exercises of litigating authority against other Executive Branch agencies, as well as the Department's apparent history of acquiescence in such exercises. We can only reiterate our earlier statement that "we do not believe that the mere exercise of a non-existent 'right' by the TVA creates either independent litigating authority in the TVA or a case or controversy against other Executive Branch agencies where constitutional principles clearly compel to the contrary. See generally United States v. Morton Salt Co., 338 U.S. 632, 647 (1950)." May 17 OLC Memorandum at n.10.

(c) Comptroller of the Currency

As for the Comptroller of the Currency, the SBA Memorandum points out that under the Bank Merger Act of 1960 as amended, 12 U.S.C. § 1828(c), the Comptroller is authorized to approve mergers of federally insured banks with other banking institutions and "may appear as a party of its own motion and as of right, and be represented by its counsel," in antitrust actions brought by the Attorney General, 12 U.S.C. § 1828(c)(7)(D), and has done so in the past. See, e.g., United States v. Marine Bancorporation, 418 U.S. 602 (1974); United States v. Third National Bank of Nashville, 390 U.S. 41 (1968); United States v. First City National Bank of Houston, 386 U.S. 361 (1967). In making his determination whether to approve a proposed merger, the Comptroller is required under the Act to "request reports on the competitive factors involved from the Attorney General and the [Board of Governors of the Federal Reserve System and Federal Deposit Insurance Corporation]." § 1828(c)(4). However, if the Comptroller fails to accept the Attorney General's recommendations, the Attorney General may bring an antitrust action on behalf of the United States against the merging banks, in which suit § 1828(c)(7)(d) authorizes the Comptroller to "appear." 27/

27/ The legislative history of § 1828(c)(7)(D) is very sparse, due primarily to the fact that it was introduced as an amendment in the House to S. 1698, the bill that ultimately was enacted, after extensive hearings in the House regarding other aspects of the bill. Thus, at the time of the Attorney General's testimony before the Subcommittee on Domestic Finance of the

27/ Continued

There is no question that the Comptroller of the Currency, performing functions that are "almost completely executive in nature," having an office in the Department of the Treasury and being subject "in all his duties to the 'general directions' of the Secretary of the Treasury," is an officer of the Executive Branch. Memorandum from the Acting Attorney General to the President, re: "Removal of the Comptroller of the Currency" (January 24, 1966) at 2.

27/ Continued

House Committee on Banking and Currency, subsection (c)(7)(D) was not a part of the bill. See generally To Amend the Bank Merger Act of 1960: Hearings on S. 1698 (and Related Bills) Before the Subcomm. on Domestic Finance of the House Comm. on Banking and Currency, 89th Cong., 1st Sess. 169 (v.1)(1965).

After the provision was added to the bill, it was reported out of the House Committee in 1966 with several dissents. Included among the various dissents were statements by Representatives Todd and Gonzalez, whose grounds for dissent included the encroachment upon the Attorney General's authority to represent the United States in court which is embodied in subsection (c)(7)(d). Representative Todd stated:

I vigorously oppose [sub]paragraph [c](7)(D). . . .

First, this committee and its subcommittee did not have hearings on this subject. As a member of the subcommittee which so painstakingly examined S. 1698, and who attended regularly, and as a member of the committee who attended all the committee meetings, I can remember no discussion of the implications of this paragraph.

Second, I oppose it because it would create the ludicrous situation in court of seeing the Comptroller of the Currency, . . . [an] agenc[y] of the Federal Government, opposing the United States in its sovereign capacity. We do not need the Government opposing itself in court. The Attorney General is presently charged with representing the executive branch of the Government in court. To provide otherwise by this bill would create a drastic change in existing law.

27/ Continued

Notwithstanding the Comptroller's status as an Executive Branch officer, the Department of Justice on several occasions

27/ Continued

Third, the provision is in derogation of the President's power to initiate and carry out policy and of his authority over the executive branch. Presumably, when a branch of the executive like the Antitrust Division acts, it acts for the President, and the effectiveness of that action should not be undermined by other executive agencies. Moreover, it is normally assumed that the President, in his role as head of the executive branch, can and should resolve differences among executive agencies, so that ultimate expression of a position (as, for example, in court) reflects a firm and well-considered executive determination. It is unseemly for executive agencies to "fight it out" in court, and it implies that the President is unable to keep his own house in order.

Fourth, the provision derogates the Attorney General's authority and responsibility to control Government litigation. In any case in which the Comptroller intervened, the court could no longer look to the U.S. attorney or departmental attorney as the spokesman for "the Government" and would indeed be denied the benefit of any uniform Government position.

The act which established the Department of Justice in 1870 clearly had the intent of putting all matters requiring that the Government be represented before the courts under the supervision and control of the Attorney General. In reading the full act, nothing could be clearer.

H.R. REP NO. 1221, 89th Cong., 2d Sess. 33 (1966)(citation and footnote omitted). Representative Gonzalez stated:

I dissent from the views expressed in the report on the proposed bank merger bill

* * *

27/ Continued

apparently has not challenged the Comptroller's appearance in court to oppose the Attorney General's determination that

27/ Continued

The bill would permit any Federal banking agency approving a merger which has subsequently been challenged by the Department of Justice to appear in the suit by its own counsel and present the court the reasons for its action. In effect, this encourages Federal agencies to intervene in a lawsuit instituted by the Department of Justice for the purpose of opposing the Department of Justice. This is a bad precedent, one that fragmentizes the authority of the Attorney General to enforce the law, and one that could lead to much internecine squabbling amongst separate agencies of the Federal Government.

Id. at 27.

In addition, there was extensive floor debate in the House on this provision, with most of the Members who spoke favoring the provision as "necessary and essential" to the full and fair presentation of "the pros and cons of the situation . . . not by the Department of Justice alone, which will be seeking to stop a merger, but also by those who are in support of the merger." 112 CONG. REC. 2444 (1966)(remarks of Representative Multer). See also, e.g., 112 CONG. REC. 2449-50, 2456, supra. But see 112 CONG. REC. 2454, 2460, 2461, supra (remarks of Representatives Cellar, Todd, & Dingell).

During consideration in the Senate, although several Senators spoke against subsection (c)(7)(D), see, e.g., 112 CONG. REC. 2658, 2662, supra, (remarks by Senators Hart and Proxmire), the prevailing view appears to have been that the provision was necessary in order to ensure adequate representation of the Comptroller's views in approving the merger, and that,

27/ Continued

a proposed merger previously approved by the Comptroller would violate the antitrust laws. 28/ Nevertheless, notwithstanding its failure to challenge the Comptroller's right to appear, the Department has argued, and the Court has agreed, that in view of the Act's requirement that the

27/ Continued

notwithstanding the views of the Senators and Representatives who opposed this provision,

The bill is a compromise. If we are not willing to accept a reasonable compromise, we do not get anything. I do not know of anyone who has read the entire bill, who has studied it, and who is interested in it, who would endorse it 100 percent. But it is the best bill we can get. For that reason, I hope that my motion to accept the House amendment as it has been sent to us will be agreed to.

112 CONG. REC. 2657, supra (remarks of Senator Robertson).

28/ But see Memorandum to the President re: "Removal of the Comptroller of the Currency," supra, discussing the Comptroller's assertion of "independence" in litigation as a ground for removal:

Basically, this Department's problem with [the incumbent Comptroller] is that he has consistently been unwilling to work with other agencies of government on a cooperative basis and to attempt to resolve differences of view by discussion or decision within the government. Apparently he feels that his objectives and those of his office are paramount, and it is clear that he regards all other agencies, including this Department, as adversaries rather than allies.

* * *

On two occasions the Comptroller has actually applied to United States District

28/ Continued

court "review de novo the issues presented," § 1828(c)(7)(A), the Comptroller's determination should be given no weight. 29/

28/ Continued

Courts for leave to intervene on the side of the defendant in cases brought by the Attorney General to enforce the antitrust laws. These applications, which were made without any permission or clearance whatever, constituted an unheard-of challenge to the authority of the Attorney General to represent the interests of the United States in litigation. Both applications were rejected by the courts.

Id. at 3, 4 (emphasis added). Although written prior to the enactment of the Act's 1966 amendments which, inter alia, purported to authorize the Comptroller to appear in antitrust actions brought by the United States challenging mergers which had been approved by him, this memorandum nevertheless demonstrates the Department's early opposition, on constitutional grounds, to such participation by the Comptroller.

29/ In its brief in United States v. First City National Bank of Houston and United States v. Provident National Bank, the Department argued:

Congress, to be sure, has required that all proposed mergers involving banks subject to federal supervision obtain the approval of the responsible federal banking agency. But it has also very clearly provided that if such an approved merger is challenged in an antitrust suit, the court shall make an independent determination of legality - not merely review the agency's decision to the limited extent that orders of administrative agencies like the Interstate Commerce Commission are reviewed.

* * *

There is thus no sound reason why the agency's judgment should be accorded great weight.

29/ Continued

However, we acknowledge, as we must, that the fact that the Comptroller's views are given little or no weight by the court in determining the antitrust implications of a proposed merger does not rectify the constitutional impropriety that occurs by virtue of the Comptroller's appearance in court in an adversary posture to the United States. 30/ Nevertheless, as with the similar instances involving the TVA, we recognize that the mere exercise of a non-existent right cannot create such a "right" where constitutional principles clearly compel to the contrary. See 24, supra. With respect to the statute,

29/ Continued

Brief for the United States at 15, 24. See also United States v. First City National Bank, 386 U.S. at 368, 369:

[The words of § 1828(c)(7)(A)] mean to us that the court should make an independent determination of the issues. Congressman Patman, Chairman of the House Committee that drafted the Act, in speaking of this de novo review, said . . . that the 'court is not to give any special weight to the determination of the bank supervisory agency on this issue.' 112 Cong. Rec. 2335 (Feb. 8, 1966).

* * *

The courts may find the Comptroller's reasons persuasive or well nigh conclusive. But it is the court's judgment, not the Comptroller's, that finally determines whether the merger is legal. That was the practice prior to the 1966 Act; and we cannot find purpose on the part of Congress to change the rule.

30/ Notwithstanding our view that such appearances violate the constitutional unity and integrity of the Executive's faithful execution of the laws, in circumstances in which a concrete adversity exists between two real parties independently of the Comptroller's appearance, the courts are not called upon to address the constitutionality of the Comptroller's appearance; rather, satisfied that Article III jurisdictional requirements have been met, courts may treat the Comptroller's appearance in proceedings in which the Department is involved on behalf of the United States as a matter of Executive Branch "house-keeping" to be resolved by the President.

30/ Continued

as we have said regarding similar statutes "authorizing" the exercise of such authority by the Environmental Protection Agency and the Advisory Council on Historic Preservation, it must be construed in a manner, if at all possible, that is consistent with constitutional principles. Thus, we would construe § 1828(c)(7)(D) to authorize the Comptroller to present his views in antitrust actions brought by the Attorney General only to the extent that such views are not inconsistent with those presented by the Attorney General on behalf of the United States. In cases in which his views are contrary to those of the Attorney General, the Comptroller may register those views with the Attorney General in an attempt to persuade the Attorney General to adopt his views, or submit to the process outlined in Executive Order 12146.

III. Conclusion

In conclusion, we trust that the foregoing response to the issues raised in the SBA Memorandum will successfully dispel the erroneous belief which appears to underlie most of the Memorandum, namely that the determination of the Chief Counsel's litigating authority under § 612(b) is exclusively a matter of statutory authority. This belief appears to be grounded in the SBA's assertion that amicus participation in agency review proceedings is so minimally intrusive into the affairs of the Executive as to preclude raising any constitutional issues.

30/ Continued

We would add that the Supreme Court, in its recent opinion in a case in which the Comptroller had appeared and argued against the position taken by the United States, did not make any reference to the position of the Comptroller other than to recognize that the Comptroller had appeared; and the Court made clear that the position asserted by this Department on behalf of the United States was the position of the "Government," see United States v. Marine Bancorporation, 418 U.S. 602 (1974), notwithstanding that the Comptroller's brief continually referred to this Department's position as merely that of this Department.

We have demonstrated above, in general discussion and in the context of the examples cited to you by the SBA, that the Chief Counsel's exercise of authority as contemplated in the SBA Memorandum, however minimally intrusive, raises serious "case or controversy" issues under Article III, as well as threatens the separation of powers and challenges the President's authority to execute faithfully the laws under Article II. This being the case, fundamental principles of jurisprudence dictate that the statute be construed in a manner that is not inconsistent with these constitutional mandates. Such a construction has been set forth in our May 17 Memorandum, and is reiterated above in this memorandum.

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Office of Legal Counsel