

NLWJC- Kagan

Counsel - Box 005 - Folder 010

Civil Justice Reform EO [2]



U. S. Department of Justice

Office of Legal Counsel

Washington, D.C. 20530

DATE: 11-9-95

FACSIMILE TRANSMISSION SHEET

FROM: Karen Papp

OFFICE PHONE: 202-514-0188

TO: Mac Reed

OFFICE PHONE: 202-395-5600

NUMBER OF PAGES: 13 PLUS COVER SHEET

FAX NUMBER: 202-395-7294

REMARKS:

Please see our comments on the attached.

IF YOU HAVE ANY QUESTIONS REGARDING THIS FAX, PLEASE CONTACT KATHLEEN MURPHY OF KEVIN SMITH ON 514-2057

**OFFICE OF LEGAL COUNSEL FAX NUMBER: (202) 514-0563
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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

FAX TRANSMISSION

TO: Rosemary Hart
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FROM: Mac Reed
Office of the General Counsel

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DATE: 10-31-95

NO. OF PAGES (including cover): 13



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

October 30, 1995

MEMORANDUM FOR DESIGNATED AGENCY HEADS
(SEE ATTACHED DISTRIBUTION LIST)

FROM: Robert G. Damus (signature)
General Counsel

SUBJECT: Proposed Executive Order Entitled "Civil Justice Reform"

Attached is a proposed Executive order entitled "Civil Justice Reform."

It was prepared by the White House Counsel's Office, in accordance with the provisions of Executive Order No. 11030, as amended.

On behalf of the Director of the Office of Management and Budget, I would appreciate receiving any comments you may have concerning this proposal. If you have any comments or objections, they should be received no later than close of business Wednesday, November 8, 1995. Please be advised that agencies that do not respond by the November 8, 1995 deadline will be recorded as not objecting to the proposal.

Comments or inquiries may be submitted by telephone to Mr. Mac Reed of this office (Phone: 395-3563; Fax: 395-7294).

Thank you.

Attachments - Distribution List
Proposed Executive Order

- cc: Jack Lew
- John Koskinen
- Gordon Adams
- T.J. Glauthier
- Bob Litan
- Joe Minarik
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Domestic Policy

Honorable Abner Mikva
Counsel to the President

Honorable Todd Stern
Assistant to the President
and Staff Secretary

Honorable Jack Quinn
Chief of Staff to the Vice President

EXECUTIVE ORDER

CIVIL JUSTICE REFORM

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code, and in order to improve access to justice for all persons who wish to avail themselves of court and administrative adjudicatory tribunals to resolve disputes, to facilitate the just and efficient resolution of civil claims involving the United States Government, to encourage the filing of only meritorious civil claims, to improve legislative and regulatory drafting to reduce needless litigation, to promote fair and prompt adjudication before administrative tribunals, and to provide a model for similar reforms of litigation practices in the private sector and in various states, it is hereby ordered as follows:

Section 1. Guidelines to Promote Just and Efficient Government Civil Litigation. To promote the just and efficient resolution of civil claims, those Federal agencies and litigation counsel that conduct or otherwise participate in civil litigation on behalf of the United States Government in Federal court shall respect and adhere to the following guidelines during the conduct of such litigation:

(a) Pre-filing Notice of a Complaint. No litigation counsel shall file a complaint initiating civil litigation without first making a reasonable effort to notify all disputants about the nature of the dispute and to attempt to achieve a settlement, or confirming that the referring agency that previously handled the dispute has made a reasonable effort to notify the disputants and to achieve a settlement or has used its conciliation processes.

(b) Settlement Conferences. As soon as practicable after ascertaining the nature of a dispute in litigation, and throughout the litigation, litigation counsel shall evaluate settlement possibilities and make reasonable efforts to settle the litigation. Such efforts shall include offering to participate in a settlement conference or moving the court for a conference pursuant to Rule 16 of the Federal Rules of Civil Procedure in an attempt to resolve the dispute without additional civil litigation.

(c) Alternative Methods of Resolving the Dispute in Litigation. Litigation counsel shall make reasonable attempts to resolve a dispute expeditiously and properly before proceeding to trial.

(1) Whenever feasible, claims should be resolved through informal discussions, negotiations, and settlements rather than through utilization of any formal court proceeding. Where the benefits of Alternative Dispute

Resolution ("ADR") may be derived, and after consultation with the agency referring the matter, litigation counsel should suggest the use of an appropriate ADR technique to the parties.

(2) It is appropriate to use ADR techniques or processes to resolve claims of or against the United States or its agencies, after litigation counsel determines that the use of a particular technique is warranted in the context of a particular claim or claims, and that such use will materially contribute to the prompt, fair, and efficient resolution of the claims.

(3) To facilitate broader and effective use of informal and formal alternative dispute resolution methods, all litigation counsel should be trained in ADR techniques.

(d) Discovery. To the extent practical, litigation counsel shall make every reasonable effort to streamline and expedite discovery in cases under counsel's supervision and control.

(1) Review of Proposed Document Requests. Each agency within the executive branch shall establish a coordinated procedure for the conduct and review of document discovery undertaken in litigation directly by that agency when that agency is litigation counsel. The procedure shall include, but is not necessarily limited to, review by a senior lawyer prior to service or filing of the request in litigation to determine that the request is not cumulative or duplicative, unreasonable, oppressive, unduly burdensome or expensive, taking into account the requirements of the litigation, the amount in controversy, the importance of the issues at stake in the litigation, and whether the documents can be obtained from some other source that is more convenient, less burdensome, or less expensive.

(2) Discovery Motions. Before petitioning a court to resolve a discovery motion or petitioning a court to impose sanctions for discovery abuses, litigation counsel shall attempt to resolve the dispute with opposing counsel. If litigation counsel makes a discovery motion concerning the dispute, he or she shall represent in that motion that any attempt at resolution was unsuccessful or impracticable under the circumstances.

(e) Sanctions. Litigation counsel shall take steps to seek sanctions against opposing counsel and opposing parties where appropriate.

(1) Litigation counsel shall evaluate filings made by opposing parties and, where appropriate, shall petition the court to impose sanctions against those responsible for abusive practices.

(2) Prior to filing a motion for sanctions, litigation counsel shall submit the motion for review to the sanctions officer, or his or her designee, within the litigation counsel's agency. Such officer or designee shall be a senior supervising attorney within the agency, and shall be licensed to practice law before a State court, courts of the District of Columbia, or courts of any territory or Commonwealth of the United States. The sanctions officer or designee shall also review motions for sanctions that are filed against litigation counsel, the United States, its agencies, or its officers.

(f) Improved Use of Litigation Resources. Litigation counsel shall employ efficient case management techniques and shall make reasonable efforts to expedite civil litigation in cases under that counsel's supervision and control. This includes but is not limited to:

(1) making reasonable efforts to negotiate with other parties about, and stipulate to, facts that are not in dispute;

(2) reviewing and revising pleadings and other filings to ensure that they are accurate and that they reflect a narrowing of issues, if any, that has resulted from discovery;

(3) requesting early trial dates where practicable;

(4) moving for summary judgment in every case where the movant would be likely to prevail, or where the motion is likely to narrow the issues to be tried; and

(5) reviewing and revising pleadings and other filings to ensure that unmeritorious threshold defenses and jurisdictional arguments, resulting in unnecessary delay, are not raised.

Sec. 2. Government Pro Bono and Volunteer Service. All federal agencies should develop appropriate programs to encourage and facilitate pro bono legal and other volunteer service by government employees, including attorneys.

Sec. 3. Principles to Enact Legislation and Promulgate Regulations Which Do Not Unduly Burden the Federal Court System.

(a) General Duty to Review Legislation and Regulations.

Within current budgetary constraints and existing executive branch coordination mechanisms and procedures established in OMB Circular A-19 and Executive Order No. 12866, each agency promulgating new regulations, reviewing existing regulations, developing legislative proposals concerning regulations, and developing new legislation shall adhere to the following requirements:

(1) The agency's proposed legislation and regulations shall be reviewed by the agency to eliminate drafting errors and needless ambiguity;

(2) The agency's proposed legislation and regulations shall be written to minimize needless litigation; and

(3) The agency's proposed legislation and regulations shall provide a clear and certain legal standard for affected conduct rather than a general standard, and shall promote simplification and burden reduction.

(b) Specific Issues for Review. In conducting the reviews required by subsection (a), each agency formulating proposed legislation and regulations shall make every reasonable effort to ensure:

(1) that the legislation--

(A) specifies whether all causes of action arising under the law are subject to statutes of limitations;

(B) specifies in clear language the preemptive effect, if any, to be given to the law;

(C) specifies in clear language the effect on existing Federal law, if any, including all provisions repealed, circumscribed, displaced, impaired, or modified;

(D) provides a clear and certain legal standard for affected conduct rather than a general standard, and a mens rea requirement if it is a criminal statute;

(E) specifies whether private arbitration and other forms of private dispute resolution are appropriate under enforcement and relief provisions; subject to constitutional requirements;

(F) specifies whether the provisions of the law are severable if one or more of them is found to be unconstitutional;

(G) specifies in clear language the retroactive effect, if any, to be given to the law;

(H) specifies in clear language the applicable burdens of proof;

(I) specifies in clear language whether it grants private parties a right to sue and, if so, the relief available and the conditions and terms for authorized awards of attorney's fees, if any;

(J) specifies whether State courts have jurisdiction under the law and, if so, whether and under what conditions an action would be removable to Federal court;

(K) specifies whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires the exhaustion of administrative remedies;

(L) sets forth the standards governing the assertion of personal jurisdiction, if any;

(M) defines key statutory terms, either explicitly or by reference to other statutes that explicitly define those terms;

(N) specifies whether the legislation applies to the Federal Government or its agencies;

(O) specifies whether the legislation applies to States, territories, the District of Columbia, and the Commonwealths of Puerto Rico and of the Northern Mariana Islands;

(P) specifies what remedies are available such as money damages, civil penalties, injunctive relief, and attorney's fees; and

(Q) addresses other important issues affecting clarity and general draftsmanship of legislation set forth by the Attorney General, with the concurrence of the Director of the Office of Management and Budget ("OMB") and after consultation with affected agencies, that are determined to be in accordance with the purposes of this order.

(2) that the regulation--

(A) specifies in clear language the preemptive effect, if any, to be given to the regulation;

(B) specifies in clear language the effect on existing Federal law or regulation, if any, including all provisions repealed, circumscribed, displaced, impaired, or modified;

(C) provides a clear and certain legal standard for affected conduct rather than a general standard, while promoting simplification and burden reduction;

(D) specifies in clear language the retroactive effect, if any, to be given to the regulation;

(E) specifies whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires the exhaustion of administrative remedies;

(F) defines key terms, either explicitly or by reference to other regulations or statutes that explicitly define those items; and

(G) addresses other important issues affecting clarity and general draftsmanship of regulations set forth by the Attorney General, with the concurrence of the Director of the Office of Management and Budget and after consultation with affected agencies, that are determined to be in accordance with the purposes of this order.

(c) Certification of Compliance for Agency Legislation or Regulations. When transmitting such draft legislation or regulation to OMB, the agency must certify that (1) it has reviewed such draft legislation or regulation in light of this section, and that (2) either the draft legislation or regulation meets the applicable standards provided in subsections (a) and (b) of this section, or it is unreasonable to require the particular piece of draft legislation or regulation to meet one or more of those standards. Where the standards are not met, the agency certification must include an explanation of the reasons for the departure from the standards.

Sec. 4. Principles to Promote Just and Efficient Administrative Adjudications.

(a) Implementation of Administrative Conference Recommendations. In order to promote just and efficient resolution of disputes, an agency that adjudicates administrative claims shall, to the extent reasonable and practicable, and when not in conflict with other sections of this order, implement the recommendations of the Administrative Conference of the United States, entitled "Case Management as a Tool for Improving Agency Adjudication," as contained in 1 C.F.R. 305.86-7 (1991).

(b) Improvements in Administrative Adjudication. All federal agencies should review their administrative adjudicatory processes and develop specific procedures to reduce delay in decision-making, to facilitate self-representation, to expand non-lawyer counseling and representation where appropriate, and to invest maximum discretion in fact-finding officers to encourage appropriate settlement of claims as early as possible.

(c) Bias. All federal agencies should review their administrative adjudicatory processes to identify any type of bias that hinders full access to justice for all persons; regularly train all fact-finders, decision-makers and administrative law judges to eliminate such bias; and establish appropriate mechanisms to receive and resolve bias complaints from persons who appear before administrative adjudicatory tribunals.

(d) Public Education. All federal agencies should develop effective and simple methods, including the use of electronic technology, to educate the public about its claims/benefits policies and procedures.

Sec. 5. Coordination by the Department of Justice.

(a) The Attorney General shall coordinate efforts by Federal agencies to implement sections 1, 2 and 4 of this order.

(b) To implement the principles and purposes announced by this order, the Attorney General is authorized to issue guidelines implementing sections 1 and 4 of this order for the Department of Justice. Such guidelines shall serve as models for internal guidelines that may be issued by other agencies pursuant to this order.

§ 2 has been added to this TP but not to (b). Was this intention?

Sec. 6. Definitions. For purposes of this order:

(a) The term "agency" shall be defined as that term is defined in section 451 of title 28, United States Code, except that it shall exclude all departments and establishments in the legislative or judicial branches of the United States.

(b) The term "litigation counsel" shall be defined as the trial counsel or the office in which such trial counsel is employed, such as the United States Attorney's Office for the district in which the litigation is pending or a litigating division of the Department of Justice. Special Assistant United States Attorneys are included within this definition. Those agencies authorized by law to represent themselves in court without assistance from the Department of Justice are also included in this definition, as are private counsel hired by any Federal agency to conduct litigation on behalf of the agency or the United States.

Sec. 7. No Private Rights Created. This order is intended only to improve the internal management of the executive branch in resolving disputes, conducting litigation in a reasonable and just manner, and reviewing legislation and regulations. This order shall not be construed as creating any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States, its agencies, its officers, or any other person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order. Nothing in this order shall be construed to obligate the United States to accept a particular settlement or resolution of a dispute, to alter its standards for accepting settlements, to forego seeking a consent decree or other relief, or to alter any existing delegation of settlement or litigating authority.

Sec. 8. Scope.

(a) No Applicability to Criminal Matters or Proceedings in Foreign Courts. This order is applicable to civil matters only. It is not intended to affect criminal matters, including enforcement of criminal fines or judgments of criminal forfeiture. This order does not apply to litigation brought by or against the United States in foreign courts or tribunals.

(b) Application of Notice Provision. Notice pursuant to subsection (a) of section 1 is not required (1) in any action to seize or forfeit assets subject to forfeiture or in any action to seize property; (2) in any bankruptcy, insolvency, conservatorship, receivership, or liquidation proceeding; (3) when the assets that are the subject of the action or that would satisfy the judgment are subject to flight, dissipation, or destruction; (4) when the defendant is subject to flight; (5) when, as determined by litigation counsel, exigent circumstances make providing such notice impracticable or such notice would otherwise defeat the purpose of the litigation, such as in actions seeking temporary restraining orders or preliminary injunctive relief; or (6) in those limited classes of cases where the Attorney General determines that providing such notice would defeat the purpose of the litigation.

(c) Application of Alternative Dispute Resolution. Subsections (c) of section 1 of this order shall not apply (1) to any action to seize or forfeit assets subject to forfeiture, or (2) to any debt collection case (including any action for civil penalties or taxes) involving an amount in controversy less than \$100,000.

(d) Additional Guidance as to Scope. The Attorney General shall have the authority to issue further guidance as to the scope of this order, except section 3, consistent with the

purposes of this order.

Sec. 9. Conflicts with Other Rules. Nothing in this order shall be construed to require litigation counsel or any agency to act in a manner contrary to the Federal Rules of Civil Procedure, Tax Court Rules of Practice and Procedure, State or Federal law, other applicable rules of practice or procedure, or court order.

Sec. 10. Privileged Information. Nothing in this order shall compel or authorize the disclosure of privileged information, sensitive law enforcement information, information affecting national security, or information the disclosure of which is prohibited by law.

Sec. 11. Effective Date. This order shall become effective 90 days after the date of signature. This order shall not apply to litigation commenced prior to the effective date.

Sec. 12. Revocation. Executive Order 12778 is hereby revoked.

THE WHITE HOUSE,

WILLIAM J. CLINTON



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE GENERAL COUNSEL

395-7294

Division of Legislative Counsel
(Telephone # - 401-8313)

Telefax Transmittal Sheet
(Telefax # - 401-5391)

TO: Mac Reed, OMB
FROM: Jack Krivsky
DATE/TIME: 11/8
PAGES SENT (including transmittal) 10
COMMENTS:

ED comments on draft Executive Order on
civil justice reform.

400 MARYLAND AVE., S.W. WASHINGTON, D.C. 20202-2110

Our mission is to ensure equal access to education and to promote educational excellence throughout the Nation.

Who, or what, is being coordinated?

Resolution ("ADR") may be derived, and after consultation with the agency referring the matter, litigation counsel should suggest the use of an appropriate ADR technique to the parties.

(2) It is appropriate to use ADR techniques or processes to resolve claims of or against the United States or its agencies, after litigation counsel determines that the use of a particular technique is warranted in the context of a particular claim or claims, and that such use will materially contribute to the prompt, fair, and efficient resolution of the claims.

(3) To facilitate broader and effective use of informal and formal ~~alternative dispute resolution~~ methods, all litigation counsel should be trained in ADR techniques.

(d) Discovery. To the extent practical litigation counsel shall make every reasonable effort to streamline and expedite discovery ~~in cases under counsel's supervision and control.~~ (Obvious)

(1) Review of Proposed Document Requests. Each agency within the executive branch shall establish a coordinated procedure for the conduct and review of document discovery undertaken in litigation directly by that agency when that agency is litigation counsel. The procedure shall include, but is not necessarily limited to, review by a senior lawyer prior to service or filing of the request in litigation to determine that the request is not cumulative or duplicative, unreasonable, oppressive, unduly burdensome or expensive, taking into account the requirements of the litigation, the amount in controversy, the importance of the issues at stake in the litigation, and whether the documents can be obtained from some other source that is more convenient, less burdensome, or less expensive.

(2) Discovery Motions. Before petitioning a court to resolve a discovery motion or petitioning a court to impose sanctions for discovery abuses, litigation counsel shall attempt to resolve the dispute with opposing counsel. If litigation counsel makes a discovery motion concerning the dispute, he or she shall represent in that motion that any attempt at resolution was unsuccessful or impracticable under the circumstances.

(e) Sanctions. Litigation counsel shall take steps to seek sanctions against opposing counsel and opposing parties where appropriate.

(1) Litigation ^{when} counsel shall evaluate filings made by opposing parties and, ^{where} where appropriate, shall petition the court to impose sanctions against those responsible for abusive practices.

Could it be otherwise?

(2) Prior to filing ^{The} a motion for sanctions, litigation counsel shall submit the motion for review to the sanctions officer, or his or her designee, within the litigation counsel's agency. Such officer or designee shall be a senior supervising attorney within the agency, and shall be licensed to practice law before a State court, courts of the District of Columbia, or courts of any territory or Commonwealth of the United States. The sanctions officer or designee shall also review motions for sanctions that are filed against litigation counsel, the United States, its agencies, or its officers.

(f) Improved Use of Litigation Resources. Litigation counsel shall employ efficient case management techniques and shall make reasonable efforts to expedite civil litigation, ⁱⁿ ~~in~~ ^(obvious) cases under that counsel's supervision and control. This includes ² but is not limited to:

(1) making reasonable efforts to negotiate with other parties about, and stipulate to, facts that are not in dispute;

(2) reviewing and revising pleadings and other filings to ensure that they are accurate and that they reflect a narrowing of issues, if any, that has resulted from discovery;

(3) requesting early trial dates where practicable

(4) moving for summary judgment in every case ^{in which} where the movant would be likely to prevail, or where the motion ^{is likely to narrow the issues to be tried; and} ^{in which}

(5) reviewing and revising pleadings and other filings to ensure that unmeritorious threshold defenses and jurisdictional arguments, resulting in unnecessary delay, are not raised.

Sec. 2. Government Pro Bono and Volunteer Service. All federal agencies should develop appropriate programs to encourage and facilitate pro bono legal and other volunteer service by government employees, including attorneys. ^{During the workday?}

Sec. 3. Principles to Enact Legislation and Promulgate Regulations Which Do Not Unduly Burden the Federal Court System.

^{That}

(a) General Duty to Review Legislation and Regulations.
 Within current budgetary constraints and existing executive branch coordination mechanisms and procedures established in OMB Circular A-19 and Executive Order No. 12866, each agency promulgating new regulations, reviewing existing regulations, developing legislative proposals concerning regulations, and developing new legislation shall adhere to the following requirements:

(redundant)

Use active voice!

- (1) The agency's ~~proposed legislation and regulations~~ shall be reviewed by the agency to eliminate drafting errors and needless ambiguity; *in proposed legislation and regulations*
- (2) The agency's ~~proposed legislation and regulations~~ shall be written to minimize needless litigation; and *shall draft its (what does (2) add to (1)?)*
- (3) The agency's proposed legislation and regulations shall provide a clear and certain legal standard for affected conduct rather than a general standard, and shall promote simplification and burden reduction.

"is here appropriate"
 (A "general standard," e.g. "reasonableness" may sometimes be appropriate.)

(b) Specific Issues for Review. In ~~conducting the reviews~~ required by subsection (a), each agency ~~formulating proposed legislation and regulations~~ shall make every reasonable effort to ensure:

(redundant)

- (1) that the legislation-- *is appropriate*
 - (A) specifies whether all causes of action arising under the law are subject to statutes of limitations;
 - (B) specifies ~~in clear language~~ the preemptive effect, if any, to be given to the law; *(redundant)*
 - (C) specifies ~~in clear language~~ the effect on existing Federal law, if any, including all provisions repealed, circumscribed, displaced, impaired, or modified;
 - (D) provides a clear and certain legal standard for affected conduct rather than a general standard, and a mens rea requirement if it is a criminal statute;
 - (E) specifies whether private arbitration and other forms of private dispute resolution are appropriate under enforcement and relief provisions; ~~subject to constitutional requirements;~~
 - (F) specifies whether the provisions of the law are severable if one or more of them is found to be unconstitutional;

This is an inappropriate standard. When would the effort not be reasonable? The issue is when is it appropriate for proposals to address such matter? e.g., why should education statutes routinely identify that only causes of action are subject to generally applicable rules of the detour in sec. 3 (b) would be on behalf of a statute (main; don't clutter the statutes with unrelated boilerplate!)

Note that sec. 3 (9) (3) might be read to imply a preference for prescriptive legislation/regulation.

Again, not all of these are appropriately specified in every proposal. List should be introduced with some modifier indicating "as appropriate".

(G) specifies ~~in clear language~~ the retroactive effect, if any, to be given to the law;

(H) specifies in clear language the applicable burdens of proof;

(I) specifies ~~in clear language~~ whether it grants private parties a right to sue and, if so, the relief available and the conditions and terms for authorized awards of attorney's fees, if any;

(J) specifies whether State courts have jurisdiction under the law and, if so, whether and under what conditions an action would be removable to Federal court; ~~Doesn't this turn the presumption of State Court jurisdiction on its head?~~

(K) specifies whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires the exhaustion of administrative remedies;

(L) sets forth the standards governing the assertion of personal jurisdiction, if any;

(M) defines key statutory terms, ~~either explicitly or by reference to other statutes that explicitly define those terms;~~

(N) specifies whether the legislation applies to the Federal Government or its agencies;

(O) specifies whether the legislation applies to States, territories, the District of Columbia, and the Commonwealths of Puerto Rico and of the Northern Mariana Islands;

(P) specifies what remedies are available, such as money damages, civil penalties, injunctive relief, and attorney's fees; and

(Q) addresses other important issues affecting clarity and general draftsmanship of legislation set forth by the Attorney General, with the concurrence of the Director of the Office of Management and Budget ("OMB") and after consultation with affected agencies, that are determined to be in accordance with the purposes of this order; and

(2) that the regulation--

(A) specifies ~~in clear language~~ the preemptive effect, if any, to be given to the regulation;

by whom
AG

(B) specifies in clear language the effect on existing Federal law or regulation, if any, including all provisions repealed, circumscribed, displaced, impaired, or modified;

(C) provides a clear and certain legal standard for affected conduct rather than a general standard, while promoting simplification and burden reduction;

(D) specifies in clear language the retroactive effect, if any, to be given to the regulation;

(E) specifies whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires the exhaustion of administrative remedies;

(F) defines key terms, either explicitly or by reference to other regulations or statutes that explicitly define those terms; and

(G) addresses other important issues affecting clarity and general draftsmanship of regulations set forth by the Attorney General, with the concurrence of the Director of the Office of Management and Budget and after consultation with affected agencies, that are determined to be in accordance with the purposes of this order by whom?

(c) Certification of Compliance for Agency Legislation or Regulations. When transmitting such draft legislation or regulation to OMB, the agency must certify that (1) it has reviewed such draft legislation or regulation in light of this section, and that (2) either the draft legislation or regulation meets the applicable standards provided in subsections (a) and (b) of this section, or it is unreasonable to require the particular piece of draft legislation or regulation to meet one or more of those standards. Where the standards are not met, the agency certification must include an explanation of the reasons for the departure from the standards.

Sec. 4. Principles to Promote Just and Efficient Administrative Adjudications.

(a) Implementation of Administrative Conference Recommendations. In order to promote just and efficient resolution of disputes, an agency that adjudicates administrative claims shall, to the extent reasonable and practicable and when not in conflict with other sections of this order, implement the recommendations of the Administrative Conference of the United States, entitled "Case Management as a Tool for Improving Agency Adjudication," as contained in 1 C.F.R. 305.86-7 (1991).

As noted above, the issue is not so much "reasonableness" but whether it makes sense in the legislative/regulatory context to be addressing statutes of limitation, personal jurisdiction, or applicability to the Northern Mariana. Usually it won't. You want an assurance that these things have been considered and addressed where appropriate, or an explanation why not.

not "shall" -> appropriate

(b) Improvements in Administrative Adjudication. All federal agencies should review their administrative adjudicatory processes and develop specific procedures to reduce delay in decision-making, to facilitate self-representation, to expand non-lawyer counseling and representation where appropriate, and to invest maximum discretion in fact-finding officers to encourage appropriate settlement of claims as early as possible.

(c) Bias. All federal agencies should review their administrative adjudicatory processes to identify any type of bias that hinders full access to justice for all persons; regularly train all fact-finders, decision-makers, and administrative law judges to eliminate such bias; and establish appropriate mechanisms to receive and resolve bias complaints from persons who appear before administrative adjudicatory tribunals.

(d) Public Education. All federal agencies should develop effective and simple methods, including the use of electronic technology, to educate the public about its claims/benefits policies and procedures.

? Programmatic? Adjudicatory?

Sec. 5. Coordination by the Department of Justice.

(a) The Attorney General shall coordinate efforts by Federal agencies to implement sections 1, 2, and 4 of this order.

(b) To implement the principles and purposes announced by this order, the Attorney General is authorized to issue guidelines implementing sections 1 and 4 of this order for the Department of Justice. Such guidelines shall serve as models for internal guidelines that may be issued by other agencies pursuant to this order.

Sec. 6. Definitions. For ^{the} purposes of this order:

(a) The term "agency" ^{not include any by the following given} shall be defined as that term is defined in section 451 of title 28, United States Code, except that it shall ~~exclude all departments and establishments~~ in the legislative or judicial branches of the United States.

(b) The term "litigation counsel" ^{means} shall be defined as the trial counsel or the office in which such trial counsel is employed, such as the United States Attorney's Office for the district in which the litigation is pending or a litigating division of the Department of Justice. Special Assistant United States Attorneys are included within this definition. Those agencies authorized by law to represent themselves in court without assistance from the Department of Justice are also included in this definition, as are private counsel hired by any Federal agency to conduct litigation on behalf of the agency or the United States.

Why the non-standard definitions? Why not the more common 5 USC §105? Also note that the draft uses "agency" and "federal agency" interchangeably.

11/03/80 09:00 0202 401 0001 0211 20 000

Sec. 7. No Private Rights Created. This order is intended only to improve the internal management of the Executive Branch in resolving disputes, conducting litigation in a reasonable and just manner, and reviewing legislation and regulations. This order shall not be construed as creating any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States, its agencies, its officers, or any other person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order. Nothing in this order shall be construed to obligate the United States to accept a particular settlement or resolution of a dispute, to alter its standards for accepting settlements, to forgo seeking a consent decree or other relief, or to alter any existing delegation of settlement or litigating authority.

Sec. 8. Scope.

data (a) No Applicability to Criminal Matters or Proceedings in Foreign Courts. *opinion* This order is ~~applicable~~ to civil matters only. It is ~~not intended to~~ affect criminal matters, including enforcement of criminal fines or judgments of criminal forfeiture. This order does not apply to litigation brought by or against the United States in foreign courts or tribunals.

(b) Application of Notice Provision. Notice pursuant to subsection (a) of section 1 is not required (1) in any action to seize or forfeit assets subject to forfeiture or in any action to seize property; (2) in any bankruptcy, insolvency, conservatorship, receivership, or liquidation proceeding; (3) when the assets that are the subject of the action or that would satisfy the judgment are subject to flight, dissipation, or destruction; (4) when the defendant is subject to flight; (5) when, as determined by litigation counsel, exigent circumstances make providing such notice impracticable or such notice would otherwise defeat the purpose of the litigation, such as in actions seeking temporary restraining orders or preliminary injunctive relief; or (6) in those limited classes of cases where the Attorney General determines that providing such notice would defeat the purpose of the litigation.

data (c) Application of Alternative Dispute Resolution. Subsections (c) of section 1 of this order shall not apply (1) to any action to seize or forfeit assets subject to forfeiture, or (2) to any debt collection case (including any action for civil penalties or taxes) involving an amount in controversy less than \$100,000.

WAM (d) Additional Guidance as to Scope. The Attorney General ~~shall have the authority to~~ issue further guidance as to the scope of this order, except section 3, consistent with the

Why this exception with respect to "scope"?
Section 3 addresses the authority of the AG to address "issues affecting clarity and general draftsmanship."

purposes of this order.

Sec. 9. Conflicts with Other Rules. Nothing in this order shall be construed to require litigation counsel or any agency to act in a manner contrary to the Federal Rules of Civil Procedure, Tax Court Rules of Practice and Procedure, State or Federal law, other applicable rules of practice or procedure, or court order.

^{he lead to}
Sec. 10. Privileged Information. Nothing in this order shall ~~compel~~ or authorize the disclosure of privileged information, sensitive law enforcement information, information affecting national security, or information the disclosure of which is prohibited by law.

^{is}
Sec. 11. Effective Date. This order shall ~~become~~ effective 90 days after the date of signature. This order shall not apply to litigation commenced prior to the effective date.

Sec. 12. Revocation. Executive Order 12778 is hereby revoked.

WILLIAM J. CLINTON

THE WHITE HOUSE,



U. S. Department of Housing and Urban Development
Washington, D.C. 20410-0500

OFFICE OF GENERAL COUNSEL

LEGISLATION DIVISION
ROOM 10282

FAX COVER SHEET

DATE: 11/22/95
TIME: 7:45 a.m. / p.m.
Number of Pages (including cover): 3
TO: Mac Reed

Facsimile Number: 395-7294

FROM: Facsimile Number 708-4337

- Jeff Lischer
- Ed Murphy
- Mike Moran
- Celestine Smith
- Al Polsby
- Barbara Jay
- Pat Parker
- Fred Block
- Florence Burt
- Thelma Hunter
- Eugenia Harris
- Irwin Raij

COMMENTS:

HUD comments on proposed Civil Justice Reform E.O.
I know they are late, but hope they will still be of
some use.

IF PROBLEMS OCCUR DURING TRANSMISSION, PLEASE CALL (202) 708-1793

NOV 22 1995

NOTE FOR: Mac Reed

FROM: *Barbara Jay*
Barbara Jay/Jeff Lischer

SUBJECT: HUD Comments on Proposed Civil Justice Reform Executive Order

HUD has reviewed the above-referenced proposed Executive Order, and offers the following comments:

1. Section 1(c)(3). Section 1(c)(3), page 2, would require all litigation counsel to be trained in alternative dispute resolution (ADR) techniques. HUD notes that DOJ currently encourages agencies to explore the use of ADR techniques to resolve potential litigation, a point which was reinforced by Attorney General Janet Reno at a July 12, 1995 ADR Conference sponsored by DOJ and the Administrative Conference of the United States. The conference focussed on implementing the National Performance Review (NPR) recommendations on ADR. ADR is an efficient and cost effective way of addressing potential litigation. Therefore, HUD fully supports increased usage and awareness of ADR techniques. This notwithstanding, HUD notes that training all litigating attorneys in ADR techniques, as this proposed Executive Order would appear to require, is unnecessary and would be very expensive. Trial counsel may need to learn negotiating techniques to improve the possibility of settlement, but training in ADR skills such as mediation, arbitration, mini-trial, and settlement judge roles, all of which are third-party roles in which a government trial attorney would rarely, if ever, serve, does not seem essential for all government counsel. Rather, HUD suggests that government trial attorneys should be made aware of the various ADR techniques available to them and their agency, and of the usefulness of these techniques, but should not be required to be trained in these techniques per se. In light of the foregoing, HUD suggests that section 1(c)(3) be revised to read as follows:

*enforced
immediately*

"(3) To facilitate broader and effective use of informal and formal alternative dispute resolution methods, all litigation counsel should be made aware of the various types and availability of ADR techniques."

2. Section 1(e)(2). Section 1(e)(2), page 2, which is identical to section 1(f)(2) of the existing Civil Justice Reform Executive Order, appears to require litigation counsel to submit any motion for sanctions (possibly including any motion for sanctions against the Government), to the litigating agency's sanctions officer for review. Among the issues raised by this section are the following:

a. Section 1(e)(2) does not clearly indicate whether it refers to sanctions in general, or only to discovery sanctions. HUD presumes that this section applies to sanctions in general.

b. This section does not say what the sanctions officer is to do upon review of any motion for sanctions, nor does it contemplate the role of the sanctions officer, if any, when counsel appears before a judge to argue the motion or settle the sanctions dispute. Can a sanctions officer effectively prevent counsel from requesting sanctions?

c. This section does not appear to contemplate a motion for sanctions that arises during the trial itself. In that circumstance, would a trial attorney be bound to stop in the middle of the trial to consult with the sanctions officer before requesting sanctions? Such a requirement would result in an unnecessary delay of the litigation.

In light of the foregoing, HUD recommends clarification of section 1(e)(2) to address the above concerns, or in the alternative, deletion of that section.

3. Section 3. HUD has several comments on section 3, Principles to Enact Legislation and Promulgate Regulations Which Do Not Unduly Burden the Federal Court System, pages 3-6. While HUD acknowledges that these provisions are almost identical to provisions in Executive Order 12778 (which would be repealed by this draft Order), HUD had expressed the following concerns with respect to E.O. 12778, and believes them to still be valid:

a. Section 3(a), page 4. HUD recommends that this section be amended by striking "reviewing existing regulations" and inserting "revising existing regulations." This would clarify that existing regulations would be reviewed as they are being revised rather than requiring a review of all existing regulations. *obj*

b. Section 3(b), pages 4-5. This section requires each agency reviewing proposed legislation and regulations to make every reasonable effort to assure it meets each of 17 standards. Many of these provisions do not appear to apply to HUD programs. They seem to be directed at enforcement initiatives or other litigation contexts. *Disapplicable*

HUD recommends that this section be amended by inserting ", where applicable," after "shall". Agencies would then take these requirements into consideration when drafting legislation or regulations, but would not be required to certify compliance with requirements which are clearly not applicable to a particular legislative or regulatory proposal.

The following are among those standards that do not seem applicable to HUD programs:

(A) Statutes of limitations are not applicable in the case of program authorizations, including HUD grant and mortgage insurance programs.

(H) Special burdens of proof would not appear to be necessary or appropriate for HUD programs. The APA, for example, sets standards for challenges to agency actions.

(J) State v. federal court jurisdiction is covered by the Constitution and other laws and rules of procedure. It does not appear to be necessary or appropriate to have every HUD provision specify jurisdiction.

(P) Specification of damages such as money damages, civil penalties, injunctive relief, and attorney's fees would not appear to be necessary or appropriate for most HUD programs.

c. Certification of Compliance for Agency Legislation or Regulations, section 3(c), page 6. Consistent with comment (b), HUD recommends that the requirement for agency certification be expanded to permit an agency to certify that the standards do not apply to the particular legislation or regulation.

4. Section 4(b). Section 4(b), page 7, indicates that all agencies should "review their administrative adjudicatory processes and develop specific procedures to...facilitate self-representation..." It is HUD's experience that self-representation usually delays the adjudicatory process, and could produce unfair results because lay persons rarely possess sufficient skills to prepare a case, to frame the issues in dispute, to objectively present the facts, and to understand legal issues. In many cases, pro se appellants should be advised to seek legal counsel to protect their interests. HUD suggests deletion of the phrase "to facilitate self-representation,".

5. Section 8(c). Section 8(c), page 8, states that the provisions regarding ADR shall not apply "...to any debt collection case (including any action for civil penalties or taxes) involving an amount in controversy less than \$100,000." HUD acknowledges that this mirrors section 7(c) of the existing Executive Order on Civil Justice Reform, but questions the intent behind the dollar limitation. Should this section read "...involving an amount in controversy more than \$100,000"?

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

OFFICE OF THE ADMINISTRATIVE LAW JUDGES

F A C S I M I L E T R A N S M I S S I O N
C O V E R S H E E T

TO: Mack Reed, OMB, Assis. General Counsel
TELEPHONE NO.: 202 - 395 - 7294
(Fax #)

SENDER: Judge Bruce Birchman, Legislative
Chairman, FORUM
TELEPHONE NO.: 202 - 219 - 2544
(Office #)

FAX # (Sending/Receiving): (202) 219-3289
(Verification) : (202) 219-2500

NUMBER OF PAGES (Including this cover sheet) 4

Additional Message:

I would like to speak with you
about the E.O. and about H.R. 1502
+ S. 26. Forum, like the Administration
opposes H.R. 1502 + S. 26, the ATJ Conf
Bills.

Bruce Birchman

NOTE: The information contained in this facsimile is CONFIDENTIAL and is being transmitted to and is intended only for the use of the individual(s) named above.

THE FORUM



of United States Administrative Law Judges

P.O. Box 14076
Washington, D.C. 20044-4076

November 7, 1995

Mr. Mack Reed
Deputy Assistant General Counsel
U.S. Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Reed:

This letter concerns the draft Proposed Executive Order on Civil Justice Reform dated October 31, 1995.

The Forum of United States Administrative Law Judges (Forum) is a professional organization of Administrative Law Judges (ALJs) appointed under 5 U.S.C. § 3105 of the Administrative Procedure Act of 1946 (APA). Forum believes that the proposed Executive Order is unnecessary and may be unconstitutional. To ensure that the decisional independence of Administrative Law Judges under the APA is not infringed, Forum requests that if the proposed Executive order is issued, consistent with Administrative Conference (ACUS) Recommendation 86-7, the Office of Management and Budget (OMB) direct the Attorney General to solicit and consider the views of Forum and other organizations that represent the administrative law judiciary prior to establishment by the Attorney General of case management guidelines for ALJs.

The APA and regulations in 5 C.F.R. Part 9 provide for a fair and impartial public hearing process and protections to ensure the decisional independence of ALJs. Decisional independence of ALJs under the APA means freedom to find facts, freedom to make a decision based on the judge's best assessment of the record in light of agency policy, and freedom to render decisions without fear of retaliation or discrimination in any form because of the decision reached.

The APA ensures ALJ decisional independence as follows: 5 U.S.C. § 1104 (a)(2) requires the appointment based on merit of ALJs from a register maintained by the Office of Personnel Management (OPM) following successful completion of a rigorous competitive examination conducted by OPM; 5 U.S.C. § 4302(D) and 5 U.S.C. § 5372 exempt the pay of ALJs from agency performance recommendations and ratings prescribed for other civil servants; 5 U.S.C. § 3105 requires that agency rulemakings and hearings be assigned to ALJs in rotation as far as practical; 5 U.S.C. § 554 requires that ALJ decisions be made after an on-the-record hearing; 5 U.S.C. §§ 551, 555, and 557(d) bar ex parte communications with ALJs; and 5 U.S.C. § 7521 prohibits agencies from removing ALJs

except after a hearing before the Merit Systems Protections Board and upon a showing of good cause.

Section 4 of the Proposed Executive Order would implement ACUS Recommendation 86-7, 1 C.F.R. § 305.86-7 (1991). Section 5(b) of the proposed Executive Order directs the Attorney General to issue case management guidelines that implement section 4 of the proposed order and that "shall serve as models for internal guidelines that may be issued by other agencies pursuant to this order."

done now
done now

Forum requests that any case management guidelines that may be issued by the Attorney General for the Department of Justice as models for that agency and other executive agencies be developed with and after consideration of the views of organizations, such as Forum, that represent ALJs. Consideration of the views of the administrative law judiciary is central to ACUS Recommendation 86-7 which expressed the concern that "personnel management devices" should be fashioned "appropriately . . . without compromising independence of judgment." ACUS Recommendation 86-7 expressly states that "The experiences and opinions of presiding officers should play a large part in shaping these criteria and procedures." (Emphasis supplied)

The Proposed Executive Order appears to be unnecessary. ACUS Recommendation 86-7 was not implemented by the Congress. On October 21, 1993, this recommendation was removed from the Code of Federal Regulations. See 58 Fed. Reg. 54271 (1993). In addition, as a result of the Alternate Dispute Resolution Act of 1990 (ADR Act), agencies have adopted alternate dispute resolution procedures. Thus, for example, the Federal Energy Regulatory Commission adopted regulations which enhanced its long-standing settlement procedures that were a model for the ADR act and which foster settlement of complex multi-party litigation. See, e.g., FERC Order No. 578, 71 FERC ¶ 61,036 (1995) and 18 C.F.R. § 343.1 et. seq.

The Proposed Executive Order appears to be unconstitutional. The Proposed order delegates to the Attorney General authority to issue case management guidelines that will serve as models for all agencies. ACUS Recommendation 86-7 proposed that the Congress, not the Attorney General, require agencies to establish case management guidelines. In light of the unique statutory protections conferred upon ALJs by the APA, establishment of case management guidelines for ALJs, in the first instance, is a matter for the Congress, and not the Executive branch.

If the Proposed Executive Order is issued, Forum requests that OMB direct the Attorney General to solicit and consider the views

of organizations such as Forum, which represent Administrative Law Judges, prior to the establishment of any case management guidelines.

Yours truly,



Judge Bruce L. Birchman
Legislative Chairman
202-219-2544



ZVLK

Office of the General Counsel
Business and Administrative Law
Rm. 5362 Cohen Bldg.
330 Independence Ave., S.W.
Washington, D.C. 20201

November 8, 1995

Robert J. Damus
General Counsel
Office of Management and Budget
Washington, D.C. 20503

Re: Proposed Executive Order Entitled "Civil Justice Reform"

Dear Mr. Damus:

This provides the comments of the Department of Health and Human Services on the draft Executive Order entitled "Civil Justice Reform." The Executive Order would supersede Executive Order No. 12778, to which it is quite similar.

Generally, we concur in the issuance of the draft Executive Order but suggest that you consider continuing the provision of section 1(c)(3) of Executive Order 12778, prohibiting the use of binding arbitration in connection with alternate dispute resolution of matters in litigation. We make this suggestion because, notwithstanding section 7 of the draft, in our experience plaintiffs often seek to have provisions of the Executive Order imposed on the Government in litigation.

None

Thank you for giving us the opportunity to comment on this draft Order.

Sincerely,

Leslie L. Clune

Leslie L. Clune
Associate General Counsel



DEPARTMENT OF VETERANS AFFAIRS
Office of the General Counsel
Washington DC 20420

NOV 13 1995

In Reply Refer To: 022

Mr. Robert G. Damus
General Counsel
Office of Management and Budget
Executive Office of the President
Washington, D.C. 20603

Dear Mr. Damus:

This letter contains the Department of Veterans Affairs' (VA) comments on the proposed Executive Order (EO) entitled "Civil Justice Reform." We telefaxed our draft comments to Mr. Mac Reed of your office on November 8, 1995.

We note initially that the proposed EO restates many of the provisions of Executive Order No. 12778, Civil Justice Reform (Oct. 23, 1991). The Chairman of the (Department of Veterans Affairs Board of Contract Appeals (Board)), however, has expressed concern about one of the new provisions in the proposed EO.

The Board operates pursuant to the statutory authority of the *Contract Disputes Act of 1978 (CDA)*. The major purpose of the CDA was to "set new standards for selection, tenure and compensation of board members which will increase the independence of the boards . . . [which] will function with the independence of trial courts." H. R. REP. No. 95-1556, 95th Cong., 2d Sess. (1978) (emphasis added). Board decisions are final with respect to the agency and are subject to review by the Court of Appeals for the Federal Circuit only upon appeal by the Appellant or the Department.

According to the Board Chairman, the record demonstrates that the Board and other agency contract appeals boards have operated independently, without interference from agencies and departments, as intended by Congress. See e.g., GAO Rep. 85-102, THE ARMED SERVICES BOARD HAS OPERATED INDEPENDENTLY, September 23, 1985.

Section 4(c) of the draft EO directs Federal agencies to "review their administrative adjudicatory processes to identify any type of bias that hinders full access to justice" and to

Mr. Robert G. Damus

"establish appropriate mechanisms to receive and *resolve bias complaints* from persons who appear before administrative adjudicatory tribunals." (emphasis added). The Chairman believes section 4 is unclear as to whether the Boards of Contract Appeals are intended to be covered by this order, and if so, what precisely is contemplated by this section. How is "bias" defined? Does it contemplate something beyond impermissible discrimination based on race, gender, etc.? Is it intended that allegations of "bias," however defined, would allow agency officials to affect or alter any adjudication by the Board?

The Chairman believes that, as judicial officers, the members of the Board are committed to rendering objective, fair decisions in disputes brought before the Board. The United States Court of Appeals for the Federal Circuit has full jurisdiction to set aside any decision by the Board which is "fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence." 41 U.S.C. § 609 (b).

In light of the foregoing, the Board questions the necessity for this section, which the Chairman characterizes as "ill-defined," and is concerned that it will create the appearance, if not the reality, of agency interference with the intended independent role of the Board contemplated by Congress.

The Chairman of our Board of Veterans' Appeals (BVA) has voiced similar objections to proposed section 4(c) and urges its elimination. Although there are rules regarding disqualification of BVA members on grounds of bias (38 C.F.R. § 19.12) and both administrative and judicial remedies exist for claimants who believe BVA decisions in their claims are the product of bias, he is concerned that the term is undefined in the draft EO and, depending on the form taken by any implementing directives, there is some potential for compromising BVA's independence.

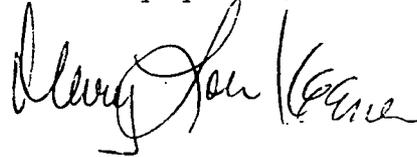
Finally, we have two technical recommendations. We recommend deleting the last line of section 3(b)(1)(D) relating to a mens rea requirement since section 8(a) provides that this

Mr. Robert G. Damus

EO is applicable only to civil matters. For clarity, we also recommend deletion of the word "needless" from sections 3(a)(1) and (2).

If you have any questions or require additional information, please contact Kerwin Miller of my office at (202) 273-6330.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Mary Lou Keener".

Mary Lou Keener
General Counsel

TO: Mac Reed
Phone: (202) 395-3563
Fax: (202) 395-7294

FROM: MaryAnn Shebek
Phone: (202) 586-1522
FAX: (202) 586-8685

SUBJECT: Proposed Executive Order Entitled "Civil Justice Reform"

The enclosures provide comments from the Department of Energy on the subject executive order. More may be forthcoming as I have not yet received responses from all offices.

7 pages including cover sheet

memorandum

DATE: November 8, 1995

REPLY TO
ATTN OF: IG-1

SUBJECT: Proposed Executive Order: "Civil Justice Reform"

TO: Deputy Assistant General Counsel for Legal Counsel

The Office of Inspector General has reviewed the subject proposed Executive Order and offers the following comments: We support the general thrust of the proposal which is designed to reform the means for adjudicating civil claims. Any such program, however, should be accompanied by legislative proposals designed to place applicable requirements on private litigants bringing action against the United States.

Section 2. of the proposed Executive Order encourages agencies to develop programs to facilitate pro bono and other volunteer services being performed by Government employees, including attorneys. Any such provision or program thereunder should caution on 18 U.S.C. 205 limitations as well as any applicable Standards of Conduct regarding outside employment/activities.

Finally, Section 8. of the proposed Executive Order excludes criminal matters from coverage under this order. It appears that civil false claims actions, in many respects, are similar to criminal prosecutions and, therefore, may warrant exclusion from this order also.

John C. Layton
John C. Layton
Inspector General

11/28/95 13:22 001 - 01/17/95 224

**OFFICE OF
INFORMATION RESOURCES MANAGEMENT**

**U.S. DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY**

FACSIMILE TRANSMITTAL SHEET

FAX Number 202/208-4022

HERE IS YOUR FAX!



Date: 11/8/95

To: Mac Reed

Telephone Number: 395-3563

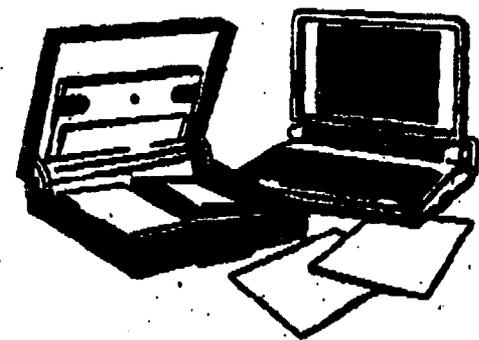
Agency/Company: OMB

FAX Number: 395-7294

From: Ben Peterson

Telephone Number: 208-5340
(Use as FAX verification number)

Number of Pages (including Cover): 4





United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

November 8, 1995

Mr. Robert D. Damus
General Counsel
Executive Office of the President
Office of Management and Budget
Washington, DC 20503

Dear Mr. Damus:

As requested, we have reviewed the proposed Executive order entitled "Civil Justice Reform."

Enclosed are comments from our Office of Hearings and Appeals. We agree with their comments and are forwarding them without changes.

Thank you for the opportunity to comment on this proposed Executive order.

Sincerely,

Janet L. Bishop
Office of Information
Resources Management

Enclosure



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS

4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

October 31, 1995

Memorandum

To: Janet L. Bishop, Office of Information Resource Management

From: Barry E. Hill, Director *BEH*

Subj: Comments on Proposed Executive Order: Civil Justice Reform

Thank you for the opportunity to comment on the proposed Executive Order entitled "Civil Justice Reform." The Office of Hearings and Appeals strongly supports the proposed Executive Order. The following recommended changes are provided for clarity and accuracy:

a. Page 1, section 1(a), last line. Add "or other ADR" after the word "conciliation."

RATIONALE: Completeness. Conciliation is but one of the available processes among ADR techniques that could be used to achieve settlement of a dispute prior to trial.

b. Page 2, section 1(c)(3), 1st line. Add "more" before the word "effective."

RATIONALE: To convey intended meaning within context of sentence. Sentence would read: "To facilitate broader and more effective use of formal and informal alternative dispute resolution . . ."

c. Page 2, section 1(e), second line. Add "for discovery abuses" after "parties;" delete "where appropriate." *no*

RATIONALE: Clarity, and to ensure that it is understood that sanctions are to be sought for abuses of discovery.

d. Page 6, section 4(a), line 6. Add "former" before "Administrative Conference of the United States." *no*

RATIONALE: The ACUS has not been funded for FY 96 and beyond, thus the section should not imply its continued vitality. The Office of the Associate Attorney General has assumed ACUS functions.

e. Page 8, section 8(a), line 2. Add ", to include civil penalty cases," after "civil matters." *no*

RATIONALE: Clarity. Civil penalty cases are a class of civil

cases most like criminal proceedings in their result and their implications for the litigant. This makes clear that the EO applies to these cases as well as other civil matters.

TO: Mac Reed
Phone: (202) 395-3563
Fax: (202) 395-7294

FROM: MaryAnn Shebek
Phone: (202) 586-1522
FAX: (202) 586-8685

SUBJECT: Proposed Executive Order Entitled "Civil Justice Reform"

The enclosures provide comments from the Department of Energy on the subject executive order. More may be forthcoming as I have not yet received responses from all offices.

7 pages including cover sheet

Energy Board of Contract Appeals

4040 No. Fairfax Dr., Ste 1006
Arlington, VA 22203
703/235-2705
Fax: 703/235-3566

FAX TRANSMISSION COVER SHEET

Date: November 7, 1995
To: Mary Shebek, GC-80
Fax: 202-586-8685
Re: Proposed E.O. "Civil Justice Reform"
Sender: Barclay Van Doren

YOU SHOULD RECEIVE 3 PAGE(S), INCLUDING THIS COVER SHEET. IF YOU DO NOT RECEIVE ALL THE PAGES, PLEASE CALL 703/235-2705.

Thank you for the opportunity to comment on the above-referenced proposed executive order. We support the general thrust of "Civil Justice Reform," as set forth in the proposed order. The portions directed toward court litigation are well-conceived and helpful, particularly with respect to their emphasis on ADR. In this regard, our Board has actively promoted ADR in Board litigation for nearly a decade. However, Section 4 of the proposed order, regarding administrative litigation, raises serious questions of intent and scope and should be revised.

As you know, the Energy Board of Contract Appeals operates pursuant to the statutory authority of the Contract Disputes Act of 1978 (CDA). The CDA recognizes the unusual nature of disputes litigated before the Boards and does not follow the Administrative Procedure Act (APA) model. SEN. REP. NO. 95-118, 95th Cong., 2d Sess. (1978), p. 15. Because agencies were to be parties before their Boards, independence was a major Congressional concern and special arrangements were enacted to assure this independence. The CDA was to "set new standards for selection, tenure and compensation of board members which will increase the independence of the boards ... [which] will function with the independence of trial courts." H.R. REP. No. 95-1556, 95th Cong., 2d Sess. (1978). Additionally, the CDA contains unusual provisions typical of true courts that make board decisions binding on all parties and subject only to review by the Court of Appeals for the Federal

Circuit upon appeal by the Appellant or the Department.

The CDA statutory scheme has stood the test of more than 15 years and, under it, the Boards have been effective fora, hearing most contract dispute litigation. The Boards have operated independently, without interference from agencies and departments, as intended by Congress. See e.g., GAO Rep. 85-102, THE ARMED SERVICE BOARD HAS OPERATED INDEPENDENTLY, September 23, 1985. Despite Board success, the statutory arrangement is a fragile one and continued independence is balanced precariously upon continued Executive Branch discretion and restraint. Almost any intrusion by an agency upon the operations of its Board, no matter how well intentioned, can upset this balance.

Several provisions of Section 4 of this proposed order could tip the scales and impair essential decisional independence:

(a) The Recommendations of the Administrative Conference of United States (ACUS), referenced in paragraph (a), contain many worthy recommendations which this Board and other Boards of Contract Appeals pioneered long before the ACUS recommendations were developed. However, the recommendations also contain several provisions which could have unintended consequences if applied to the Boards. For one, the Order could be read in conjunction with the referenced recommendation to require agencies to direct changes to Board procedures and to establish time standards for dispositions. By practice supported by law, these subjects have been the exclusive province of the individual Boards with guidance from the Office of Federal Procurement Policy, 41 U.S.C. § 607(h). Agencies have been free to publicly criticize their Boards, which is proper. However, agency establishment of procedures and standards can lead to attempts to enforce compliance and involvement of agencies in the daily operations of their Boards in ways that could impair independence or undermine public confidence in their independence.

This is not a change!

(b) Likewise, paragraph (c) directs Federal agencies to "review their administrative adjudicatory process ... to identify any type of bias that hinders full access to justice" and to "establish appropriate mechanisms to receive and resolve bias complaints from persons who appear before administrative adjudicatory tribunals." It is unclear whether Boards of Contract Appeals are intended to be covered by this order, and if so, what precisely is contemplated by this section. How is "bias" defined? Does it contemplate something beyond impermissible discrimination based upon race, gender, etc.? Is it intended that allegations of "bias," however defined, would allow agency officials to affect or alter any adjudication by the Board? And how would the Board processes be improved by such a provision, which could carry with it high risks for impairment of Board independence -- especially, when the Courts have made it clear that bias or the appearance of bias in Board proceedings will not be tolerated. See e.g., Baltimore Contractors, Inc. v. United States, 643 F.2d 729, 733-34 (Ct.Cl. 1981) (setting aside a Board decision for appearance of bias in favor of the Government); Gulf & Western Industries, Inc. v. United States, 671 F.2d 1322 (Ct.Cl. 1982) (applying the Canons of Judicial Ethics to Board of Contract Appeals members).

On place.

As judicial officers, we are obligated and committed to rendering objective fair decisions in disputes brought before our Board. The Court of Appeals has full jurisdiction to set aside any decision by the Board which is "fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply

bad faith, or if such decision is not supported by substantial evidence." 41 U.S.C. §609 (b).

In light of the foregoing, we believe Section should be revised to expressly exclude litigation under the Contract Disputes Act. If considered necessary, the Office of Federal Procurement Policy could be directed to review the appropriateness of applying the provisions of this section to such litigation. The Office of Federal Procurement Policy could be further directed to develop any necessary implementation which would maintain the confidence of the both the public and the agencies in Board independence and impartiality, as already mandated by the CDA.

If you have any questions regarding these comments, please do not hesitate to contact me at 702/235-2500. If it would help, I will send you the text by Email so that you can copy it to your word processor.

cc (by fax):

Agnes Dover, GC-60
Marry Egger, GC-61

EXECUTIVE ORDER

CIVIL JUSTICE REFORM

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code, and in order to improve access to justice for all persons who wish to avail themselves of court and administrative adjudicatory tribunals to resolve disputes, to facilitate the just and efficient resolution of civil claims involving the United States Government, to encourage the filing of only meritorious civil claims, to improve legislative and regulatory drafting to reduce needless litigation, to promote fair and prompt adjudication before administrative tribunals, and to provide a model for similar reforms of litigation practices in the private sector and in various states, it is hereby ordered as follows:

Section 1. Guidelines to Promote Just and Efficient Government Civil Litigation. To promote the just and efficient resolution of civil claims, those Federal agencies and litigation counsel that conduct or otherwise participate in civil litigation on behalf of the United States Government in Federal court shall respect and adhere to the following guidelines during the conduct of such litigation:

(a) Pre-filing Notice of a Complaint. No litigation counsel shall file a complaint initiating civil litigation without first making a reasonable effort to notify all disputants about the nature of the dispute and to attempt to achieve a settlement, or confirming that the referring agency that previously handled the dispute has made a reasonable effort to notify the disputants and to achieve a settlement or has used its conciliation processes, *including mediation.* ✓

(b) Settlement Conferences. As soon as practicable after ascertaining the nature of a dispute in litigation, and throughout the litigation, litigation counsel shall evaluate settlement possibilities and make reasonable efforts to settle the litigation. Such efforts shall include offering to participate in a settlement conference or moving the court for a conference pursuant to Rule 16 of the Federal Rules of Civil Procedure in an attempt to resolve the dispute without additional civil litigation.

(c) Alternative Methods of Resolving the Dispute in Litigation. Litigation counsel shall make reasonable attempts to resolve a dispute expeditiously and properly before proceeding to trial.

(1) Whenever feasible, claims should be resolved through informal discussions, negotiations, and settlements rather than through utilization of any formal court proceeding. Where the benefits of Alternative Dispute

*the use of a party
should be neutral*

Resolution ("ADR") may be derived, and after consultation with the agency referring the matter, litigation counsel should suggest the use of an appropriate ADR technique to the parties. ✓

(2) It is appropriate to use ADR techniques or processes to resolve claims of or against the United States or its agencies, after litigation counsel determines that the use of a particular technique is warranted in the context of a particular claim or claims, and that such use will materially contribute to the prompt, fair, and efficient resolution of the claims.

(3) To facilitate broader and effective use of informal and formal alternative dispute resolution methods, all litigation counsel, *as well as agency counsel,* should be trained in ADR techniques. ✓

(d) Discovery. To the extent practical, litigation counsel shall make every reasonable effort to streamline and expedite discovery in cases under counsel's supervision and control.

(1) Review of Proposed Document Requests. Each agency within the executive branch shall establish a coordinated procedure for the conduct and review of document discovery undertaken in litigation directly by that agency when that agency is litigation counsel. The procedure shall include, but is not necessarily limited to, review by a senior lawyer prior to service or filing of the request in litigation to determine that the request is not cumulative or duplicative, unreasonable, oppressive, unduly burdensome or expensive, taking into account the requirements of the litigation, the amount in controversy, the importance of the issues at stake in the litigation, and whether the documents can be obtained from some other source that is more convenient, less burdensome, or less expensive.

(2) Discovery Motions. Before petitioning a court to resolve a discovery motion or petitioning a court to impose sanctions for discovery abuses, litigation counsel shall attempt to resolve the dispute with opposing counsel. If litigation counsel makes a discovery motion concerning the dispute, he or she shall represent in that motion that any attempt at resolution was unsuccessful or impracticable under the circumstances.

(e) Sanctions. Litigation counsel shall take steps to seek sanctions against opposing counsel and opposing parties where appropriate.

(1) Litigation counsel shall evaluate filings made by opposing parties and, where appropriate, shall petition the court to impose sanctions against those responsible for abusive practices.

(2) Prior to filing a motion for sanctions, litigation counsel shall submit the motion for review to the sanctions officer, or his or her designee, within the litigation counsel's agency. Such officer or designee shall be a senior supervising attorney within the agency, and shall be licensed to practice law before a State court, courts of the District of Columbia, or courts of any territory or Commonwealth of the United States. The sanctions officer or designee shall also review motions for sanctions that are filed against litigation counsel, the United States, its agencies, or its officers.

(f) Improved Use of Litigation Resources Litigation counsel shall employ efficient case management techniques and shall make reasonable efforts to expedite civil litigation in cases under that counsel's supervision and control. This includes but is not limited to:

(1) making reasonable efforts to negotiate with other parties about, and stipulate to, facts that are not in dispute;

(2) reviewing and revising pleadings and other filings to ensure that they are accurate and that they reflect a narrowing of issues, if any, that has resulted from discovery;

(3) requesting early trial dates where practicable;

(4) moving for summary judgment in every case where the movant would be likely to prevail, or where the motion is likely to narrow the issues to be tried; and

(5) reviewing and revising pleadings and other filings to ensure that unmeritorious threshold defenses and jurisdictional arguments, resulting in unnecessary delay, are not raised.

Sec. 2. Government Pro Bono and Volunteer Service. All federal agencies should develop appropriate programs to encourage and facilitate pro bono legal and other volunteer service by government employees, including attorneys.

including mediators

Sec. 3. Principles to Enact Legislation and Promulgate Regulations Which Do Not Unduly Burden the Federal Court System.

(No comments on page 4 - 9 of proposed E.O.)

U.S. Department of Labor
Office of the Solicitor
Washington, DC 20210

TELEFAX MESSAGE

OFFICE OF THE SOLICITOR

DATE: NOV. 7, 1995

PLEASE HAND DELIVER THE FOLLOWING DOCUMENT TO:

NAME: MAC TRUED

FIRM: OMB

FROM: KATHY JOYCE

PHONE NUMBER: 219-8065

TOTAL NUMBER OF PAGES INCLUDING COVER SHEET: 4

PLEASE CALL IMMEDIATELY IF THE COPY YOU RECEIVE IS
INCOMPLETE OR ILLEGIBLE.

DESCRIPTION OF DOCUMENT TRANSMITTED: DRAFT Commentaries
of E.O. on Civil Justice Reform

DRAFT

PROPOSED E.O. ON CIVIL JUSTICE REFORM
WITH NOTED CHANGES FROM E.O. 12778

DRAFT

PREAMBLE

o Proposed E.O. shorter, more succinct, different tone. Among other things, the existing E.O. emphasizes the harmful consequences because of the growth of civil litigation.

Section 1. Guidelines to Promote Just and Efficient Government Civil Litigation. Federal attorneys to adhere to the following litigation guidelines.

(a) Pre-filing Notice of Complaint. Try to resolve disputes prior to filing a complaint.

(b) Settlement Conferences. Use reasonable efforts and tools to try to settle the case throughout litigation.

(c) Alternative Methods of Resolving the Dispute in Litigation. Make reasonable attempts to resolve dispute before proceeding to trial.

(1) Preference expressed for claims being resolved by means other than resorting to formal trial proceedings. Recommended use of Alternative Dispute Resolution ("ADR") when beneficial after consulting with referring agency.

(2) When appropriate to use ADR techniques.

(3) All litigation counsel to be trained in ADR techniques.

CHANGE: Existing E.O.(c)(3) has a prohibition against the use of binding arbitration or any other equivalent ADR technique. Proposed E.O.(c)(3) drops prohibition against use of binding arbitration.

COMMENTS: FLS DIV. DISAGREES WITH REMOVING PROHIBITION ON THE USE OF BINDING ARBITRATION. ASP AGREES WITH REMOVAL.

OTHER: who's going to pay for training?

(d) Discovery. Make reasonable efforts to streamline and expedite discovery.

(1) Review of Proposed Document Requests. Requires agencies to establish a review procedure for the conduct of document discovery to insure among it is not overly burdensome. (Same as (d)(2) of existing E.O.)

CHANGE: Proposed E.O. ~~deletes~~ existing (d)(1), "Disclosure of Core Information," which instructs litigation counsel to mutually exchange core information relevant to dispute and to stipulate to an order memorializing exchanged information. (It should be noted that since the execution of the existing E.O. a similar requirement was incorporated in FRCP 26 by 1993 Amendments.)

(2) Discovery Motions. Before petitioning court to resolve discovery motion or impose sanctions, counsel to attempt to resolve dispute with opposing counsel. (Same as (d)(3) in existing E.O.)

CHANGE: DELETES PREVIOUS E.O. SUBSECTIONS (e)(1)-(4), requiring the presentation of only reliable, recognized expert witnesses.

(e) Sanctions. Seek sanctions against opposing counsel and parties where appropriate.

(1) Evaluate filings for possible court sanctions or abusive practice.

(2) A senior supervising attorney should review all motions for sanctions prior to filing.

(f) Improved Use of Litigation Resources. Case management techniques and other efforts to expedite civil litigation to be used, including:

(1) stipulating to facts;

(2) revise pleadings for accuracy and narrowing of issues as discovery progresses;

(3) request early trial dates;

(4) move for summary judgment;

(5) CHANGE: do not raise unmeritorious threshold defenses and jurisdictional arguments.

CHANGE: DELETES PREVIOUS E.O. SUBSECTION (h), Fees and Expenses, requiring counsel to offer to enter into two-way fee shifting agreement.

CHANGE: NEW SECTION 2, Government Pro Bono and Volunteer Service. Encourages agencies to develop pro bono and other volunteer service by government employees.

Section 3. Principles to Enact Legislation and Promulgate Regulations Which Do Not Unduly Burden the Federal Court System

(a) General Duty to Review Legislation and Regulations.

The following requirements must be adhered to when developing regulations or legislation:

(1) reviewed to eliminate errors and ambiguities;

(2) written to minimize litigation;

(3) contain clear and certain legal standards for affected conduct, not a general standard.

COMMENT AND ISSUE RAISED RE (3): FLS DIV. NOTES THAT ITS DRAFT CHILD LABOR REGS ARE GENERAL STANDARDS.

(b) Specific Issues for Review. In meeting the requirements of subsection (a), effort is to be made to ensure:

(1) that the legislation --

subsections (A) through (Q) then set forth general drafting principles, requirements for clarity in specifying parties rights, jurisdictional requirements, statutory terms, etc.

(2) that the regulation --

subsections (A) through (G) also sets forth general drafting principles for clarity of language and rights

(c) Certification of Compliance for Agency Legislation or Regulations. Requires agencies to certify that they adhered to the requirements in subsections (a) & (b) before submitting regs or legislation to OMB.

Section 4. Principles to Promote Just and Efficient Administrative Adjudications.

DRAFT

(a) Implementation of Administrative Conference Recommendations Recommends that the recommendations of the Administrative Conference of the U.S. be adopted and implemented in adjudicating administrative claims.

(b) CHANGE NEW: Improvements in Administrative Adjudication Reduce delay in decision-making, promote self-representation and non-lawyer counseling, encourage early settlements.

(c) CHANGE NEW: Bias. Identify bias that hinders justice, eliminate bias, set up mechanism to receive and resolve bias complaints.

(d) CHANGE NEW: Public Education. Public to be educated about agencies claims/benefits policies and procedures.

Section 5. Coordination by the Department of Justice.

(a) AG to coordinate implementation of sections 1, 2 & 4.

(b) AG to issue guidelines to serve as model for agency implementation.

Section 6. Definitions.

(a) agency & (b) litigation counsel.

Section 7. No Private Rights Created.

Section 8. Scope.

(a) No applicability to Criminal Matters or Proceedings in Foreign Courts.

(b) Application of Notice Provision. Spells out when the notice provisions section 1(a) are not required.

(c) Application of ADR. When section 1(c) ADR requirements shall not apply.

(d) Additional Guidance as to Scope. A.G. to issue further guidance as to scope of E.O.

Section 9. Conflicts with Other Rules. This E.O. not to conflict with or supersede any other existing rules of law.

Section 10. Privileged Information. No privileged information to be disclosed.

Section 11. Effective Date.

Section 12. Revocation.



DEPARTMENT OF THE TREASURY
WASHINGTON

OFFICE OF THE ASSOCIATE GENERAL COUNSEL
(LEGISLATION, LITIGATION & REGULATION)

1500 PENNSYLVANIA AVENUE, N.W.
ROOM 1417
WASHINGTON, D.C. 20220

FAX: (202) 622-1188

VOICE: (202) 622-0650

DATE: 11/24/95 PAGES TO FOLLOW: 2

TO: <u>MAC REED</u>	FAX: <u>395-7294</u>
TO: _____	FAX: _____
TO: _____	FAX: _____
TO: _____	FAX: _____

FROM: Rich Carro

SUBJECT: EO - CIVIL JUSTICE REFORM

COMMENTS/SPECIAL INSTRUCTIONS

> UNCLASSIFIED <

11/24/95

DEPARTMENT OF THE TREASURY

COMMENTS ON DRAFT EXECUTIVE ORDER ON
CIVIL JUSTICE REFORM

Sections 1(a) and (b). We believe these should be clarified so that they do not require a formal settlement conference in every case. In addition, these provisions appear to apply only to litigation in Federal court, not administrative "litigation." This distinction should be strengthened.

no

Section 1(c). ADR in some administrative enforcement actions may not be appropriate. Some cases -- such as those in the Office of the Comptroller of the Currency -- are particularly complex. Also, this section may conflict with section 309 of PL 103-325.

no

We are concerned that resources may not be sufficient to satisfy the requirement that all litigation counsel be trained in ADR.

Section 1(d)(1). Review by a "senior lawyer" of all requests is likely to be time consuming and unnecessary. Perhaps this should be limited to significant/substantial requests. Also, it is not clear who is a "senior lawyer".

no

Section 1(e)(2). The requirement that each agency designate a single "sanctions officer" is inefficient in agencies with large field structures. Moreover, is this unnecessary micro-management? Also, it is not clear who is a "senior supervising attorney".

no

Section 2. As a general matter, this section could weaken the Government's traditional position that, based on federalism concerns, States should not be allowed to require Government attorneys to do pro bono work. Implementation of this section potentially could result in States dictating how Federal attorneys must spend part of their official time. If Government attorneys are required to adhere to State pro bono requirements, the result may be that many attorneys (particularly those in Washington DC who are members of State bars) may be forced to travel significant distances and spend substantial amounts of money if the pro bono work must be performed within the State of admission.

~~no~~

It is questionable whether administrative leave may be granted to attorneys doing pro bono legal work, unless the time spent on such activities is brief and pre-determined. See 61 Comp. Gen. 652 (1982).

Also, we note that attorneys may not provide legal assistance to third parties regarding claims against the Government or represent anyone before the Government in connection with any matter in which the Government is a party or has a direct and substantial interest. See 18 USC 205.

Section 3(b)(1)(D). Since the EO concerns civil justice reform (and is "not intended to affect criminal matters"), this provision appears inappropriate. Moreover, there are some criminal violations for which "scienter" is not required. See *US v. Froed* (401 US 601, 607 (1971)) and *Staples v. US* (114 S. Ct. 1793 (1994)).

Yes

Section 3(b)(1)(L). We question whether this is necessary. Rules of personal jurisdiction do not change depending on the statute at issue.

NO

Sections 3(b)(1)(P) and (R). These seem to overlap and instead should be combined into a single provision.

NO

Section 3(c). The required certification is unnecessarily bureaucratic and demeaning; compliance should be assumed. Alternatively -- and only if it is deemed necessary -- it would be better to direct agencies to establish procedures to ensure that regulations and legislation are reviewed for consistency with this and other applicable EOs.

OK-changes

Section 3(b)(2)(B). This will be extremely burdensome and not likely helpful in many cases -- particularly when entire regulations are being reinvented. Perhaps it would be better to require such information when appropriate to assist in understanding the scope of a regulation. We also question whether this is the appropriate EO for such a provision.

NO

Section 10. We believe this provision was included in EO 12778 because of the provisions in EO 12778 concerning the disclosure of core information to litigation parties. The disclosure provisions are not retained in the instant draft EO; is there a continued need for section 10?

NO



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

October 30, 1995

MEMORANDUM FOR DESIGNATED AGENCY HEADS
(SEE ATTACHED DISTRIBUTION LIST)

FROM: Robert G. Damus *(Signature)*
General Counsel

SUBJECT: Proposed Executive Order Entitled "Civil Justice Reform"

Who did this work?
Elena worked on this
JE

Attached is a proposed Executive order entitled "Civil Justice Reform."

It was prepared by the White House Counsel's Office, in accordance with the provisions of Executive Order No. 11030, as amended.

On behalf of the Director of the Office of Management and Budget, I would appreciate receiving any comments you may have concerning this proposal. If you have any comments or objections, they should be received no later than close of business Wednesday, November 8, 1995. Please be advised that agencies that do not respond by the November 8, 1995 deadline will be recorded as not objecting to the proposal.

Comments or inquiries may be submitted by telephone to Mr. Mac Reed of this office (Phone: 395-3563; Fax: 395-7294).

Thank you.

Attachments - Distribution List
Proposed Executive Order

- cc: Jack Lew
- John Koskinen
- Gordon Adams
- T.J. Glauthier
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- Joe Minarik
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Elena
This is a... looks like... I haven't heard from...
JE

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Honorable Todd Stern
Assistant to the President
and Staff Secretary

Honorable Jack Quinn
Chief of Staff to the Vice President

EXECUTIVE ORDER

CIVIL JUSTICE REFORM

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code, and in order to improve access to justice for all persons who wish to avail themselves of court and administrative adjudicatory tribunals to resolve disputes, to facilitate the just and efficient resolution of civil claims involving the United States Government, to encourage the filing of only meritorious civil claims, to improve legislative and regulatory drafting to reduce needless litigation, to promote fair and prompt adjudication before administrative tribunals, and to provide a model for similar reforms of litigation practices in the private sector and in various states, it is hereby ordered as follows:

Section 1. Guidelines to Promote Just and Efficient Government Civil Litigation. To promote the just and efficient resolution of civil claims, those Federal agencies and litigation counsel that conduct or otherwise participate in civil litigation on behalf of the United States Government in Federal court shall respect and adhere to the following guidelines during the conduct of such litigation:

(a) Pre-filing Notice of a Complaint. No litigation counsel shall file a complaint initiating civil litigation without first making a reasonable effort to notify all disputants about the nature of the dispute and to attempt to achieve a settlement, or confirming that the referring agency that previously handled the dispute has made a reasonable effort to notify the disputants and to achieve a settlement or has used its conciliation processes.

(b) Settlement Conferences. As soon as practicable after ascertaining the nature of a dispute in litigation, and throughout the litigation, litigation counsel shall evaluate settlement possibilities and make reasonable efforts to settle the litigation. Such efforts shall include offering to participate in a settlement conference or moving the court for a conference pursuant to Rule 16 of the Federal Rules of Civil Procedure in an attempt to resolve the dispute without additional civil litigation.

(c) Alternative Methods of Resolving the Dispute in Litigation. Litigation counsel shall make reasonable attempts to resolve a dispute expeditiously and properly before proceeding to trial.

(1) Whenever feasible, claims should be resolved through informal discussions, negotiations, and settlements rather than through utilization of any formal court proceeding. Where the benefits of Alternative Dispute

Resolution ("ADR") may be derived, and after consultation with the agency referring the matter, litigation counsel should suggest the use of an appropriate ADR technique to the parties.

(2) It is appropriate to use ADR techniques or processes to resolve claims of or against the United States or its agencies, after litigation counsel determines that the use of a particular technique is warranted in the context of a particular claim or claims, and that such use will materially contribute to the prompt, fair, and efficient resolution of the claims.

(3) To facilitate broader and effective use of informal and formal alternative dispute resolution methods, all litigation counsel should be trained in ADR techniques.

(d) Discovery. To the extent practical, litigation counsel shall make every reasonable effort to streamline and expedite discovery in cases under counsel's supervision and control.

(1) Review of Proposed Document Requests. Each agency within the executive branch shall establish a coordinated procedure for the conduct and review of document discovery undertaken in litigation directly by that agency when that agency is litigation counsel. The procedure shall include, but is not necessarily limited to, review by a senior lawyer prior to service or filing of the request in litigation to determine that the request is not cumulative or duplicative, unreasonable, oppressive, unduly burdensome or expensive, taking into account the requirements of the litigation, the amount in controversy, the importance of the issues at stake in the litigation, and whether the documents can be obtained from some other source that is more convenient, less burdensome, or less expensive.

(2) Discovery Motions. Before petitioning a court to resolve a discovery motion or petitioning a court to impose sanctions for discovery abuses, litigation counsel shall attempt to resolve the dispute with opposing counsel. If litigation counsel makes a discovery motion concerning the dispute, he or she shall represent in that motion that any attempt at resolution was unsuccessful or impracticable under the circumstances.

(e) Sanctions. Litigation counsel shall take steps to seek sanctions against opposing counsel and opposing parties where appropriate.

(1) Litigation counsel shall evaluate filings made by opposing parties and, where appropriate, shall petition the court to impose sanctions against those responsible for abusive practices.

(2) Prior to filing a motion for sanctions, litigation counsel shall submit the motion for review to the sanctions officer, or his or her designee, within the litigation counsel's agency. Such officer or designee shall be a senior supervising attorney within the agency, and shall be licensed to practice law before a State court, courts of the District of Columbia, or courts of any territory or Commonwealth of the United States. The sanctions officer or designee shall also review motions for sanctions that are filed against litigation counsel, the United States, its agencies, or its officers.

(f) Improved Use of Litigation Resources. Litigation counsel shall employ efficient case management techniques and shall make reasonable efforts to expedite civil litigation in cases under that counsel's supervision and control. This includes but is not limited to:

(1) making reasonable efforts to negotiate with other parties about, and stipulate to, facts that are not in dispute;

(2) reviewing and revising pleadings and other filings to ensure that they are accurate and that they reflect a narrowing of issues, if any, that has resulted from discovery;

(3) requesting early trial dates where practicable;

(4) moving for summary judgment in every case where the movant would be likely to prevail, or where the motion is likely to narrow the issues to be tried; and

(5) reviewing and revising pleadings and other filings to ensure that unmeritorious threshold defenses and jurisdictional arguments, resulting in unnecessary delay, are not raised.

Sec. 2. Government Pro Bono and Volunteer Service. All federal agencies should develop appropriate programs to encourage and facilitate pro bono legal and other volunteer service by government employees, including attorneys.

Sec. 3. Principles to Enact Legislation and Promulgate Regulations Which Do Not Unduly Burden the Federal Court System.

(a) General Duty to Review Legislation and Regulations. Within current budgetary constraints and existing executive branch coordination mechanisms and procedures established in OMB Circular A-19 and Executive Order No. 12866, each agency promulgating new regulations, reviewing existing regulations, developing legislative proposals concerning regulations, and developing new legislation shall adhere to the following requirements:

(1) The agency's proposed legislation and regulations shall be reviewed by the agency to eliminate drafting errors and needless ambiguity;

(2) The agency's proposed legislation and regulations shall be written to minimize needless litigation; and

(3) The agency's proposed legislation and regulations shall provide a clear and certain legal standard for affected conduct rather than a general standard, and shall promote simplification and burden reduction.

(b) Specific Issues for Review. In conducting the reviews required by subsection (a), each agency formulating proposed legislation and regulations shall make every reasonable effort to ensure:

(1) that the legislation--

(A) specifies whether all causes of action arising under the law are subject to statutes of limitations;

(B) specifies in clear language the preemptive effect, if any, to be given to the law;

(C) specifies in clear language the effect on existing Federal law, if any, including all provisions repealed, circumscribed, displaced, impaired, or modified;

(D) provides a clear and certain legal standard for affected conduct rather than a general standard, and a mens rea requirement if it is a criminal statute;

(E) specifies whether private arbitration and other forms of private dispute resolution are appropriate under enforcement and relief provisions; subject to constitutional requirements;

(F) specifies whether the provisions of the law are severable if one or more of them is found to be unconstitutional;

(G) specifies in clear language the retroactive effect, if any, to be given to the law;

(H) specifies in clear language the applicable burdens of proof;

(I) specifies in clear language whether it grants private parties a right to sue and, if so, the relief available and the conditions and terms for authorized awards of attorney's fees, if any;

(J) specifies whether State courts have jurisdiction under the law and, if so, whether and under what conditions an action would be removable to Federal court;

(K) specifies whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires the exhaustion of administrative remedies;

(L) sets forth the standards governing the assertion of personal jurisdiction, if any;

(M) defines key statutory terms, either explicitly or by reference to other statutes that explicitly define those terms;

(N) specifies whether the legislation applies to the Federal Government or its agencies;

(O) specifies whether the legislation applies to States, territories, the District of Columbia, and the Commonwealths of Puerto Rico and of the Northern Mariana Islands;

(P) specifies what remedies are available such as money damages, civil penalties, injunctive relief, and attorney's fees; and

(Q) addresses other important issues affecting clarity and general draftsmanship of legislation set forth by the Attorney General, with the concurrence of the Director of the Office of Management and Budget ("OMB") and after consultation with affected agencies, that are determined to be in accordance with the purposes of this order.

(2) that the regulation--

(A) specifies in clear language the preemptive effect, if any, to be given to the regulation;

(B) specifies in clear language the effect on existing Federal law or regulation, if any, including all provisions repealed, circumscribed, displaced, impaired, or modified;

(C) provides a clear and certain legal standard for affected conduct rather than a general standard, while promoting simplification and burden reduction;

(D) specifies in clear language the retroactive effect, if any, to be given to the regulation;

(E) specifies whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires the exhaustion of administrative remedies;

(F) defines key terms, either explicitly or by reference to other regulations or statutes that explicitly define those items; and

(G) addresses other important issues affecting clarity and general draftsmanship of regulations set forth by the Attorney General, with the concurrence of the Director of the Office of Management and Budget and after consultation with affected agencies, that are determined to be in accordance with the purposes of this order.

(c) Certification of Compliance for Agency Legislation or Regulations. When transmitting such draft legislation or regulation to "OMB", the agency must certify that (1) it has reviewed such draft legislation or regulation in light of this section, and that (2) either the draft legislation or regulation meets the applicable standards provided in subsections (a) and (b) of this section, or it is unreasonable to require the particular piece of draft legislation or regulation to meet one or more of those standards. Where the standards are not met, the agency certification must include an explanation of the reasons for the departure from the standards.

Sec. 4. Principles to Promote Just and Efficient Administrative Adjudications.

(a) Implementation of Administrative Conference Recommendations. In order to promote just and efficient resolution of disputes, an agency that adjudicates administrative claims shall, to the extent reasonable and practicable, and when not in conflict with other sections of this order, implement the recommendations of the Administrative Conference of the United States, entitled "Case Management as a Tool for Improving Agency Adjudication," as contained in 1 C.F.R. 305.86-7 (1991).

(b) Improvements in Administrative Adjudication. All federal agencies should review their administrative adjudicatory processes and develop specific procedures to reduce delay in decision-making, to facilitate self-representation, to expand non-lawyer counseling and representation where appropriate, and to invest maximum discretion in fact-finding officers to encourage appropriate settlement of claims as early as possible.

(c) Bias. All federal agencies should review their administrative adjudicatory processes to identify any type of bias that hinders full access to justice for all persons; regularly train all fact-finders, decision-makers and administrative law judges to eliminate such bias; and establish appropriate mechanisms to receive and resolve bias complaints from persons who appear before administrative adjudicatory tribunals.

(d) Public Education. All federal agencies should develop effective and simple methods, including the use of electronic technology, to educate the public about its claims/benefits policies and procedures.

Sec. 5. Coordination by the Department of Justice.

(a) The Attorney General shall coordinate efforts by Federal agencies to implement sections 1, 2 and 4 of this order.

(b) To implement the principles and purposes announced by this order, the Attorney General is authorized to issue guidelines implementing sections 1 and 4 of this order for the Department of Justice. Such guidelines shall serve as models for internal guidelines that may be issued by other agencies pursuant to this order.

Sec. 6. Definitions. For purposes of this order:

(a) The term "agency" shall be defined as that term is defined in section 451 of title 28, United States Code, except that it shall exclude all departments and establishments in the legislative or judicial branches of the United States.

(b) The term "litigation counsel" shall be defined as the trial counsel or the office in which such trial counsel is employed, such as the United States Attorney's Office for the district in which the litigation is pending or a litigating division of the Department of Justice. Special Assistant United States Attorneys are included within this definition. Those agencies authorized by law to represent themselves in court without assistance from the Department of Justice are also included in this definition, as are private counsel hired by any Federal agency to conduct litigation on behalf of the agency or the United States.

Sec. 7. No Private Rights Created. This order is intended only to improve the internal management of the executive branch in resolving disputes, conducting litigation in a reasonable and just manner, and reviewing legislation and regulations. This order shall not be construed as creating any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States, its agencies, its officers, or any other person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order. Nothing in this order shall be construed to obligate the United States to accept a particular settlement or resolution of a dispute, to alter its standards for accepting settlements, to forego seeking a consent decree or other relief, or to alter any existing delegation of settlement or litigating authority.

Sec. 8. Scope.

(a) No Applicability to Criminal Matters or Proceedings in Foreign Courts. This order is applicable to civil matters only. It is not intended to affect criminal matters, including enforcement of criminal fines or judgments of criminal forfeiture. This order does not apply to litigation brought by or against the United States in foreign courts or tribunals.

(b) Application of Notice Provision. Notice pursuant to subsection (a) of section 1 is not required (1) in any action to seize or forfeit assets subject to forfeiture or in any action to seize property; (2) in any bankruptcy, insolvency, conservatorship, receivership, or liquidation proceeding; (3) when the assets that are the subject of the action or that would satisfy the judgment are subject to flight, dissipation, or destruction; (4) when the defendant is subject to flight; (5) when, as determined by litigation counsel, exigent circumstances make providing such notice impracticable or such notice would otherwise defeat the purpose of the litigation, such as in actions seeking temporary restraining orders or preliminary injunctive relief; or (6) in those limited classes of cases where the Attorney General determines that providing such notice would defeat the purpose of the litigation.

(c) Application of Alternative Dispute Resolution. Subsections (c) of section 1 of this order shall not apply (1) to any action to seize or forfeit assets subject to forfeiture, or (2) to any debt collection case (including any action for civil penalties or taxes) involving an amount in controversy less than \$100,000.

(d) Additional Guidance as to Scope. The Attorney General shall have the authority to issue further guidance as to the scope of this order, except section 3, consistent with the

purposes of this order.

Sec. 9. Conflicts with Other Rules. Nothing in this order shall be construed to require litigation counsel or any agency to act in a manner contrary to the Federal Rules of Civil Procedure, Tax Court Rules of Practice and Procedure, State or Federal law, other applicable rules of practice or procedure, or court order.

Sec. 10. Privileged Information. Nothing in this order shall compel or authorize the disclosure of privileged information, sensitive law enforcement information, information affecting national security, or information the disclosure of which is prohibited by law.

Sec. 11. Effective Date. This order shall become effective 90 days after the date of signature. This order shall not apply to litigation commenced prior to the effective date.

Sec. 12. Revocation. Executive Order 12778 is hereby revoked.

THE WHITE HOUSE,

WILLIAM J. CLINTON

Judge --

Attached is a memorandum from you to Alice Rivlin requesting that OMB process an Executive Order on Civil Justice Reform. This is the EO that came from John Schmidt's shop, which allows the United States to enter into binding arbitration.

I've already given the proposed EO to OMB, and OMB has begun to process it. But it seems that a formal request memo from this office to Alice Rivlin is necessary. Accordingly, could you send the attached memo, along with the proposed EO, to Alice? Thanks.

Elena



U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D. C. 20530

September 7, 1995

**MEMORANDUM FOR JOHN SCHMIDT,
ASSOCIATE ATTORNEY GENERAL**

From: Walter Dellinger *WED*
Assistant Attorney General

Re: Constitutional Limitations on Federal Government Participation in Binding Arbitration

You have asked for our opinion as to whether the Constitution in any way limits the authority of the federal government to submit to binding arbitration.¹ Specifically, you have asked us to explain and expand on advice we issued on September 19, 1994, in which we confirmed our earlier oral advice that "the Office of Legal Counsel no longer takes the view that the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, bars the United States from entering into binding arbitration." Memorandum from Dawn Johnsen, Deputy Assistant Attorney General, to David Cohen, Director, Commercial Litigation Branch, Civil Division, re: Binding Arbitration (Sept. 19, 1994).² Below, we reiterate this conclusion and, pursuant to your

¹ Several components of the Department of Justice have submitted comments on the subject of binding arbitration. See Memorandum from Carol DiBattiste, Director, Executive Office for United States Attorneys, to Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, re: Binding Arbitration Involving the Federal Government as a Party (Mar. 1, 1995) ("EOUSA memorandum"); Memorandum from Frank W. Hunger, Assistant Attorney General, Civil Division, to Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, re: Constitutionality of Binding Arbitration Involving the Federal Government as a Party (Feb. 28, 1995) ("Civil Division memorandum"); Memorandum from Lois J. Schiffer, Assistant Attorney General, Environment and Natural Resources Division, to Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, re: Binding Arbitration Involving the Federal Government as a Party (Feb. 24, 1995) ("ENRD memorandum").

² The Office of Legal Counsel has never issued an opinion on the matter. Then-Assistant Attorney General for the Office of Legal Counsel William Barr, however, testified that the Appointments Clause would prohibit the government from entering into binding arbitration unless arbitrators were appointed by one of the methods described in that Clause, which they typically are not. See Hearing before the Subcommittee on Oversight of Government Management of the Senate Committee on Governmental Affairs Regarding the Use of Alternative Dispute Resolution by Federal Agencies (Sept. 19, 1989) (statement of William P. Barr); Hearing before the Subcommittee on Administrative Law and Government Relations of the House Committee on the Judiciary Regarding the Use of Alternative Dispute Resolution by Federal Agencies (Jan. 31, 1990) (statement of William P. Barr). In addition, the Civil Division has issued a manual entitled "Guidance on the Use of Alternative Dispute Resolution for Litigation in the Federal Courts" (Aug. 1992). That manual asserted that "[t]he Government cannot enter into agreements to

I. Background

Neither term in the phrase "binding arbitration" bears a settled meaning. First, "arbitration" may be a very different exercise in different contexts and cases. because there are no universally applicable rules of practice, procedure, or evidence governing the conducting of arbitration. In addition, there is no standard as to whether arbitration is to be conducted by a single arbitrator or by a panel of arbitrators or as to the method for selecting the individuals who serve in that capacity.⁴ Moreover, arbitration may be voluntary -- in that both parties have agreed to resolve their dispute by this method -- or compulsory -- in that some other requirement such as a statute compels the parties to resolve their dispute by this method. Second, it is not at all clear what exactly is meant by referring to an arbitration as "binding." We take this to mean that judicial review of the arbitral decision is narrowly limited, as opposed to non-binding arbitration in which each party remains free to disregard any arbitral ruling. The limitation on judicial review could take numerous forms. It may mean that there is to be no review of an arbitral decision. Alternatively, it may mean that an arbitral decision is reviewable only under a very limited standard, such as fraud by the arbitrator(s) or arbitrary and capricious decision making. Because of this indeterminacy, it is not possible to draw many specific conclusions. We are able, however, to offer generalizations and guidance pertaining to participation by the federal government in the various forms that binding arbitration may take.

II. The Appointments Clause

A. Whether Arbitrators Are Officers of the United States

To understand why the assertion that the Appointments Clause prohibits the government from entering into binding arbitration is not well-founded, it is necessary first to examine the requirements of the Appointments Clause itself. The Appointments Clause provides that

[the President,] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2. The Appointments Clause sets forth the exclusive mechanisms by which an officer of the United States may be appointed. See Buckley v. Valeo, 424 U.S. 1, 124-37 (1976) (per curiam). The first issue to be resolved is, who is an "officer" within the meaning of the Constitution and therefore must be appointed by one of the methods set out in

⁴ Typically, arbitrators are either professional arbitrators or possess some expertise in the subject matter of the specific arbitration wherein they act. Throughout this memorandum, we assume that they are selected to arbitrate particular disputes on a case-by-case basis in the manner of independent contractors.

the Appointments Clause?

Not everyone who performs duties for the federal government is an officer within the meaning of the Appointments Clause. The requirements of the Appointments Clause apply only where an individual is appointed to an "office" within the federal government. From the early days of the Republic, the concepts of "office" and "officer" have been understood to embrace the ideas of "tenure, duration, emolument, and duties." United States v. Hartwell, 73 U.S. (6 Wall.) 385, 393 (1868). Because Hartwell has long been taken as the leading statement of the constitutional meaning of "officer,"⁵ that statement is worth repeating in full:

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

The employment of the defendant was in the public service of the United States. He was appointed pursuant to law, and his compensation was fixed by law. Vacating the office of his superior would not have affected the tenure of his place. His duties were continuing and permanent, not occasional or temporary. They were to be such as his superior in office should prescribe.

A government office is different from a government contract. The latter from its nature is necessarily limited in its duration and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other.

Id. at 393.

Hartwell and the cases following it specify a number of criteria for identifying those who must be appointed as constitutional officers, and in some cases it is not entirely clear which criteria the court considered essential to its decision. Nevertheless, we believe that from the earliest reported decisions onward, the constitutional requirement has involved at least three necessary components. The Appointments Clause is implicated only if there is created or an individual is appointed to (1) a position of employment (2) within the federal government (3) that is vested with significant authority pursuant to the laws of the United States.

⁵ In an opinion discussing an Appointments Clause issue, Attorney General Robert F. Kennedy referred to Hartwell as providing the "classical definition pertaining to an officer." Communications Satellite Corporation, 42 Op. Att'y Gen. 165, 169 (1962). Hartwell itself cited several earlier opinions, including United States v. Maurice, 26 F. Cas. 1211 (C.C.D. Va. 1823) (No. 15,747) (Marshall, Circuit Justice), see 73 U.S. at 393 n.†, and in turn has been cited by numerous subsequent Supreme Court decisions, including United States v. Germaine, 99 U.S. 508, 511-12 (1878), and Auffmordt v. Hedden, 137 U.S. 310, 327 (1890). These latter two decisions were cited with approval by the Court in Buckley, 424 U.S. at 125-26 & n.162.

1. A Position of Employment: The Distinction between Appointees and Independent Contractors. An officer's duties are permanent, continuing, and based upon responsibilities created through a chain of command rather than by contract. Underlying an officer is an "office," to which the officer must be appointed. As Chief Justice Marshall, sitting as circuit justice, wrote: "Although an office is 'an employment,' it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act, or perform a service, without becoming an officer." United States v. Maurice, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747). Chief Justice Marshall speaks here of being "employed under a contract"; in modern terminology the type of non-officer status he is describing is usually referred to as that of independent contractor. In Hartwell, this distinction shows up in the opinion's attention to the characteristics of the defendant's employment being "continuing and permanent, not occasional or temporary," as well as to the suggestion that with respect to an officer, a superior can fix and then change the specific set of duties, rather than having those duties fixed by a contract. 73 U.S. at 393.

The Court also addressed the distinction between employees and persons whose relationship to the government takes some other form in United States v. Germaine, 99 U.S. 508 (1878). There, the Court considered whether a surgeon appointed by the Commissioner of Pensions "to examine applicants for pension, where [the Commissioner] shall deem an examination . . . necessary," id. at 508 (quoting Rev. Stat. § 4777), was an officer within the meaning of the Appointments Clause. The surgeon in question was "only to act when called on by the Commissioner of Pensions in some special case"; furthermore, his only compensation from the government was a fee for each examination that he did in fact perform. Id. at 512. The Court stated that the Appointments Clause applies to "all persons who can be said to hold an office under the government" and, applying Hartwell, concluded that "the [surgeon's] duties are not continuing and permanent and they are occasional and intermittent." Id. (emphasis in original). The surgeon, therefore, was not an officer of the United States. Id.⁶

2. Appointment to a Position within the Federal Government. In addition, Hartwell and the other major decisions defining "Officers of the United States" all reflect the historical understanding that the Appointments Clause speaks only to positions within the federal government. The Appointments Clause simply is not implicated when significant authority is devolved upon non-federal actors. In Hartwell the Court stated that "[a]n office is a public station, or employment, conferred by the appointment of government." 73 U.S. at 393. In holding that the Appointments Clause applied in that case, the Court stressed that "[t]he employment of the defendant was in the public service of the United States." Id.; see also United States v. Germaine, 99 U.S. 508, 510 (1878) (founders intended appointment pursuant to the Appointments Clause only for "persons who can be said to hold an office under the

⁶ Germaine clearly was discussing the concept of "officer" in the constitutional, and not simply a generic, sense: the alternative basis for the holding was that the surgeon was not an officer because he was appointed by the Commissioner who, as the head of a bureau within the Interior Department, could not be a "Head of Department" with the authority to appoint officers. Id. at 510-11.

government about to be established under the Constitution"). This means that the delegation of federal authority to state officials can present no Appointments Clause difficulties, because the individuals serve as state officials rather than as federal officials.⁷ It is a conceptual mistake to argue that federal laws delegating authority to state officials create federal "offices," which are then filled by (improperly appointed) state officials. Rather, the "public station, or employment" has been created by state law; the federal statute simply adds federal authority to a pre-existing state office.⁸ Accordingly, the substantiality of the delegated authority is immaterial to the Appointments Clause conclusion.⁹ An analogous point applies to delegations made to private individuals: the simple assignment of some duties under federal law, even significant ones, does not by itself pose an Appointments Clause problem.¹⁰

⁷ The framers appear to have envisioned that state officials would enforce federal law. For example, Madison wrote,

eventual collection [of certain Federal taxes] under the immediate authority of the Union, will generally be made by the officers, and according to the rules, appointed by the several States. Indeed it is extremely probable that in other instances, . . . the officers of the States will be clothed with the correspondent authority of the Union.

The Federalist No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961). The framers also seem to have acted upon this understanding. The first Judiciary Act, enacted by the first Congress, required state magistrates and justices of the peace to arrest and detain any criminal offender under the laws of the United States. 1 Stat. § 33. This statute, in immaterially modified form, remains in effect. 18 U.S.C. § 3041. At least two courts have interpreted this statute to authorize state and local law enforcement officers to arrest an individual who violates federal law. See United States v. Bowdach, 561 F.2d 1160 (5th Cir. 1977); Whitlock v. Boyer, 77 Ariz. 334, 271 P.2d 484 (1954).

As discussed below, the delegation to private persons or non-federal government officials of federal-law authority, sometimes incorrectly analyzed as raising Appointments Clause questions, can raise genuine questions under other constitutional doctrines, such as the non-delegation doctrine and general separation of powers principles. Compare Confederated Tribes of Siletz Indians v. United States, 841 F. Supp. 1479, 1486-89 (D. Or. 1994) (appeal pending) (confusing Appointments Clause with separation of powers analysis in holding invalid a delegation to a state governor) with United States v. Ferry County, 511 F. Supp. 546, 552 (E.D. Wash. 1981) (correctly dismissing Appointments Clause argument and analyzing delegation to county commissioners under non-delegation doctrine).

⁸ This should be distinguished from the case where a federal statute creates a federal office -- such as membership on a federal commission that wields significant authority -- and requires that a particular state officer occupy that office. In this instance, Congress has actually created a federal office and sought to fill it, which is the prototype of an Appointments Clause violation.

⁹ See Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power & Conservation Planning Coun., 786 F.2d 1359, 1365 (9th Cir. 1986) ("because the Council members do not serve pursuant to federal law," it is "immaterial whether they exercise some significant executive or administrative authority over federal activity"), cert. denied, 479 U.S. 1059 (1987).

¹⁰ One might also view delegations to private individuals as raising the same considerations as suggested by the distinction drawn earlier between appointee and independent contractor -- so long as the statute does not create such tenure, duration, emoluments and duties as would be associated with a public office, the individual is not the occupant of a constitutional office but is, rather, a private party who has assumed or been delegated some federal

In our view, therefore, the lower federal courts have been correct in rejecting Appointments Clause challenges to the exercise of federally-derived authority by state officials,¹¹ the District of Columbia City Council,¹² qui tam relators under the False Claims Act,¹³ and plaintiffs under the citizen suit provisions of the Clean Water Act.¹⁴ The same conclusion should apply to the members of multinational or international entities who are not appointed to represent the United States.¹⁵

responsibilities.

¹¹ See, e.g., Seattle Master Builders, 786 F.2d at 1364-66. The particular state officials at issue were serving on an entity created by an interstate compact established with the consent of Congress, but that fact is not significant for Appointments Clause purposes. The crucial point was that "[t]he appointment, salaries and direction" of the officials were "state-derived": "the states ultimately empower the [officials] to carry out their duties." Id. at 1365. The Supreme Court's decision in New York v. United States, 112 S. Ct. 2408 (1992), which held that Congress cannot "commandeer" state officials to serve federal regulatory purposes, reinforces this conclusion. Where state officials do exercise significant authority under or with respect to federal law, they do so as state officials, by the decision and under the ultimate authority of the state.

¹² See Techworld Dev. Corp. v. D.C. Preservation League, 648 F. Supp. 106, 115-17 (D.D.C. 1986). Though the court did not fully develop the point, we believe that the District of Columbia stands on a special footing. Congress's plenary authority to legislate for the District entails authority to establish a municipal government for the District, the officers of which are municipal rather than federal officers to whom the Appointments Clause simply does not apply.

¹³ We believe that United States ex rel. Kelly v. Boeing Co., 9 F.3d 743, 757-59 (9th Cir. 1993) (rejecting Appointments Clause challenge to False Claims Act), cert. denied, 114 S. Ct. 1125 (1994), reached the correct result but through an incorrect line of analysis. See id. at 758 (Clause not violated because of the relative modesty of the authority exercised by the relator). The better Appointments Clause analysis, in our view, is that of the court in United States ex rel. Burch v. Piqua Engineering, Inc., 803 F. Supp. 115 (S.D. Ohio 1992), which held that "because qui tam relators are not officers of the United States, the FCA does not violate the Appointments Clause." Id. at 120. We disapprove the Appointments Clause analysis and conclusion of an earlier memorandum of this Office, Constitutionality of the Qui Tam Provisions of the False Claims Act, 13 Op. O.L.C. 249 (1989) (preliminary print) (arguing that the qui tam provisions violate the Appointments Clause).

¹⁴ Here, the court phrased its analysis in terms of separation of powers, but the challenge to the statute was, at its core, based on the Appointments Clause. See Chesapeake Bay Found. v. Bethlehem Steel Corp., 652 F. Supp. 620, 624 (D. Md. 1987) (Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), "does not stand for the proposition . . . that private persons may not enforce any federal laws simply because they are not Officers of the United States appointed in accordance with Article II of the Constitution").

¹⁵ At least where these entities are created on an ad hoc or temporary basis, there is a long historical pedigree for the argument that even the United States representatives need not be appointed in accordance with Article II. See, e.g., Alexander Hamilton, The Defence No. 37 (Jan. 6, 1796), reprinted in 20 The Papers of Alexander Hamilton 13, 20 (Harold C. Syrett ed., 1974):

As to what respects the Commissioners agreed to be appointed [under the Jay Treaty with Great Britain], they are not in a strict sense OFFICERS. They are arbitrators between the two Countries. Though in the Constitutions, both of the U[nited] States and of most of the Individual states, a particular mode of appointing officers is designated, yet in practice it has not been

3. The Exercise of Significant Authority. Chief Justice Marshall's observation that "[a]lthough an office is 'an employment,' it does not follow that every employment is an office," United States v. Maurice, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747) (Marshall, Circuit Justice), points to a third distinction as well -- although not one that was at issue in Maurice itself. An officer is distinguished from other full-time employees of the federal government by the extent of authority he or she can properly exercise. As the Court expressed in Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam):

We think that the term "Officers of the United States" as used in Art. II, defined to include "all persons who can be said to hold an office under the government" in United States v. Germaine, [means] that any appointee exercising significant authority pursuant to the laws of the United States . . . must . . . be appointed in the manner prescribed by [the Appointments Clause].

Id. at 125-26 (emphasis added).¹⁶ In contrast, "[e]mployees are lesser functionaries subordinate to officers of the United States." Id. at 126 n.162.

The distinction between constitutional officers and other employees is a long-standing one. See, e.g., Burnap v. United States, 252 U.S. 512, 516-19 (1920) (landscape architect in

deemed a violation of the provision to appoint Commissioners or special Agents for special purposes in a different mode.

The traditional view of the Attorneys General has been that the members of international commissions hold "an office or employment emanating from the general treaty-making power, and created by it and" the foreign nation(s) involved and that members are not constitutional officers. Office -- Compensation, 22 Op. Att'y Gen. 184, 186 (1898); see generally Dames & Moore v. Regan, 453 U.S. 654 (1981); Harold H. Bruff, Can Buckley Clear Customs?, 49 Wash. & Lee L. Rev. 1309 (1992); James C. Chen, Appointments with Disaster: The Unconstitutionality of the Binational Arbitral Review under the United States-Canada Free Trade Agreement, 49 Wash. & Lee L. Rev. 1455 (1992); William J. Davey, The Appointments Clause and International Dispute Settlement Mechanisms: A False Conflict, 49 Wash. & Lee L. Rev. 1315 (1992); Alan B. Morrison, Appointments Clause Problems in the Dispute Resolution Provisions of the United States-Canada Free Trade Agreement, 49 Wash. & Lee L. Rev. 1299 (1992).

¹⁶ See Appointments in the Department of Commerce and Labor, 29 Op. Att'y Gen. 116, 118-19, 122-23 (1911) (official authorized to perform all the duties of the Commissioner of Fisheries, who was appointed by the President and confirmed by the Senate, was an officer; scientists, technicians, and superintendent of mechanical plant in the Bureau of Standards were employees rather than officers); Second Deputy Comptroller of the Currency - Appointment, 26 Op. Att'y Gen. 627, 628 (1908) ("The officer is distinguished from the employee in the greater importance, dignity, and independence of his position"; official authorized to exercise powers of the Comptroller of the Currency in the absence of the Comptroller was clearly an officer).

We hasten to note that the exercise of significant authority alone is not a sufficient condition to characterizing a position as an office within the meaning of the Appointments Clause. To be considered a position that must be filled in conformance with the Appointments Clause, the position must also be one of employment within the federal government. For a discussion of this point, see infra section II.B.

the Office of Public Buildings and Grounds was an employee, not an officer); Second Deputy Comptroller of the Currency -- Appointment, 26 Op. Att'y Gen. 627, 628 (1908) (Deputy Comptroller of the Currency was "manifestly an officer of the United States" rather than an employee). At an early point, the Court noted the importance of this distinction for Appointments Clause analysis. See Germaine, 99 U.S. at 509.¹⁷

The Supreme Court relied on the officer/employee distinction in Freytag v. Commissioner, 501 U.S. 868 (1991). In Freytag, the Court rejected the argument that special trial judges of the Tax Court are employees rather than officers because "they lack authority to enter a final decision" and thus arguably are mere subordinates of the regular Tax Court judges.¹⁸ Id. at 881. The Court put some weight on the fact that the position of special trial judge, as well as its duties, salary, and mode of appointment, are specifically established by statute;¹⁹ the Court also emphasized that special trial judges "exercise significant discretion" in carrying out various important functions relating to litigation in the Tax Court. Id. at 881-82.

In contrast, as this Office has concluded, the members of a commission that has purely advisory functions "need not be officers of the United States" because they "possess no enforcement authority or power to bind the Government." Proposed Commission on

¹⁷ The status of certain officials traditionally appointed in modes identical to those designated by the Appointments Clause is somewhat anomalous. For instance, low-grade military officers have always been appointed by the President and confirmed by the Senate and understood to be "Officers of the United States" in the constitutional sense; in Weiss v. United States, 114 S. Ct. 752, 757 (1994), the Supreme Court recently indicated its agreement with that understanding. It is at least arguable, however, that the authority exercised by second lieutenants and ensigns is so limited and subordinate that their analogues in the civil sphere clearly would be employees. There are at least three possible explanations. (1) Congress may make anyone in public service an officer simply by requiring appointment in one of the modes designated by the Appointments Clause. The Clause, on this view, mandates officer status for officials with significant governmental authority but does not restrict the status to such officials. This apparently was the nineteenth-century view, see, e.g., United States v. Perkins, 116 U.S. 483, 484 (1886) (cadet engineer at the Naval Academy was an officer because "Congress has by express enactment vested the appointment of cadet-engineers in the Secretary of the Navy and when thus appointed they become officers and not employees"). (2) Certain officials are constitutional officers because in the early Republic their positions were of greater relative significance in the federal government than they are today. Cf. Buckley, 424 U.S. at 126 (postmasters first class and clerks of district courts are officers). (3) Even the lowest ranking military or naval officer is a potential commander of United States armed forces in combat -- and, indeed, is in theory a commander of large military or naval units by presidential direction or in the event of catastrophic casualties among his or her superiors.

¹⁸ In fact, as the Court pointed out, the chief judge of the Tax Court can assign special trial judges to render final decisions in certain types of cases, a power that the government conceded rendered them, in those circumstances, "inferior officers who exercise independent authority." The Court rejected the argument that special trial judges could be deemed inferior officers for some purposes and employees for others. 501 U.S. at 882.

¹⁹ The text of the Appointments Clause implies that offices in the sense of the Clause must be established in the Constitution or by statute. See U.S. Const. art. II, § 2, cl. 2 (specifying certain officers and then referring to "all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law").

Deregulation of International Ocean Shipping, 7 Op. O.L.C. 202, 202-03 (1983). For that reason, the creation by Congress of presidential advisory committees composed, in whole or in part, of congressional nominees or even of members of Congress does not raise Appointments Clause concerns.

Because employees do not wield independent discretion and act only at the direction of officers, they do not in their own right "exercis[e] responsibility under the public laws of the Nation," Buckley, 424 U.S. at 131.²⁰ Conversely, "any appointee" in federal service who "exercis[es] significant authority pursuant to the laws of the United States" must be an officer in the constitutional sense and must be appointed in a manner consistent with the Appointments Clause.²¹ 424 U.S. at 126.

To recapitulate, one who occupies a position of employment within the federal government that carries significant authority pursuant to the laws of the United States is required to be an officer of the United States, and therefore to be appointed pursuant to the Appointments Clause. Each one of the underlined terms signifies an independent condition, all three of which must be met in order for the position to be subject to the requirements of the Appointments Clause. We now turn to consideration of whether arbitrators occupy a position of employment in the federal government and exercise significant federal authority.

4. Arbitrators. It seems beyond dispute that arbitrators exercise significant authority, at least in the context of binding arbitration involving the federal government. However, arbitrators retained for purposes of resolving a single case do not satisfy the remaining necessary conditions. They are manifestly private actors who are, at most, independent contractors to, rather than employees of, the federal government. Arbitrators are retained for a single matter, their service expires at the resolution of that matter, and they fix their own compensation. Hence, their service does not bear the hallmarks of a constitutional office -- tenure, duration, emoluments, and continuing duties. Consequently, arbitrators do not occupy a position of employment within the federal government, and it cannot be said that they are officers of the United States. Because arbitrators are not officers, the Appointments Clause does not place any requirements or restrictions on the manner in which they are chosen.

Auffmordt v. Hedden, 137 U.S. 310 (1890), compels this conclusion. That case involved

²⁰ That an employee may not exercise independent discretion does not, of course, mean that his or her duties may not encompass responsibilities requiring the exercise of judgment and discretion under the ultimate control and supervision of an officer. In Steele v. United States (No. 2), 267 U.S. 505, 508 (1925), the Supreme Court noted that a "deputy marshal is not in the constitutional sense an officer of the United States," yet "is called upon to exercise great responsibility and discretion" in "the enforcement of the peace of the United States, as that is embraced in the enforcement of federal law." But deputy marshals act at the direction of "the United States marshal under whom they serve," id., who is an officer in the constitutional sense.

²¹ See Appointment and Removal of Inspectors of Customs, 4 Op. Att'y Gen. 162, 164 (1843) (Congress may not provide for the appointment of "any employe[e], coming fairly within the definition of an inferior officer of the government," except by a mode consistent with the Appointments Clause).

a statute that entitled an importer who was dissatisfied with the government's valuation of dutiable goods to demand a reappraisal jointly conducted by a general appraiser (a government employee) and a "merchant appraiser" appointed by the collector of customs for the specific case. Despite the fact that the reappraisal decision was final and binding on both the government and the importer, id. at 329, the Court rejected the argument that the merchant appraiser was an "inferior Officer" whose appointment did not accord with the requirements of the Appointments Clause. In describing the merchant appraiser, the Court said:

He is selected for the special case. He has no general functions, nor any employment which has any duration as to time, or which extends over any case further than as he is selected to act in that particular case. . . . He has no claim or right to be designated, or to act except as he may be designated. . . . His position is without tenure, duration, continuing emolument, or continuous duties Therefore, he is not an 'officer,' within the meaning of the clause.

Id. at 326-27. Not only does Auffmordt compel our conclusion, the contrary position -- that an independent contractor or non-federal employee who exercises significant governmental authority must be appointed pursuant to the Appointments Clause -- would be inconsistent with the Germaine and Hartwell cases discussed above.²²

Our conclusion is consistent with the Supreme Court's classification of the independent counsel as an inferior officer in Morrison v. Olson, 487 U.S. 654 (1988). There the Court observed that "[i]t is clear that appellant is an 'officer' of the United States, not an 'employee.'" Id. at 671 n.12. Significantly, the lone authority the Court cited for this proposition was "Buckley, 424 U.S., at 126, and n. 162." At the page cited, the Buckley Court quoted and reaffirmed Germaine, and in the footnote cited the Court reaffirmed both Germaine and Auffmordt. Buckley, 424 U.S. at 126 & n.162. This coupled with Morrison's express approval of Germaine, 487 U.S. at 670, strongly counsel against interpreting Morrison to have scuttled the Auffmordt and Germaine definition of office, which treats tenure, duration, emoluments, and continuing duties as necessary conditions.

We believe that the factors that make it "clear" that an independent counsel is an officer of the United States demonstrate that an arbitrator is not. The office of independent counsel is created by statute. See 28 U.S.C. § 591 et seq. The independent counsel's compensation is fixed specifically by statute at the rate set forth at 5 U.S.C. § 5315 for level IV of the Senior

²² ENRD reads Auffmordt and Germaine as limited to "judgments of experts on areas within their expertise, as opposed to policy or legal judgments." ENRD memorandum at 3. Apparently, ENRD's position is that the negative inference from the Appointments Clause is to be drawn except where an expert acts within the scope of his or her expertise. In other words, the Appointments Clause prohibits any private actor from exercising significant authority, unless the private actor is an expert who exercises significant authority within the scope of his or her expertise. While there may be strong policy reasons for wishing to restrict Auffmordt and Germaine in this way, there is no basis in the Constitution for doing so. The text of the Appointments Clause makes no reference to, let alone an exception for, expert action. Furthermore, there is nothing in the Auffmordt or Germaine opinions themselves that supports narrowing them in this way.

Executive Service. *Id.* § 594(b). All of the others listed as receiving this compensation are in the full-time employment of the federal government and, insofar as we are aware, are in fact officers within the meaning of the Appointments Clause. *See* 5 U.S.C. § 5315 (setting compensation for, *inter alia*, assistant attorneys general). The independent counsel's operating and overhead expenses are fixed²³ by statute and appropriation. 28 U.S.C. § 594(c) (fixing compensation of attorneys employed by an independent counsel); *id.* § 594(l) (providing for administrative support, office space, and travel expenses). Significantly, Congress is the exclusive source of funding for any operations undertaken by the independent counsel. In this way, Congress takes some part in providing an ongoing definition to the office of independent counsel and may exercise some degree of influence over the independent counsel. Indeed, as the Court noted, Congress expressly retained oversight authority with respect to the activities of independent counsels and provided for submission of reports by independent counsels to congressional oversight committees. 487 U.S. at 664-65. In addition, the independent counsel occupies a position that is formally within the federal government. That position is, according to the Supreme Court, within the executive branch chain of command to at least some extent and subject to oversight and control by the President and guidance of the Attorney General. *Id.* at 685-92; 28 U.S.C. § 594(e). The independent counsel also may request and receive the assistance of the Department of Justice. 28 U.S.C. § 594(d). The independent counsel thus clearly occupies a position of employment within the federal government. In fact, this point was so clear that Congress went out of its way expressly to provide that the position of independent counsel would be "separate from and independent of the Department of Justice" for certain purposes. *Id.* § 594(i).

Arbitrators share none of these material qualities. The position of arbitrator is not created by a congressional enactment. Arbitrators set their own fee and charge the client parties, including but not limited to the government, that fee. No appropriation is made specifically to support the operations or expenses of arbitrators.²⁴ As a result, an arbitrator's compensation even for a case involving the government is not limited to the fee paid by the government and an arbitrator remains free to turn to other sources for funding of his or her operations and expenses, subject of course to conflict of interest and ethical limitations. In addition, arbitrators are not subject to congressional oversight or to presidential control.

Finally, the statute creating the office of independent counsel also defines the procedures by which the office may be terminated. *Id.* at 664. Arbitrators, by contrast, serve until the matter they are retained to resolve is completed; there is no statutory process for termination of

²³ By use of the term "fixed," we mean to distinguish this scheme -- in which Congress sets the independent counsel's salary and overhead -- from one in which an arbitrator's fee and overhead are determined by the arbitrator and passed on to the federal government, even though the government may ultimately pay them from a specific appropriation.

²⁴ Of course, any fee that the government pays must ultimately come from appropriated funds. Nevertheless, the fee is paid to an arbitrator not in the manner of an employee of the government but rather as a non-government actor who provides services to the government.

their "office." This vividly demonstrates that while there is an office underlying the position of independent counsel, there is no similar office underlying one who acts as an arbitrator; there is no process for terminating the office of an arbitrator because there is no office to terminate.

This is not to say that it is impossible for a binding arbitration mechanism to run afoul of the Appointments Clause. As indicated, arbitrators whose sole or collective decisions are binding on the government exercise significant authority. If any such arbitrator were to occupy a position of employment within the federal government, that arbitrator would be required to be appointed in conformity with the Appointments Clause. See Freytag v. CIR, 111 S. Ct. 2631, 2640-41 (1991). Thus, if a federal agency were to conduct binding arbitrations and to employ arbitrators whom it provided with all relevant attributes of an office, all such arbitrators would be required to be appointed in conformity with the Appointments Clause.

B. The Appointments Clause as Bar against Delegations to Private Actors

We do not understand there to be any dispute that arbitrators are private rather than government actors. See William J. Davey, The Appointments Clause and International Dispute Settlement Mechanisms: A False Conflict, 49 Wash. & Lee L. Rev. 1315, 1318 (1992) ("no one would argue that [arbitrators] are" officers of the United States). Instead, the position that the Appointments Clause prohibits the government from entering into binding arbitration rests on a negative inference drawn from the Appointments Clause -- specifically, that only officers of the United States appointed pursuant to the Appointments Clause may exercise significant federal authority. See, e.g., "Guidance on the Use of Alternative Dispute Resolution for Litigation in the Federal Courts" at 4 n.8 (Aug. 1992) ("Under the Appointments Clause, [significant governmental] duties may be performed only by 'Officers of the United States,' appointed in the constitutionally prescribed manner." (citation omitted)). This negative inference lacks textual support and is contrary to the consistent interpretations of the Clause by the Supreme Court.

By its own terms, the Appointments Clause addresses only the permissible methods by which officers may be appointed. The term officer has been defined to mean one who occupies a position of employment within the federal government that carries significant authority pursuant to the laws of the United States. The Appointments Clause's text says nothing about whether or what limits exist on the government's power to devolve authority on private or other non-federal actors.

Instead, what limits exist on the ability to delegate governmental authority to private actors are encompassed within the non-delegation doctrine.²⁵ The very existence of the non-delegation doctrine strongly suggests that looking to the Appointments Clause for limits on the federal government's ability to delegate authority to non-federal actors is a misguided enterprise.

²⁵ The application of the non-delegation doctrine to binding arbitration is discussed more fully infra at section V.C.

If the Appointments Clause prohibited all delegations of significant federal governmental authority to non-federal actors, there would be no need for a separate non-delegation doctrine in that context. While some of the most notable controversies under the non-delegation doctrine have involved delegations from the federal legislature to the federal executive, *see, e.g., Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212 (1989); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), the doctrine has by no means been limited to this context. The Supreme Court and the lower federal courts have reviewed the delegation of significant federal governmental authority to non-federal actors under the non-delegation doctrine. Moreover, the courts, including the Supreme Court, have upheld such delegations without even hinting that the Appointments Clause might be implicated. *See, e.g., Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985) (upholding delegation to private arbitrators); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940) (upholding delegation of regulatory authority to private industry group); *Kentucky Horseman's Benevolent & Protective Ass'n v. Turfway Park Racing Ass'n*, 20 F.3d 1406 (6th Cir. 1994) (upholding delegation of regulatory authority to a state and to private industry group); *Nance v. EPA*, 645 F.2d 701 (9th Cir. 1981) (upholding delegation of authority under Clean Air Act to Indian tribe); *First Jersey Securities, Inc. v. Bergen*, 605 F.2d 690 (3d Cir. 1979) (upholding delegation of adjudicative authority to private industry group); *Crain v. First Nat'l Bank*, 324 F.2d 532, 537 (9th Cir. 1963) ("while Congress cannot delegate to private corporations or anyone else the power to enact laws, it may employ them in an administrative capacity to carry them into effect."); *R.H. Johnson & Co. v. SEC*, 198 F.2d 690 (2d Cir.) (upholding delegation of adjudicative authority to private industry group), *cert. denied*, 344 U.S. 855 (1952).²⁶

The Supreme Court's interpretations of the Appointments Clause actually refute the negative inference that is sometimes asserted. The Court's decision in *Auffmordt* is especially compelling. There, the Court held that because the merchant appraiser -- who stands formally and functionally in the same position as an arbitrator in a binding arbitration involving the federal government -- was a private actor, the Appointments Clause did not apply and so upheld the statutory delegation of arbitral authority to the merchant appraiser. In other words, *Auffmordt* held that the Appointments Clause does not prohibit delegating significant federal authority to private actors. The Court employed the same reasoning to reject the Appointments Clause challenges in *Germaine* and *Hartwell*.

The argument asserting the negative inference from the Appointments Clause relies on *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). We believe, however, that under its best

²⁶ It is theoretically possible that the courts have upheld these delegations because the parties challenging them have repeatedly failed to raise the Appointments Clause. Compare *White v. Massachusetts Coun. of Construction Employers*, 460 U.S. 204 (1983) (upholding residency requirement for public works project against dormant Commerce Clause challenge) with *United Building and Construction Trades v. Camden*, 465 U.S. 208 (1984) (striking down residency requirement for public works projects as violation of Privileges and Immunities Clause). We would be reluctant to place the numerous delegations so upheld on such capricious footing absent a clear indication in the Court's Appointments Clause jurisprudence. While not all non-delegation litigants have raised Appointments Clause challenges, some have and as we detailed in the preceding section, those challenges consistently have been rejected.

reading Buckley reflects and endorses our view that the Appointments Clause simply does not apply to non-federal actors, and that the negative inference argument misreads the opinion. First, Buckley cites both Germaine and Auffmordt approvingly. See id. at 125-26 & n.162. Second, in several of its statements of the definition of "officers," Buckley, sometimes citing Germaine explicitly, says that the term applies to appointees or appointed officials who exercise significant authority under federal law, thus recognizing the possibility that non-appointees might sometimes exercise authority under federal law. See, e.g., 424 U.S. at 131 ("Officers" are "all appointed officials exercising responsibility under the public laws").

It is true that, at other points in its opinion, the Buckley Court used language that, taken in isolation, might suggest that the Appointments Clause applies to persons who, although they do not hold positions in the public service of the United States, exercise significant authority pursuant to federal law. See id. at 141. However, we think such a reading of Buckley is unwarranted. So understood, Buckley must be taken to have overruled, sub silentio, Germaine and Auffmordt -- cases upon which it expressly relies in its analysis, see id. at 125-26 & n.162 - - and its repeated quotation of the Germaine definition of "officer" as "all persons who can be said to hold an office under the government" would make no sense. Not only does such a reading render Buckley internally inconsistent, it fails to explain the Supreme Court's continuing and unqualified citations to and reliance upon Germaine. See Freytag v. Commissioner, 501 U.S. 868, 881 (1991); Morrison v. Olson, 487 U.S. 654, 672 (1988).

The apparently unlimited language of some passages in Buckley has a simpler explanation: there was no question that the officials at issue in Buckley held positions of "employment" under the federal government, and thus the question of the inapplicability of the Appointments Clause to persons not employed by the federal government was not before the Court.²⁷ The post-Buckley Supreme Court has often assessed the validity of statutes that would starkly pose Appointments Clause issues if, in fact, the Court had adopted the position that wielding significant authority pursuant to the laws of the United States, without more, requires appointment in conformity with that Clause. In none of these cases has the Court even hinted

²⁷ The weight of scholarship that has considered the interplay of Buckley with Hartwell, Germaine, and Auffmordt accords with our approach. As one commentator has asserted:

The Buckley Court's entire analysis is predicated upon its construction of the appointments clause in the context of its 'cognate' separation-of-powers provisions. The decision, as in Germaine and the other appointments clause cases, was concerned with determining the status of an individual who was employed by the United States. The Court's definition thus was employed to distinguish between classes of federal employees; it was not used to distinguish between federal and nonfederal employees. Since the two questions differ radically, it is hardly surprising that a standard helpful in resolving one leads to absurd results when applied to the other.

Dale D. Goble, The Council and the Constitution: An Article on the Constitutionality of the Northwest Power Planning Council, 1 J. Envtl. L. & Litig. 11, -- text at note 172 (1986); see also Harold J. Krent, Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government, 85 Nw. U. L. Rev. 62, 72-73 n.26 (1990) (whether one who exercises governmental authority is an officer is determined by looking to the factors set out in Hartwell, Germaine, and Auffmordt).

at the existence of an Appointments Clause issue. It is especially telling that two of these decisions have involved forms of binding arbitration. See Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568 (1985) (upholding statutory requirement that registrants under a federal regulatory scheme submit to binding arbitration conducted by a panel of arbitrators who are not appointed by one of the methods specified in the Appointments Clause and are subject only to limited judicial review); Schweiker v. McClure, 456 U.S. 188 (1982) (upholding submission of dispute to binding, unreviewable determination by a single arbiter who is a private actor); see also FERC v. Mississippi, 456 U.S. 742 (1982) (upholding requirement that states enforce federal regulatory scheme relating to utilities); Lake Carriers' Ass'n v. Kelley, 456 U.S. 985 (1982) (mem.), aff'g 527 F. Supp. 1114 (E.D. Mich. 1981) (three-judge panel) (upholding statute that granted states authority to ban sewage emissions from all vessels); Train v. National Resources Defense Council, Inc., 421 U.S. 60 (1975) (construing provision of Clean Air Act that gave states authority to devise and enforce plans for achieving congressionally defined national air quality standards).²⁸ The Supreme Court's decision in Buckley, we conclude, did not modify the long-settled principle that a person who is not an officer under Hartwell need not be appointed pursuant to the Appointments Clause.

Prior writings of this Office have read Buckley more broadly as standing for the proposition disavowed here -- that is, that all persons exercising significant federal authority, by virtue of that fact alone, must be appointed pursuant to the Appointments Clause. We are aware of four instances in which our disagreement with this understanding of Buckley would cause us to reach a different conclusion on the Appointments Clause question presented. See Constitutionality of Subsection 4117(b) of Enrolled Bill H.R. 5835, the "Omnibus Budget Reconciliation Act of 1990," 14 Op. O.L.C. 170, 171 (1990) (preliminary print) (statutory scheme under which congressional delegations and physicians' organizations of certain states exercise "significant authority" violates Appointments Clause); Constitutionality of the Qui Tam Provisions of the False Claims Act, 13 Op. O.L.C. 249, 264-65 (1989) (preliminary print) (provisions of False Claims Act authorizing qui tam suits by private parties violate Appointments Clause because qui tam relators exercise "significant governmental power"); Representation of the United States Sentencing Commission in Litigation, 12 Op. O.L.C. 21, 31-33 (1988) (preliminary print) (private party acting as counsel for United States agency must be appointed pursuant to Appointments Clause); Proposed Legislation to Establish the National Indian Gaming Commission, 11 Op. O.L.C. 73, 74 (1987) (Appointments Clause problems raised where state and local officials given authority to waive federal statute). We now disavow the Appointments Clause holdings of those precedents. To the extent that our reading of Buckley is inconsistent

²⁸ It is sometimes asserted that the Supreme Court in Bowsher v. Synar, 478 U.S. 714 (1986), adopted the negative inference from the Appointments Clause. We see no basis for this proposition. That case simply did not involve the Appointments Clause. While the Court makes a passing reference to the Appointments Clause, id. at 722-23, we can find no passage in which the Court even appears to contemplate construing the Appointments Clause. The question in Bowsher pertained to the limits on the authority that the Comptroller General could exercise. The Comptroller General is appointed by the President and confirmed by the Senate, see 31 U.S.C. § 703. This method of appointment conforms to the letter of the Appointments Clause. See U.S. Const. art. II, § 2, cl. 2. We cannot conceive of a reasonable reading of Bowsher as either explicitly or implicitly affirming -- or, for that matter, rejecting -- the negative inference from the Appointments Clause.

with the Appointments Clause reasoning of other prior precedents of this office, that reasoning is superseded. See Common Legislative Encroachments on Executive Branch Constitutional Authority, 13 Op. O.L.C. 299, 300 (1989) (preliminary print). We do not disavow these precedents lightly. These more recent citations, however, are inconsistent and in some cases irreconcilable with prior opinions of the Attorneys General. Moreover, the Supreme Court has not overruled but has reaffirmed Auffmordt, Hartwell, and Germaine, and we are bound to follow them.

III. The Take Care Clause

It has been suggested that the Take Care Clause prohibits the federal government from entering into binding arbitration, because that clause requires all power exercised by the executive branch to be exercised in a manner that the President judges to be "faithful." This approach forbids the President's judgment from being subordinated to the judgment of an arbitrator. This suggestion misconstrues the Take Care Clause. The Constitution establishes that "[t]he executive power shall be vested in a President of the United States of America. . . . [H]e shall take care that the laws be faithfully executed. Id. art. II, § 1, cl. 1; id. art. II, § 3. The Supreme Court and the Attorneys General have long interpreted the Take Care Clause as standing for the proposition that the President has no inherent constitutional authority to suspend the enforcement of the laws, particularly of statutes. See, e.g., INS v. Chadha, 462 U.S. 919, 953 n.16 (1983); Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524, 609-13 (1838); The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. 55, 59 (1980) (opinion of Attorney General Civiletti) ("The President has no 'dispensing power.'"); see generally Christopher N. May, Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative, 21 Hastings Const. L.Q. 865, 869-74 (1994).

The Supreme Court's decision in Kendall is illuminating. A dispute between the postmaster general and several contractors had arisen. Congress passed a law directing the Solicitor of the Department of the Treasury to resolve the dispute and requiring the postmaster general to pay whatever sum the Solicitor determined was due. The postmaster general refused to comply with the Solicitor's decision, arguing that he "was alone subject to the direction and control of the President, with respect to the execution of the duty imposed upon him by this law; and this right of the president is claimed, as growing out of the obligation imposed upon him by the constitution, to take care that the laws be faithfully executed." 37 U.S. (12 Pet.) at 612. The Court emphatically rejected this argument.²⁹ Instead the Court ruled that the Congress had waived sovereign immunity and submitted to whatever resolution the Solicitor ordered. "The terms of the submission was a matter resting entirely in the discretion of congress; and if they thought proper to vest such a power in any one, and especially as the arbitrator was an officer

²⁹ "This is a doctrine that cannot receive the sanction of this court. . . . To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible." Id. at 612.

of the government, it did not rest with the postmaster general to control congress, or the solicitor, in that affair." Id. at 611 (emphasis added). Thus, Kendall stands for the proposition that the executive must comply with the terms of valid statutes and that if a statute requires the executive to submit to binding arbitration, the executive must do so.

The Take Care Clause itself has no bearing on the question of whether the Constitution permits the federal government to enter into binding arbitration; in this context, it simply requires the President to "take Care" that whatever valid legal requirements³⁰ might exist are followed. It is necessary to consider the application of this principle in three situations. First, where a statute or other law operates to require the government to submit to binding arbitration, the government must submit. Kendall, 37 U.S. (12 Pet.) at 611. Second, where a statute or other law forbids submission to binding arbitration, such as where it expressly vests discretion in a particular government officer, submission to binding arbitration is forbidden. See Establishment of a Labor Relations System for Employees of the Federal Labor Relations Authority, 4B Op. O.L.C. 709, 715-16 (1980).³¹ Finally, where the statutes and other laws are silent, the Take Care Clause simply has nothing to say about whether the government may submit to binding arbitration.

IV. Other Article II Issues

In addition to recognizing the mandatory nature of the processes -- such as the Appointments Clause -- that the Constitution expressly ordains, the Supreme Court's decisions have identified broader structural principles that separate and limit the powers of the three branches of government. One important principle is that Congress may not vest itself, its members, or its agents with "either executive power or judicial power," Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 274 (1991) (citation omitted), and that Congress therefore may not intervene in the decision making necessary to execute the law. Bowsher v. Synar, 478 U.S. 714, 733-34 (1986); FEC

³⁰ In the above-cited opinion, Attorney General Civiletti did not ignore his power, and indeed obligation, to decline to enforce or decline to defend an unconstitutional statute, especially one violating the Constitution's separation of legislative and executive powers. See Duty to Defend and Enforce Constitutionally Objectionable Legislation, at 2 (in such a situation, the Attorney General "would be untrue to his office if he were to do otherwise"); Letter from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, to Abner J. Mikva, Counsel to the President (Nov. 2, 1994) ("there are circumstances in which a President may appropriately decline to enforce a statute that he views as unconstitutional").

³¹ Where a statute vests final decision-making authority in an executive branch official, that official must make the decision and may not -- absent congressional authorization -- delegate that authority to another official or to a private actor such as an arbitrator. See id. This case must be distinguished from the situation where the final decision of an executive official is subject to judicial review. Here, the official must make the decision in the first instance. If a challenge is subsequently brought, then absent some specific statutory bar or other legal impediment, there is nothing in the Take Care Clause that would prohibit such an official from opting for binding arbitration rather than adjudication before an Article III court. Currently, Exec. Order No. 12778 imposes an absolute prohibition on opting for binding arbitration where litigation counsel is not otherwise compelled to submit to it.

v. NRA Political Victory Fund, 6 F.3d 821, 827 (D.C. Cir. 1993), aff'd on other grounds, 115 S. Ct. 537 (1994).

"The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess." Bowsher, 478 U.S. at 726. Therefore, any scheme whereby Congress -- whether itself or through one of its committees, members, or agents -- appoints, retains removal authority over, or otherwise exercises any type of continuing authority over an arbitrator³² violates the constitutional anti-aggrandizement principle. This principle extends to non-voting members. NRA Political Victory Fund, 6 F.3d at 827. Consequently, we do not believe that Congress could make one of its members or agents an ex officio non-voting member of an arbitral panel. Id.

Legislation that is consistent with the Constitution's express procedures and with the Bowsher principle may nonetheless affect the constitutional separation of powers by invading the constitutional roles of the executive or judicial branches. "[I]n determining whether [such an] Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions." Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977); cf. CFTC v. Schor, 478 U.S. 833, 856-57 (1986) ("the separation of powers question presented in this litigation is whether Congress impermissibly undermined . . . the role of the Judicial Branch"). An affirmative answer to the question of whether Congress has prevented the executive or judiciary from accomplishing its functions, furthermore, would not lead inexorably to the judicial invalidation of the statute: in that case, the Court has stated, it would proceed to "determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." Administrator of Gen. Servs., 433 U.S. at 443.

In the context of binding arbitration, concerns under this general separation of powers principle would arise if an arbitral panel were given authority that is constitutionally committed to the executive. For example, the Supreme Court has held that the President must retain at least some ability to control the exercise of federal criminal prosecutorial power. See Morrison v. Olson, 487 U.S. 654 (1988). Thus, we believe the general separation of powers principle would stand as a bar to vesting an arbitration panel with unreviewable authority to direct or control the prosecution or conduct of federal litigation by the executive branch's attorneys.

Where, on the other hand, a dispute over the exercise of executive authority is submitted to binding arbitration, the general separation of powers principle has little force. The principle prohibits incursions that "prevent the Executive Branch from accomplishing its constitutionally

³² Buckley and NRA Political Victory Fund establish that Congress violates the anti-aggrandizement principle if it retains control over any member of a nonlegislative body, even though a single member cannot alone take any dispositive action. Thus, in the arbitration setting, it would not matter for purposes of separation of powers analysis that Congress exercises control over only a single member of, for example, a three-member arbitral panel. Such an arrangement would violate the anti-aggrandizement principle.

assigned functions." Nixon v. Administrator of Gen. Servs., 433 U.S. at 443 (emphasis added). quoted in Morrison v. Olson, 487 U.S. 654, 695 (1988). The Constitution does not, however, assign to the executive branch exclusive responsibility for resolving disputes over the exercise of its authority. The very language of Article III providing for federal court jurisdiction over disputes involving "the United States" demonstrates that the Constitution does not require that the authority to resolve such disputes over executive action be vested in the executive branch itself. Resolution of such disputes by private arbitrators, therefore, does not in itself disturb the separation of powers that the Constitution ordains.

In addition, the Constitution's text and structure grant the President a number powers that are not, as such, components of that doctrine; examples include the commander in chief and foreign affairs powers. The President may not be bound to the decision of an arbitrator in the exercise of these constitutional powers, whether by statute or by purported agreement of the President. Congress may not, for example, require the President to exercise the President's pardon power pursuant to the dictates of an arbitrator. See generally United States v. Klein, 80 U.S. 128, 148 (1871); Ex Parte Garland, 71 U.S. (4 Wall) 333, 380 (1866).

V. Article III

Article III of the Constitution, which establishes the federal judicial branch, places at least some limitations on the ability of the federal government to submit to binding arbitration. Article III provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. This "judicial power" does not refer to all federal adjudications, however. See, e.g., Freytag v. CIR, 111 S. Ct. 2631, 2655 (1991) (Scalia, J., concurring) ("there is nothing 'inherently judicial' about 'adjudication'"). The Supreme Court has long wrestled with the mandatory scope of the Article III vesting clause -- that is, what federal adjudications must be committed to an Article III tribunal.³³ It is clear, however, that Article III prohibits at least some matters from being submitted to binding arbitration.

Early on, the Supreme Court settled on a general approach for resolving questions regarding Article III's scope:

we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At

³³ Congress may, however, have power to not provide for any federal adjudication of some matters. See generally Henry Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362 (1953). If Congress has such a power, one notable exception would be the Supreme Court's original jurisdiction, which we do not believe that Congress could eliminate. See U.S. Const. art. III, § 2, cl. 2.

the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.

Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856). In its generalities, this statement remains an accurate description of the Court's approach to Article III: there are three categories of determinations -- those that must be submitted to an Article III tribunal, those that may be submitted to such a tribunal, and those that may not be submitted to such a tribunal.

The statement in Murray's Lessee, however, has been taken further to establish a so-called public rights doctrine. Under that doctrine, all federal adjudication would be required to be conducted in an Article III forum except adjudication involving a public right.³⁴ Public rights adjudication could presumably take whatever form Congress prescribed. Use of this doctrine reached its highwater mark in Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (plurality opinion), which defined public rights as "matters arising between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments" and private rights as "the liability of one individual to another under the law as defined." *Id.* at 67-68, 69-70; *see* Thomas v. Union Carbide Agric. Prods. Co. 473 U.S. 568, 585 (1985) (characterizing Northern Pipeline).

More recently the Court has eschewed the public rights doctrine as set forth in Northern Pipeline. The Court no longer accepts either the proposition that all federal adjudications of private disputes must be submitted to an Article III tribunal or that Article III has no force in cases between the government and an individual. Thomas, 473 U.S. at 585-86. The Supreme Court dismissed the public rights doctrine approach³⁵ as formalistic and admonished that "practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III." *Id.* at 587 (construing Crowell v. Benson, 285 U.S. 22 (1932)). The Court has thus directed that "the constitutionality of a given delegation of adjudicative functions to a non-Article III body . . . be assessed by reference to the purposes underlying the requirements of Article III." CFTC v. Schor, 478 U.S. 833, 847 (1986). The Court has identified two such purposes: the first is to fulfill a separation of powers interest -- protecting the role of an independent judiciary -- while the second is to protect an individual

³⁴ The general rule did not apply to courts for the territories or the District of Columbia, which arguably perform federal adjudication, or to the courts martial. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 64-70 (1982) (plurality opinion)

³⁵ While the Court has abandoned the public rights doctrine, it occasionally uses the term "public rights" as a shorthand reference to matters that need not be vested in an Article III tribunal, particularly in the context of the Seventh Amendment. *See, e.g.*, Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989); CFTC v. Schor, 478 U.S. 833, 853 (1986) ("this Court has rejected any attempt to make determinative for Article III purposes the distinction between public rights and private rights").

right -- the right to have claims decided by judges who are free of domination by other branches. Id. at 848.³⁶ Under the separation of powers rubric, the Court has resisted adopting a formalistic approach in favor of one that looks to the actual effects on the constitutional role of the Article III judiciary. The most significant factor is whether the adjudication involves a subject matter that is part of or closely intertwined with a public regulatory scheme. We consider the implications of the purposes of Article III first in the context of a statute that mandates binding arbitration and then in the context of consensual submission to binding arbitration.³⁷

A. Statutorily Mandated Binding Arbitration

1. Separation of Powers. The separation of powers purpose served by Article III, § 1 was explained in CFTC v. Schor, 478 U.S. 833 (1986): that vesting clause "safeguards the role of the Judicial Branch in our tripartite system by barring congressional attempts 'to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating' constitutional courts and thereby preventing 'the encroachment or aggrandizement of one branch at the expense of the other.'" Id. at 850 (quoting, respectively, National Insurance Co. v. Tidewater Co., 337 U.S. 582, 644 (1949) (Vinson, C.J., dissenting) and Buckley v. Valeo, 424 U.S. 1, 122 (1976) (per curiam)). In reviewing assertions that a particular delegation to a non-Article III tribunal violates Article III, the Court applies a general separation of powers principle; that is, the Court looks to whether the practical effect of a delegation outside Article III is to undermine "the constitutionally assigned role of the federal judiciary." Schor, 478 U.S. at 851; see Thomas v.

³⁶ For the purposes of this inquiry, Article III also defines the scope of another individual right, the Seventh Amendment right to a jury trial. If an adjudication may be vested in a non-Article III tribunal, the Seventh Amendment does not prohibit non-jury fact-finding:

[I]f [an] action must be tried under the auspices of an Article III court, then the Seventh Amendment affords the parties a right to a jury trial whenever the cause of action is legal in nature. Conversely, if Congress may assign the adjudication of a statutory cause of action to a non-Article III tribunal, then the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.

Granfinanciera, 492 U.S. at 63-64.

³⁷ The ENRD memorandum refers to a third category -- court-ordered binding arbitration. We believe that a court may order binding arbitration only if it is specifically authorized to do so. When Congress expressly commits jurisdiction to resolve cases of a particular type to the Article III judiciary, the Article III judiciary may not rewrite the jurisdictional statute to provide for final resolution by some other agent -- any more than the executive may refuse to carry out a valid statutory duty. Cf. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); In re United States, 816 F.2d 1083 (6th Cir. 1987). If a statute grants a court authority to order binding arbitration, the scheme is properly analyzed as an example of statutorily mandated binding arbitration. See, e.g., 28 U.S.C. § 651 *et seq.* (authorizing federal district courts to refer matters to arbitration); 28 U.S.C. §§ 631, 636 (authorizing appointment of and establishing powers of United States Magistrate Judges).

Union Carbide Agric. Prods. Co., 473 U.S. 568, 590 (1985) (looking to whether a delegation outside Article III "threatens the independent role of the Judiciary in our constitutional scheme").

It is not possible to draw a broad conclusion regarding the validity of statutory schemes that mandate binding arbitration, except to observe that some conceivable schemes would not violate Article III while other schemes conceivably could. See Thomas, 473 U.S. at 594. The Court has listed three factors that it will examine to determine whether a particular adjudication by a non-Article III tribunal, such as an arbitration panel, impermissibly undermines the constitutional role of the judiciary. The Court looks first to the extent to which essential attributes of judicial power are reserved to Article III courts and the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested in Article III courts; second to the origin and importance of the right to be adjudicated; and third to the concerns that drove Congress to place adjudication outside Article III. Schor, 478 U.S. at 851.

The first factor focuses on whether the subject matter entrusted to the non-Article III tribunal is restricted to a "particularized area of the law" or instead is relatively broad-ranging. Id. at 852. The more broad ranging the tribunal's authority, the greater the likelihood of an Article III conflict. Where a tribunal has a particularized jurisdiction, however, granting the tribunal authority to entertain additional matters in the nature of counterclaims is unlikely to yield an impermissibly broad jurisdiction. Broadening the scope to reach pendant and ancillary claims would raise serious concerns. Id. Also relevant is the range of remedies that the tribunal is empowered to issue. The closer that range approximates the full range that might be issued by an Article III tribunal, the more suspect the non-Article III tribunal appears. Most significantly, this factor requires examination of the standard under which the determination of an arbitration panel is reviewable. Id. at 853. In Thomas the statute that mandated binding arbitration permitted judicial review only for "fraud, misconduct, or misrepresentation." 473 U.S. at 592. The Court held that this limited review "preserves the 'appropriate exercise of the judicial function'" because it "protects against arbitrators who abuse their powers or willfully misconstrue their mandate under the governing law." Id. (quoting Crowell v. Benson, 285 U.S. 22, 54 (1932)).

The second factor is the nature and importance of the right to be adjudicated by the non-Article III tribunal. First and foremost, the Supreme Court has stated that any attempt by Congress or the executive to vest the final adjudication of questions of constitutional law outside Article III courts³⁸ would raise serious constitutional concerns, see Thomas, 473 U.S. at 592; although we acknowledge that the Court has never resolved this question. In any event, this is not to say that constitutional claims may not ever be submitted to arbitration as an initial matter. See, e.g., Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984). Rather, the serious constitutional concerns that the Court has raised are avoided only if matters of constitutional law

³⁸ Of course, some constitutional issues may arise that are not justiciable by an Article III court. See, e.g., Goldwater v. Carter, 444 U.S. 996 (1979). This does not mean that no government actor will make a determination based on constitutional interpretation as to how to proceed. We would not, however, regard this as an "adjudication."

must ultimately be subject to judicial review even if the matter may not have initially been submitted to an Article III tribunal.³⁹ To avoid ruling unnecessarily on the difficult constitutional question, the Supreme Court has required that Congress's intent to preclude judicial review of constitutional claims be clear before the Court will entertain the validity of such preclusion. See, e.g., Webster v. Doe, 486 U.S. 592 (1988); Weinberger v. Salfi, 422 U.S. 749 (1975); Johnson v. Robison, 415 U.S. 361, 373-74 (1974). Without such clear congressional intent, a statute that simply purports to prohibit judicial review will not prohibit judicial review of constitutional questions.⁴⁰

In addition to constitutional issues, there are other rights the Court views as being "at the 'core' of matters normally reserved to Article III courts." Schor, 478 U.S. at 853. This category was set forth as far back as Murray's Lessee and includes "suit[s] at common law, or in equity, or admiralty," Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856), as well as claims of a "state law character," see Northern Pipeline v. Marathon Pipe Line Co., 458 U.S. at 68-71. Because these matters historically have been perceived to lie at the core of Article III, attempts to withdraw them from "judicial cognizance" are subject to "searching" scrutiny. Schor, 478 U.S. at 854. The Court, however, has rejected the contention that Article III works a blanket proscription on entrusting the resolution of such matters to non-Article III tribunals. See id. at 853 (separation of powers principles do not support "accord[ing] the state law character of a claim talismanic power in Article III inquiries"). Instead, we are to examine the specific adjudication vested outside Article III, focusing on whether "Congress has . . . attempted to withdraw from judicial cognizance" the determination of these core claims. Id. at 854. Here, we will look to the scope of the non-Article III tribunal's jurisdiction over core Article III claims, the extent to which the scope of that jurisdiction is tailored to "valid and specific legislative necessities," and the extent to which determinations made by the non-Article III tribunal are subject to Article III review. Id. at 855.

On the other hand, when Congress creates rights outside Article III's core, most of the matters that arise in connection with these rights can be "conclusively determined by the Executive and Legislative Branches." Thomas, 473 U.S. at 589. The prototype of such non-core matters are rights created by statute as part of or intertwined with a complicated regulatory scheme. See Schor, 478 U.S. at 853-54; Thomas, 473 U.S. at 589-90. Where this is the case,

³⁹ We do not mean to indicate that a party may never waive a constitutional claim or be barred from asserting a constitutional claim for procedural reasons such as failure to exhaust a statutory remedy, including submission to arbitration.

⁴⁰ The Supreme Court has held questions relating only to "the interpretation or application of a particular provision of [a] statute to a particular set of facts" are not themselves constitutional questions and that Congress may bar judicial review of such claims. See Robison, 415 U.S. at 367. The courts have been vigilant in rejecting attempts by litigants to characterize as constitutional claims, especially under the Due Process Clause, what are in fact challenges to "the interpretation or application of a particular provision of [a] statute to a particular set of facts." See, e.g., Sugrue v. Derwinski, 26 F.3d 8, 11 (2d Cir. 1994) (holding claimants cannot obtain judicial review of "benefits determinations merely because those challenges are cloaked in constitutional terms"), cert. denied, 115 S. Ct. 2245 (1995).

"the danger of [Congress or the executive] encroaching on the judicial powers is reduced." *Id.* Statutes mandating binding arbitration to resolve disputes that arise in connection with these rights are unlikely to contravene Article III. That is not to say that such schemes cannot run afoul of Article III. But see Gordon Young, Public Rights and the Federal Judicial Power: From Murray's Lessee through Crowell to Schor, 35 *Buff. L. Rev.* 765, 792, 842 n.360 (1986). While the Supreme Court has observed that the threat of encroachment is "reduced," in such circumstances, it has rejected the contention that Article III has no force in these cases. See Thomas, 473 U.S. at 589.

The third factor, the purpose underlying the departure from Article III adjudication, has little independent force. That factor looks to whether Congress has attempted to "emasculate" the judiciary by enacting a particular binding arbitration requirement. Thus, Article III prohibits Congress from "creat[ing] a phalanx of non-Article III tribunals equipped to handle the entire business of the Article III courts without any Article III supervision or control." *Id.* Absent such a purpose, however, this factor alone would not limit Congress's authority to enact a mandatory binding arbitration scheme. See Thomas, 473 U.S. at 590; Crowell, 285 U.S. at 46.

The factors listed above should not be considered in isolation from one another. See, e.g., Thomas, 473 U.S. at 592 (holding limit on judicial review permissible "in the circumstances" of that statutory scheme). For instance, the limited review upheld in Thomas applied to adjudication of a right that was "closely integrated into a public regulatory scheme." *Id.* at 594. If the right at issue had been closer to the core with which Article III is particularly concerned, such limited review might not have been approved. All of this is by way of demonstration that Article III does not draw bright lines and so does not permit more specific guidance than we have set forth. Whether a particular statutory scheme impermissibly undermines the constitutional role of the judiciary can only be determined by reviewing the facts and context of each such scheme.⁴¹

2. Individual Rights. Article III also safeguards the right of litigants to have claims decided by "judges who are free from potential domination by other branches of government." Schor, 478 U.S. at 848. It is doubtful that the government possesses this individual right.⁴² Even if it does, this individual right may be waived. See id. at 850-51; Thomas, 473 U.S. at 592-93. Where Congress enacts a statute that requires the government to submit to binding arbitration, that statute -- as in the context of sovereign immunity -- acts as a waiver of whatever

⁴¹ As the Supreme Court instructed in Schor, "due regard must be given in each case to the unique aspects of the congressional plan at issue and its practical consequences in light of the larger concerns that underlie Article III." 478 U.S. at 857.

⁴² Governmental interests are generally viewed under the heading of separation of powers. The assertion that Congress impermissibly invades the executive by compelling the executive to submit to binding arbitration, for example, is in essence an argument that Congress has violated the separation of powers. We assessed these arguments in sections III and IV.

right the government might have to litigate in an Article III tribunal. The extent to which private litigants may be statutorily compelled to submit to binding arbitration is beyond the scope of the present inquiry.⁴³

B. Consensual Binding Arbitration

Where there is no statute requiring parties to enter into binding arbitration, the parties may nevertheless agree to do so. The same may be said of the government when it is a party. Absent a statute to the contrary and assuming the availability of authority to effect any remedy that might result from the arbitration, we perceive no broad constitutional prohibition on the government entering into binding arbitration. Such arrangements, however, are still technically subject to scrutiny for conformity to the purposes underlying Article III. *See Schor*, 478 U.S. at 850-51 (separation of powers violation may occur even though parties have consented). It is difficult to see how the executive -- litigating on behalf of the government -- impermissibly undermines the role of the judicial branch by agreeing to resolve a particular dispute through binding arbitration. *See Thomas*, 473 U.S. at 591 (danger of encroachment is at a minimum where parties consent to arbitration).⁴⁴ As to Article III's purpose of safeguarding the individual right to independent adjudication, it is sufficient, where the parties consent, if the agreement preserves Article III review of constitutional issues and permits an Article III tribunal to review the arbitrators' determinations for fraud, misconduct, or misrepresentation. *Id.* at 592. Such agreements should also describe the scope and nature of the remedy that may be imposed and care should be taken to insure that statutory authority exists to effect the potential remedy.

C. The Non-Delegation Doctrine

The previous discussion demonstrates that, at least in some instances, a non-Article III tribunal may conduct federal adjudication. It might still be contended that the constitutional non-delegation doctrine prohibits federal arbitral power from being vested in private actors. The Supreme Court's decisions in *Auffmordt v. Hedden*, 137 U.S. 310 (1890), and *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 609-13 (1838), however, strongly implied that there is no per se proscription on placing arbitral authority in private actors. We view the

⁴³ We note that in *Thomas*, the Court seemed to indicate that private parties could be required to submit to binding arbitration as long as the arbitration process satisfied the requirements of due process. 473 U.S. at 592-93. The Court had no occasion to define the specific requirements of due process in the binding arbitration context because the parties had waived their due process objections. In addition, a requirement that private parties submit to binding arbitration could not be imposed in such a way as to work an unconstitutional condition. *See* Martin H. Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 Duke L.J. 197, 212-14; *see also Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 596 n.1 (1985) (Brennan, J., concurring).

⁴⁴ If, however, the executive branch were to adopt and pursue a policy of entering into binding arbitration in a systematic manner designed to undermine the judiciary's constitutional role, a serious constitutional question would arise.

Supreme Court's opinion in Thomas as finally rejecting the argument that the Constitution prohibits the delegation of adjudicative authority in a private party. In Thomas the Court found no particular relevance in the fact that the adjudication was to be performed by "civilian arbitrators, selected by agreement of the parties" as long as the circumstances do not indicate that this mechanism would "diminish the likelihood of impartial decisionmaking, free from political influence." 473 U.S. at 590. As with all delegations, there must be standards to guide the determination of the recipient of the delegated adjudicative authority, but this is not an exacting requirement. See id. at 593; see generally Yakus v. United States, 321 U.S. 414 (1944). As long as these two criteria -- impartiality and discernable standards -- are present, the non-delegation doctrine does not represent a blanket prohibition of final and binding resolution of a dispute by private actors.

VI. Due Process

The Due Process Clause, U.S. Const. amend. V, does not prohibit the final resolution of claims, including claims involving the government, through binding arbitration. For instance, claims for reimbursement through Part B of the Medicare program, 42 U.S.C. § 1395j et seq., are subject to the final and unreviewable determination of a hearing officer who is hired by the insurance carrier with which the federal government contracts for administration of the program. See United States v. Erika, 456 U.S. 201 (1982). The Supreme Court rejected the contention "that Due Process requires an additional administrative or judicial review by a Government rather than a carrier-appointed hearing officer." Schweiker v. McClure, 456 U.S. 188, 198 (1982). The Due Process Clause does not establish bright-line requirements or prohibitions; rather, "Due Process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

Whether an arbitrator with authority to issue a final, binding decision may be a private actor or must be a government official, or whether any other facet of an arbitration proceeding is consistent with the Due Process Clause, is determined by reference to three relevant factors. Those factors are: the private interest that will be affected by the official action; the risk of erroneous deprivation through the procedures used and the probable value of additional or substitute safeguards; and the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See Schweiker, 456 U.S. at 198-200; Matthews v. Eldridge, 424 U.S. 319, 335 (1976). The precise requirements of these factors will vary depending on the facts and circumstances of each specific arbitration. While they may in some instance combine to require that a final, binding decision be vested in a government official, Schweiker stands for the proposition that the Due Process Clause does not per se prohibit vesting such a decision in a private actor.

VII. Conclusion

We reaffirm our conclusion that the Appointments Clause does not prohibit the federal government from submitting to binding arbitration. In addition, we do not view any other constitutional provision or doctrine as imposing a general prohibition against the federal government entering into binding arbitration. Nevertheless, we do recognize that the Constitution imposes substantial limits on the authority of the federal government to enter into binding arbitration in specific cases.

EXECUTIVE ORDER

CIVIL JUSTICE REFORM

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code, and in order to improve access to justice for all persons who wish to avail themselves of court and administrative adjudicatory tribunals to resolve disputes, to facilitate the just and efficient resolution of civil claims involving the United States Government, to encourage the filing of only meritorious civil claims, to improve legislative and regulatory drafting to reduce needless litigation, to promote fair and prompt adjudication before administrative tribunals, and to provide a model for similar reforms of litigation practices in the private sector and in various states, it is hereby ordered as follows:

Section 1. Guidelines to Promote Just and Efficient Government Civil Litigation. To promote the just and efficient resolution of civil claims, those Federal agencies and litigation counsel that conduct or otherwise participate in civil litigation on behalf of the United States Government in Federal court shall respect and adhere to the following guidelines during the conduct of such litigation:

(a) Pre-filing Notice of a Complaint. No litigation counsel shall file a complaint initiating civil litigation without first making a reasonable effort to notify all disputants about the nature of the dispute and to attempt to achieve a settlement, or confirming that the referring agency that previously handled the dispute has made a reasonable effort to notify the disputants and to achieve a settlement or has used its conciliation processes.

(b) Settlement Conferences. As soon as practicable after ascertaining the nature of a dispute in litigation, and throughout the litigation, litigation counsel shall evaluate settlement possibilities and make reasonable efforts to settle the litigation. Such efforts shall include offering to participate in a settlement conference or moving the court for a conference pursuant to Rule 16 of the Federal Rules of Civil Procedure in an attempt to resolve the dispute without additional civil litigation.

(c) Alternative Methods of Resolving the Dispute in Litigation. Litigation counsel shall make reasonable attempts to resolve a dispute expeditiously and properly before proceeding to trial.

(1) Whenever feasible, claims should be resolved through informal discussions, negotiations, and settlements rather than through utilization of any formal court proceeding. Where the benefits of Alternative Dispute

Resolution ("ADR") may be derived, and after consultation with the agency referring the matter, litigation counsel should suggest the use of an appropriate ADR technique to the parties.

(2) It is appropriate to use ADR techniques or processes to resolve claims of or against the United States or its agencies, after litigation counsel determines that the use of a particular technique is warranted in the context of a particular claim or claims, and that such use will materially contribute to the prompt, fair, and efficient resolution of the claims.

(3) To facilitate broader and effective use of informal and formal alternative dispute resolution methods, all litigation counsel should be trained in ADR techniques.

(d) Discovery. To the extent practical, litigation counsel shall make every reasonable effort to streamline and expedite discovery in cases under counsel's supervision and control.

(1) Review of Proposed Document Requests. Each agency within the executive branch shall establish a coordinated procedure for the conduct and review of document discovery undertaken in litigation directly by that agency when that agency is litigation counsel. The procedure shall include, but is not necessarily limited to, review by a senior lawyer prior to service or filing of the request in litigation to determine that the request is not cumulative or duplicative, unreasonable, oppressive, unduly burdensome or expensive, taking into account the requirements of the litigation, the amount in controversy, the importance of the issues at stake in the litigation, and whether the documents can be obtained from some other source that is more convenient, less burdensome, or less expensive.

(2) Discovery Motions. Before petitioning a court to resolve a discovery motion or petitioning a court to impose sanctions for discovery abuses, litigation counsel shall attempt to resolve the dispute with opposing counsel. If litigation counsel makes a discovery motion concerning the dispute, he or she shall represent in that motion that any attempt at resolution was unsuccessful or impracticable under the circumstances.

(e) Sanctions. Litigation counsel shall take steps to seek sanctions against opposing counsel and opposing parties where appropriate.

(1) Litigation counsel shall evaluate filings made by opposing parties and, where appropriate, shall petition the court to impose sanctions against those responsible for abusive practices.

(2) Prior to filing a motion for sanctions, litigation counsel shall submit the motion for review to the sanctions officer, or his or her designee, within the litigation counsel's agency. Such officer or designee shall be a senior supervising attorney within the agency, and shall be licensed to practice law before a State court, courts of the District of Columbia, or courts of any territory or Commonwealth of the United States. The sanctions officer or designee shall also review motions for sanctions that are filed against litigation counsel, the United States, its agencies, or its officers.

(f) Improved Use of Litigation Resources. Litigation counsel shall employ efficient case management techniques and shall make reasonable efforts to expedite civil litigation in cases under that counsel's supervision and control. This includes but is not limited to:

(1) making reasonable efforts to negotiate with other parties about, and stipulate to, facts that are not in dispute;

(2) reviewing and revising pleadings and other filings to ensure that they are accurate and that they reflect a narrowing of issues, if any, that has resulted from discovery;

(3) requesting early trial dates where practicable;

(4) moving for summary judgment in every case where the movant would be likely to prevail, or where the motion is likely to narrow the issues to be tried; and

(5) reviewing and revising pleadings and other filings to ensure that unmeritorious threshold defenses and jurisdictional arguments, resulting in unnecessary delay, are not raised.

Sec. 2. Government Pro Bono and Volunteer Service. All federal agencies should develop appropriate programs to encourage and facilitate pro bono legal and other volunteer service by government employees, including attorneys.

Sec. 3. Principles to Enact Legislation and Promulgate Regulations Which Do Not Unduly Burden the Federal Court System.

(a) General Duty to Review Legislation and Regulations.

Within current budgetary constraints and existing executive branch coordination mechanisms and procedures established in OMB Circular A-19 and Executive Order No. 12866, each agency promulgating new regulations, reviewing existing regulations, developing legislative proposals concerning regulations, and developing new legislation shall adhere to the following requirements:

(1) The agency's proposed legislation and regulations shall be reviewed by the agency to eliminate drafting errors and needless ambiguity;

(2) The agency's proposed legislation and regulations shall be written to minimize needless litigation; and

(3) The agency's proposed legislation and regulations shall provide a clear and certain legal standard for affected conduct rather than a general standard, and shall promote simplification and burden reduction.

(b) Specific Issues for Review. In conducting the reviews required by subsection (a), each agency formulating proposed legislation and regulations shall make every reasonable effort to ensure:

(1) that the legislation--

(A) specifies whether all causes of action arising under the law are subject to statutes of limitations;

(B) specifies in clear language the preemptive effect, if any, to be given to the law;

(C) specifies in clear language the effect on existing Federal law, if any, including all provisions repealed, circumscribed, displaced, impaired, or modified;

(D) provides a clear and certain legal standard for affected conduct rather than a general standard, and a mens rea requirement if it is a criminal statute;

(E) specifies whether private arbitration and other forms of private dispute resolution are appropriate under enforcement and relief provisions; subject to constitutional requirements;

(F) specifies whether the provisions of the law are severable if one or more of them is found to be unconstitutional;

(G) specifies in clear language the retroactive effect, if any, to be given to the law;

(H) specifies in clear language the applicable burdens of proof;

(I) specifies in clear language whether it grants private parties a right to sue and, if so, the relief available and the conditions and terms for authorized awards of attorney's fees, if any;

(J) specifies whether State courts have jurisdiction under the law and, if so, whether and under what conditions an action would be removable to Federal court;

(K) specifies whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires the exhaustion of administrative remedies;

(L) sets forth the standards governing the assertion of personal jurisdiction, if any;

(M) defines key statutory terms, either explicitly or by reference to other statutes that explicitly define those terms;

(N) specifies whether the legislation applies to the Federal Government or its agencies;

(O) specifies whether the legislation applies to States, territories, the District of Columbia, and the Commonwealths of Puerto Rico and of the Northern Mariana Islands;

(P) specifies what remedies are available such as money damages, civil penalties, injunctive relief, and attorney's fees; and

(Q) addresses other important issues affecting clarity and general draftsmanship of legislation set forth by the Attorney General, with the concurrence of the Director of the Office of Management and Budget ("OMB") and after consultation with affected agencies, that are determined to be in accordance with the purposes of this order.

(2) that the regulation--

(A) specifies in clear language the preemptive effect, if any, to be given to the regulation;

(B) specifies in clear language the effect on existing Federal law or regulation, if any, including all provisions repealed, circumscribed, displaced, impaired, or modified;

(C) provides a clear and certain legal standard for affected conduct rather than a general standard, while promoting simplification and burden reduction;

(D) specifies in clear language the retroactive effect, if any, to be given to the regulation;

(E) specifies whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires the exhaustion of administrative remedies;

(F) defines key terms, either explicitly or by reference to other regulations or statutes that explicitly define those items; and

(G) addresses other important issues affecting clarity and general draftsmanship of regulations set forth by the Attorney General, with the concurrence of the Director of the Office of Management and Budget and after consultation with affected agencies, that are determined to be in accordance with the purposes of this order.

(c) Certification of Compliance for Agency Legislation or Regulations. When transmitting such draft legislation or regulation to "OMB", the agency must certify that (1) it has reviewed such draft legislation or regulation in light of this section, and that (2) either the draft legislation or regulation meets the applicable standards provided in subsections (a) and (b) of this section, or it is unreasonable to require the particular piece of draft legislation or regulation to meet one or more of those standards. Where the standards are not met, the agency certification must include an explanation of the reasons for the departure from the standards.

Sec. 4. Principles to Promote Just and Efficient Administrative Adjudications.

(a) Implementation of Administrative Conference Recommendations. In order to promote just and efficient resolution of disputes, an agency that adjudicates administrative claims shall, to the extent reasonable and practicable, and when not in conflict with other sections of this order, implement the recommendations of the Administrative Conference of the United States, entitled "Case Management as a Tool for Improving Agency Adjudication," as contained in 1 C.F.R. 305.86-7 (1991).

(b) Improvements in Administrative Adjudication. All federal agencies should review their administrative adjudicatory processes and develop specific procedures to reduce delay in decision-making, to facilitate self-representation, to expand non-lawyer counseling and representation where appropriate, and to invest maximum discretion in fact-finding officers to encourage appropriate settlement of claims as early as possible.

(c) Bias. All federal agencies should review their administrative adjudicatory processes to identify any type of bias that hinders full access to justice for all persons; regularly train all fact-finders, decision-makers and administrative law judges to eliminate such bias; and establish appropriate mechanisms to receive and resolve bias complaints from persons who appear before administrative adjudicatory tribunals.

(d) Public Education. All federal agencies should develop effective and simple methods, including the use of electronic technology, to educate the public about its claims/benefits policies and procedures.

Sec. 5. Coordination by the Department of Justice.

(a) The Attorney General shall coordinate efforts by Federal agencies to implement sections 1, 2 and 4 of this order.

(b) To implement the principles and purposes announced by this order, the Attorney General is authorized to issue guidelines implementing sections 1 and 4 of this order for the Department of Justice. Such guidelines shall serve as models for internal guidelines that may be issued by other agencies pursuant to this order.

Sec. 6. Definitions. For purposes of this order:

(a) The term "agency" shall be defined as that term is defined in section 451 of title 28, United States Code, except that it shall exclude all departments and establishments in the legislative or judicial branches of the United States.

(b) The term "litigation counsel" shall be defined as the trial counsel or the office in which such trial counsel is employed, such as the United States Attorney's Office for the district in which the litigation is pending or a litigating division of the Department of Justice. Special Assistant United States Attorneys are included within this definition. Those agencies authorized by law to represent themselves in court without assistance from the Department of Justice are also included in this definition, as are private counsel hired by any Federal agency to conduct litigation on behalf of the agency or the United States.

Sec. 7. No Private Rights Created. This order is intended only to improve the internal management of the executive branch in resolving disputes, conducting litigation in a reasonable and just manner, and reviewing legislation and regulations. This order shall not be construed as creating any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States, its agencies, its officers, or any other person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order. Nothing in this order shall be construed to obligate the United States to accept a particular settlement or resolution of a dispute, to alter its standards for accepting settlements, to forego seeking a consent decree or other relief, or to alter any existing delegation of settlement or litigating authority.

Sec. 8. Scope.

(a) No Applicability to Criminal Matters or Proceedings in Foreign Courts. This order is applicable to civil matters only. It is not intended to affect criminal matters, including enforcement of criminal fines or judgments of criminal forfeiture. This order does not apply to litigation brought by or against the United States in foreign courts or tribunals.

(b) Application of Notice Provision. Notice pursuant to subsection (a) of section 1 is not required (1) in any action to seize or forfeit assets subject to forfeiture or in any action to seize property; (2) in any bankruptcy, insolvency, conservatorship, receivership, or liquidation proceeding; (3) when the assets that are the subject of the action or that would satisfy the judgment are subject to flight, dissipation, or destruction; (4) when the defendant is subject to flight; (5) when, as determined by litigation counsel, exigent circumstances make providing such notice impracticable or such notice would otherwise defeat the purpose of the litigation, such as in actions seeking temporary restraining orders or preliminary injunctive relief; or (6) in those limited classes of cases where the Attorney General determines that providing such notice would defeat the purpose of the litigation.

(c) Application of Alternative Dispute Resolution. Subsections (c) of section 1 of this order shall not apply (1) to any action to seize or forfeit assets subject to forfeiture, or (2) to any debt collection case (including any action for civil penalties or taxes) involving an amount in controversy less than \$100,000.

(d) Additional Guidance as to Scope. The Attorney General shall have the authority to issue further guidance as to the scope of this order, except section 3, consistent with the

purposes of this order.

Sec. 9. Conflicts with Other Rules. Nothing in this order shall be construed to require litigation counsel or any agency to act in a manner contrary to the Federal Rules of Civil Procedure, Tax Court Rules of Practice and Procedure, State or Federal law, other applicable rules of practice or procedure, or court order.

Sec. 10. Privileged Information. Nothing in this order shall compel or authorize the disclosure of privileged information, sensitive law enforcement information, information affecting national security, or information the disclosure of which is prohibited by law.

Sec. 11. Effective Date. This order shall become effective 90 days after the date of signature. This order shall not apply to litigation commenced prior to the effective date.

Sec. 12. Revocation. Executive Order 12778 is hereby revoked.

THE WHITE HOUSE,

WILLIAM J. CLINTON

THE WHITE HOUSE

WASHINGTON

October 25, 1995

MEMORANDUM FOR ALICE M. RIVLIN

FROM: ABNER J. MIKVA

SUBJECT: PROPOSED EXECUTIVE ORDER

I am attaching a proposed Executive Order to replace Executive Order No. 12778 on the subject of Civil Justice Reform. The current Executive Order 12778 bars the United States from entering into binding arbitration. The proposed Executive Order reverses this policy, allowing the United States to enter into binding arbitration, as part of an ADR initiative or otherwise. This change reflects the opinion of the Office of Legal Counsel (September 7, 1995) that the Appointments Clause of the U.S. Constitution does not bar the United States from entering into binding arbitration.

The proposed Executive Order also makes several other changes, including the correction of the restatement of law on the admissibility of expert testimony.

By this memo, I am requesting that the Office of Management and Budget process the proposed Executive Order pursuant to Executive Order No. 11030, as amended. I would be grateful if such processing were accomplished as soon as possible.



FACSIMILE TRANSMISSION SHEET

DATE: 10/20/95

NO. OF PAGES (INCLUDING THIS SHEET): X 14

TO: Elene Kazan

AGENCY: _____

FACSIMILE NO: 456-1647

FROM: Cathy Sheehey

AGENCY: **U.S. DEPARTMENT OF JUSTICE
OFFICE OF THE ASSOCIATE ATTORNEY GENERAL
ALTERNATIVE DISPUTE RESOLUTION PROGRAM
Telephone No. (202) 616-9471
FAX No. (202) 616-9570**

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*Aloma
616-9477*

Call Aloma Sheehey at (202) 616-9471, if all pages are not received.

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~~Research~~

~~Peer could be used~~

~~structure~~

~~Peer perhaps to see~~

How to get publicity?

Deal w/ Karman or
Katz?

Kathy Schaefer 514-2704

Needs to be

Processed by OMTB -
↓
⇒ OLC

OLC - binding arbitration - no court prohibition - opinion by recently.

EO needed to be changed.
Civ Justice Reform Wkg Grp - ADR subsp. - Schaefer

↓
Then to OLC to review

↓
Went back to John

—
No ^{const} limit on entering into binding arbitration.

Current EO 12778 - forbids counsel from entering into b.a. (except, presumably, where there is a statutory or other legal oblig to do so)

No appointments clause problem

Arbs are priv actors - at most indep kars

No office → no officers

Appointments clause just doesn't apply where above is true.

No problem under the take care clause

All it says is follow the law - with respect to binding arb as w/ respect to all other matters.

Art III prohibits some mhrs from being submitted to TSA.

Need to preserve Art III review of const issues?

Also to have review of arb determ for fraud, misrep, misconduct?

Due Process - Matthews v Eldridge test may in some cases req that govt offl make a final binding decision.

Art II generally - prohibits any from exercising control over or being arbitrator.

Also a prob if an arbitral panel were given auth const committed to executive - e.g. unrev auth to control ^{criminal} prosecution

Also Pres may not be bound by decision of arb in exercise of his spec const powers - e.g. pardon + tr arb's powers.

Conclu - No gen prohib aft fed govt entering into BA. (No appointments cl problem.) But Const may impose limits to enter into BA in specific cases.

THE WHITE HOUSE

WASHINGTON

October 25, 1995

MEMORANDUM FOR ALICE M. RIVLIN

FROM: ABNER J. MIKVA *AJM*

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EXECUTIVE ORDER

CIVIL JUSTICE REFORM

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code, and in order to improve access to justice for all persons who wish to avail themselves of court and administrative adjudicatory tribunals to resolve disputes, to facilitate the just and efficient resolution of civil claims involving the United States Government, to encourage the filing of only meritorious civil claims, to improve legislative and regulatory drafting to reduce needless litigation, to promote fair and prompt adjudication before administrative tribunals, and to provide a model for similar reforms of litigation practices in the private sector and in various states, it is hereby ordered as follows:

Section 1. Guidelines to Promote Just and Efficient Government Civil Litigation. To promote the just and efficient resolution of civil claims, those Federal agencies and litigation counsel that conduct or otherwise participate in civil litigation on behalf of the United States Government in Federal court shall respect and adhere to the following guidelines during the conduct of such litigation:

(a) Pre-filing Notice of a Complaint. No litigation counsel shall file a complaint initiating civil litigation without first making a reasonable effort to notify all disputants about the nature of the dispute and to attempt to achieve a settlement, or confirming that the referring agency that previously handled the dispute has made a reasonable effort to notify the disputants and to achieve a settlement or has used its conciliation processes.

(b) Settlement Conferences. As soon as practicable after ascertaining the nature of a dispute in litigation, and throughout the litigation, litigation counsel shall evaluate settlement possibilities and make reasonable efforts to settle the litigation. Such efforts shall include offering to participate in a settlement conference or moving the court for a conference pursuant to Rule 16 of the Federal Rules of Civil Procedure in an attempt to resolve the dispute without additional civil litigation.

(c) Alternative Methods of Resolving the Dispute in Litigation. Litigation counsel shall make reasonable attempts to resolve a dispute expeditiously and properly before proceeding to trial.

(1) Whenever feasible, claims should be resolved through informal discussions, negotiations, and settlements rather than through utilization of any formal court proceeding. Where the benefits of Alternative Dispute

Resolution ("ADR") may be derived, and after consultation with the agency referring the matter, litigation counsel should suggest the use of an appropriate ADR technique to the parties.

(2) It is appropriate to use ADR techniques or processes to resolve claims of or against the United States or its agencies, after litigation counsel determines that the use of a particular technique is warranted in the context of a particular claim or claims, and that such use will materially contribute to the prompt, fair, and efficient resolution of the claims.

(3) To facilitate broader and effective use of informal and formal alternative dispute resolution methods, all litigation counsel should be trained in ADR techniques.

(d) Discovery. To the extent practical, litigation counsel shall make every reasonable effort to streamline and expedite discovery in cases under counsel's supervision and control.

(1) Review of Proposed Document Requests. Each agency within the executive branch shall establish a coordinated procedure for the conduct and review of document discovery undertaken in litigation directly by that agency when that agency is litigation counsel. The procedure shall include, but is not necessarily limited to, review by a senior lawyer prior to service or filing of the request in litigation to determine that the request is not cumulative or duplicative, unreasonable, oppressive, unduly burdensome or expensive, taking into account the requirements of the litigation, the amount in controversy, the importance of the issues at stake in the litigation, and whether the documents can be obtained from some other source that is more convenient, less burdensome, or less expensive.

(2) Discovery Motions. Before petitioning a court to resolve a discovery motion or petitioning a court to impose sanctions for discovery abuses, litigation counsel shall attempt to resolve the dispute with opposing counsel. If litigation counsel makes a discovery motion concerning the dispute, he or she shall represent in that motion that any attempt at resolution was unsuccessful or impracticable under the circumstances.

(e) Sanctions. Litigation counsel shall take steps to seek sanctions against opposing counsel and opposing parties where appropriate.

(1) Litigation counsel shall evaluate filings made by opposing parties and, where appropriate, shall petition the court to impose sanctions against those responsible for abusive practices.

(2) Prior to filing a motion for sanctions, litigation counsel shall submit the motion for review to the sanctions officer, or his or her designee, within the litigation counsel's agency. Such officer or designee shall be a senior supervising attorney within the agency, and shall be licensed to practice law before a State court, courts of the District of Columbia, or courts of any territory or Commonwealth of the United States. The sanctions officer or designee shall also review motions for sanctions that are filed against litigation counsel, the United States, its agencies, or its officers.

(f) Improved Use of Litigation Resources. Litigation counsel shall employ efficient case management techniques and shall make reasonable efforts to expedite civil litigation in cases under that counsel's supervision and control. This includes but is not limited to:

(1) making reasonable efforts to negotiate with other parties about, and stipulate to, facts that are not in dispute;

(2) reviewing and revising pleadings and other filings to ensure that they are accurate and that they reflect a narrowing of issues, if any, that has resulted from discovery;

(3) requesting early trial dates where practicable;

(4) moving for summary judgment in every case where the movant would be likely to prevail, or where the motion is likely to narrow the issues to be tried; and

(5) reviewing and revising pleadings and other filings to ensure that unmeritorious threshold defenses and jurisdictional arguments, resulting in unnecessary delay, are not raised.

Sec. 2. Government Pro Bono and Volunteer Service. All federal agencies should develop appropriate programs to encourage and facilitate pro bono legal and other volunteer service by government employees, including attorneys.

Sec. 3. Principles to Enact Legislation and Promulgate Regulations Which Do Not Unduly Burden the Federal Court System.

(a) General Duty to Review Legislation and Regulations. Within current budgetary constraints and existing executive branch coordination mechanisms and procedures established in OMB Circular A-19 and Executive Order No. 12866, each agency promulgating new regulations, reviewing existing regulations, developing legislative proposals concerning regulations, and developing new legislation shall adhere to the following requirements:

(1) The agency's proposed legislation and regulations shall be reviewed by the agency to eliminate drafting errors and needless ambiguity;

(2) The agency's proposed legislation and regulations shall be written to minimize needless litigation; and

(3) The agency's proposed legislation and regulations shall provide a clear and certain legal standard for affected conduct rather than a general standard, and shall promote simplification and burden reduction.

(b) Specific Issues for Review. In conducting the reviews required by subsection (a), each agency formulating proposed legislation and regulations shall make every reasonable effort to ensure:

(1) that the legislation--

(A) specifies whether all causes of action arising under the law are subject to statutes of limitations;

(B) specifies in clear language the preemptive effect, if any, to be given to the law;

(C) specifies in clear language the effect on existing Federal law, if any, including all provisions repealed, circumscribed, displaced, impaired, or modified;

(D) provides a clear and certain legal standard for affected conduct rather than a general standard, and a mens rea requirement if it is a criminal statute;

(E) specifies whether private arbitration and other forms of private dispute resolution are appropriate under enforcement and relief provisions; subject to constitutional requirements;

(F) specifies whether the provisions of the law are severable if one or more of them is found to be unconstitutional;

(G) specifies in clear language the retroactive effect, if any, to be given to the law;

(H) specifies in clear language the applicable burdens of proof;

(I) specifies in clear language whether it grants private parties a right to sue and, if so, the relief available and the conditions and terms for authorized awards of attorney's fees, if any;

(J) specifies whether State courts have jurisdiction under the law and, if so, whether and under what conditions an action would be removable to Federal court;

(K) specifies whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires the exhaustion of administrative remedies;

(L) sets forth the standards governing the assertion of personal jurisdiction, if any;

(M) defines key statutory terms, either explicitly or by reference to other statutes that explicitly define those terms;

(N) specifies whether the legislation applies to the Federal Government or its agencies;

(O) specifies whether the legislation applies to States, territories, the District of Columbia, and the Commonwealths of Puerto Rico and of the Northern Mariana Islands;

(P) specifies what remedies are available such as money damages, civil penalties, injunctive relief, and attorney's fees; and

(Q) addresses other important issues affecting clarity and general draftsmanship of legislation set forth by the Attorney General, with the concurrence of the Director of the Office of Management and Budget ("OMB") and after consultation with affected agencies, that are determined to be in accordance with the purposes of this order.

(2) that the regulation--

(A) specifies in clear language the preemptive effect, if any, to be given to the regulation;

(B) specifies in clear language the effect on existing Federal law or regulation, if any, including all provisions repealed, circumscribed, displaced, impaired, or modified;

(C) provides a clear and certain legal standard for affected conduct rather than a general standard, while promoting simplification and burden reduction;

(D) specifies in clear language the retroactive effect, if any, to be given to the regulation;

(E) specifies whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires the exhaustion of administrative remedies;

(F) defines key terms, either explicitly or by reference to other regulations or statutes that explicitly define those items; and

(G) addresses other important issues affecting clarity and general draftsmanship of regulations set forth by the Attorney General, with the concurrence of the Director of the Office of Management and Budget and after consultation with affected agencies, that are determined to be in accordance with the purposes of this order.

(c) Certification of Compliance for Agency Legislation or Regulations. When transmitting such draft legislation or regulation to "OMB", the agency must certify that (1) it has reviewed such draft legislation or regulation in light of this section, and that (2) either the draft legislation or regulation meets the applicable standards provided in subsections (a) and (b) of this section, or it is unreasonable to require the particular piece of draft legislation or regulation to meet one or more of those standards. Where the standards are not met, the agency certification must include an explanation of the reasons for the departure from the standards.

Sec. 4. Principles to Promote Just and Efficient Administrative Adjudications.

(a) Implementation of Administrative Conference Recommendations. In order to promote just and efficient resolution of disputes, an agency that adjudicates administrative claims shall, to the extent reasonable and practicable, and when not in conflict with other sections of this order, implement the recommendations of the Administrative Conference of the United States, entitled "Case Management as a Tool for Improving Agency Adjudication," as contained in 1 C.F.R. 305.86-7 (1991).

(b) Improvements in Administrative Adjudication. All federal agencies should review their administrative adjudicatory processes and develop specific procedures to reduce delay in decision-making, to facilitate self-representation, to expand non-lawyer counseling and representation where appropriate, and to invest maximum discretion in fact-finding officers to encourage appropriate settlement of claims as early as possible.

(c) Bias. All federal agencies should review their administrative adjudicatory processes to identify any type of bias that hinders full access to justice for all persons; regularly train all fact-finders, decision-makers and administrative law judges to eliminate such bias; and establish appropriate mechanisms to receive and resolve bias complaints from persons who appear before administrative adjudicatory tribunals.

(d) Public Education. All federal agencies should develop effective and simple methods, including the use of electronic technology, to educate the public about its claims/benefits policies and procedures.

Sec. 5. Coordination by the Department of Justice.

(a) The Attorney General shall coordinate efforts by Federal agencies to implement sections 1, 2 and 4 of this order.

(b) To implement the principles and purposes announced by this order, the Attorney General is authorized to issue guidelines implementing sections 1 and 4 of this order for the Department of Justice. Such guidelines shall serve as models for internal guidelines that may be issued by other agencies pursuant to this order.

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Sec. 11. Effective Date. This order shall become effective 90 days after the date of signature. This order shall not apply to litigation commenced prior to the effective date.

Sec. 12. Revocation. Executive Order 12778 is hereby revoked.

THE WHITE HOUSE,

WILLIAM J. CLINTON