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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION	
001. memo	From Richard L. Shiffrin and Paul P. Colborn to Walter Dellinger. Subject: Cutler Memorandum on Executive Privilege. (3 pages)	10/17/1994	P5	1629
002. memo	Michael Small to File. Subject: Foreign Relations Authorizations Act, Fy 1994 and 1995/ Presidential Signing Statement. (9 pages)	05/06/1994	P5	1630

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FOLDER TITLE:

Presidential Powers - Signing Statements and Vetoes [1]

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RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Memorandum

Executive Privilege

Subject	Date
Cutler Memorandum on Executive Privilege	October 17, 1994

To	From
Walter Dellinger	Richard L. Shiffrin RLS Paul P. Colborn PPC

This memorandum summarizes our concerns about the attached September 28, 1994 memorandum to general counsels from Lloyd Cutler regarding documents protected by executive privilege.

1. Has been converted into a White House statement on executive privilege generally. The purpose of the original drafts of the memorandum was simply to inform the agencies of the White House policy of exercising control over certain types of documents and to set out the procedures that should be followed when congressional requests to the agencies encompass such documents. Between the last time we reviewed a draft (June 14th) and the time it was issued, however, the memorandum's subject line was changed -- from "Congressional requests to agencies for documents originating in the White House, delivered from the White House to an agency, or concerning White House-agency deliberations" to "Congressional Requests to Departments and Agencies for Documents Protected by Executive Privilege" -- and a very brief background discussion of executive privilege was significantly expanded to include broader issues and statements of Administration policy for the entire executive branch. The result of these two changes is that the memorandum has become a White House statement on executive privilege generally. This is problematic because the memorandum contains so many statements we disagree with and the document could be cited by Congress as a dispositive executive branch statement.

2. May be viewed as narrowing the scope of executive privilege. The most problematic specific part of the memorandum is the discussion in the second paragraph of what is protected by executive privilege. We are concerned that the memorandum's enumeration of deliberations and communications that are covered by the privilege could be read to be an exhaustive list. Although we believe that the intent of the drafters was that the memorandum would only control the disposition of White House documents and communications between the White House and the agencies, a broader interpretation that the memorandum definitively describes the current President's view of the scope

of executive privilege could be based on both the specific wording of the first two sentences of the paragraph and the context that the discussion is part of a document whose subject is described broadly as "documents protected by executive privilege" and part of a wide-ranging discussion of executive privilege principles and policy that is not limited to White House interests.

Because the enumeration omits at least two major categories of documents protected by executive privilege -- <u>intra-agency</u> and <u>non-White House inter-agency</u> deliberations and other confidential communications -- it will be necessary to issue a clarifying statement. This is of vital importance because the two omitted categories, especially the intra-agency category, represent the kind of documents that are most often subject to congressional requests and therefore the most frequent subjects of executive privilege concerns. Absent a clarification, we would expect congressional committees to respond to agency attempts to protect the confidentiality of internal or inter-agency documents by citing the Cutler memorandum and demanding immediate unconditional production on the grounds the documents are not within the scope of executive privilege.

3. <u>Incorrectly stating that executive privilege always operates as a qualified privilege</u>. The third paragraph states that "[e]xecutive privilege must always be weighed" against the interests of the requesting coordinate branch of government. This statement is inconsistent with the long-established executive branch position that the state secrets component of executive privilege is an absolute privilege, which means that it is <u>not</u> weighed against the interests of the other branch. The balancing referred to in the memorandum only arises in connection with qualified privileges, such as the deliberative process and presidential communications components of executive privilege. We also question the inclusion in this paragraph of a reference to balancing of "the judicial need to obtain relevant evidence, especially in criminal proceedings." Judicial needs are irrelevant, of course, in the congressional context (which is the subject of the memorandum), and the reference only adds to the appearance that the memorandum is a broad statement on executive privilege generally.

4. <u>Misleadingly suggesting what is "usually" done by the courts</u>. The fourth paragraph states that "[i]n the last resort, this balancing is usually conducted by the courts" and "the courts usually decline to intervene" until the accommodation process between Congress and the executive branch has failed to resolve the matter. These statements are misleading because they suggest that the courts have a significant role in this area; to the contrary, the courts historically have had quite a limited role and there are political question and other justiciability

issues that necessarily limit their role. The statements are also incorrect: (1) the balancing is done during the accommodation process by the agencies and Congress and at the executive privilege stage by the President, and in only one case (Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974) (en banc)) has a court ever balanced; and (2) it is incorrect to say that the courts "usually decline to intervene" because there are too few litigated cases for anything to be "usual" (we're aware of only three cases: Senate Select Committee; United States v. American Tel. & Tel. Co., 567 F.2d 121 (D.C. Cir. 1977); United States v. House of Representatives, 556 F.Supp. 150 (D.D.C. 1983)).

Memorandum

Dellinger Johnsen Shiffrin Murphy R.File
Powell Roseborough Small File Ret.(SMALLM)lead/reauth

Subject
Foreign Relations Authorization Act, FY 1994 and 1995/Presidential Signing Statement

Date
May 6, 1994

To
File

From
Michael Small
Office of Legal Counsel

On April 26, 1994, Mary Helen Carlson of the State Department Legal Adviser's Office asked OLC to review a draft presidential signing statement that her Office had prepared in connection with the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995 (the "Act"). Deputy Assistant Attorney General Richard Shiffrin and I reviewed the draft signing statement, as well as the Act itself. We provided comments to Ms. Carlson and to representatives of the Office of Management and Budget ("OMB") in a series of telephone conversations on April 27, April 28, and April 29, 1994. We also sent the State Department some suggested revisions to the signing statement. This memorandum summarizes our principal comments.[1]

The subject matter of the comments fell into two categories: (i) provisions of the Act that arguably intrude on the President's constitutional authority to conduct the nation's foreign affairs; and (ii) Appointments Clause and general separation of powers concerns with respect to provisions of the Act that establish new entities within the United States Information Agency ("USIA") to coordinate international broadcasting initiatives of the U.S. government.

I. Presidential Authority With Respect to Foreign Affairs

The draft signing statement that Ms. Carlson sent us on April 26 identified a number of provisions in the Act that arguably intrude on the President's constitutional authority to conduct foreign affairs. Our comments focused on parts of the Act dealing with (a) Tibet; (b) United States participation in international financial organizations; and (c) presidential determinations with respect to persons who contribute to nuclear proliferation through the provision of financial assistance.

1 President Clinton signed the Act into law on April 30, and issued a signing statement. We did not see the final version of the signing statement.

A. Tibet

Section 221 of the Act states that the Director of the USIA:

> shall seek to establish an office in Lhasa, Tibet, for the purpose of (1) disseminating information about the United States; (2) promoting discussions on conflict resolution and human rights; (3) facilitating United States private sector involvement in educational and cultural activities in Tibet; and (4) advising the United States government with respect to Tibetan public opinion.

Tibet is, of course, part of the People's Republic of China. In light of the sensitive nature of U.S. foreign relations with China -- especially with respect to the status of Tibet and human rights issues there -- the draft signing statement identified Section 221 as a potentially troublesome provision. In particular, the signing statement noted that Section 221 could be construed as requiring the President to establish a USIA office in Tibet without the consent of China. Accordingly, the signing statement took the position that Section 221 would have to be implemented consistent with the President's foreign affairs responsibilities.

We told Ms. Carlson that we agreed that Section 221 posed constitutional concerns with respect to the President's conduct of foreign relations with China and his handling of the Tibetan issue. We also pointed out that another provision of the Act, Section 236, could be read as requiring the USIA to take certain action with respect to Tibet, but that it had not been identified in the draft signing statement. Section 236 states that the Director of the USIA "shall establish programs of educational and cultural exchange between the United States and the people of Tibet." We advised Ms. Carlson that if Section 221 was to be mentioned in the signing statement, then so too should Section 236. Subsequent drafts of the signing statement grouped Sections 221 and 236 together and said that both provisions would have to be implemented consistent with the President's constitutional responsibilities.

B. International Financial Organizations

Section 527(a) states that no funds made available to carry out the Act (as well as the Foreign Assistance Act of 1961 or the Arms Control Export Act) may be provided to a country that has expropriated property belonging to a "United States person." Section 527(b) states that the President shall instruct U.S. representatives at multilateral development banks and international financial institutions to vote against any loan or other utilization of the funds for the benefit of any country that has expropriated U.S. property, unless the financial assistance in question is directed to the basic human needs of citizens of that country.

The draft signing statement said that Section 527(b) "purport[s] specifically to direct the President how to proceed in negotiations with international organizations, and might be construed to require the executive branch to espouse certain substantive positions regarding specific issues." As such, the draft continued, Section 527(b) could be interpreted as hindering the exercise of the discretion that the Constitution bestows on the President in the conduct of foreign affairs. The draft stated that to avoid this result, Section 527(b) would be construed as merely "precatory."

We told Ms. Carlson that we agreed with the State Department's position with respect to Section 527(b). We pointed out, however, that Section 823 of the Act raised similar concerns regarding presidential authority over the U.S. role international financial institutions, but that it had not been identified in the draft signing statement. Section 823 states that the Secretary of Treasury shall instruct U.S. representatives of international financial institutions to vote against the use of the institutions' funds for the purposes of assisting acquisition of nuclear weapons materials. We advised Ms. Carlson that if 527(b) merited attention in the signing statement, so too did Section 823. Subsequent drafts of the signing statement grouped the two provisions together and said that both provisions would be treated as precatory.

C. Presidential Determinations: Financial Aid for <u>Nuclear Proliferation</u>

Much of our attention centered on Section 824 of the Act, which, in our view, is the provision of the legislation that poses the most significant constitutional issues.

Section 824(a) and (b) prohibit any person within the jurisdiction of the United States from contributing to nuclear proliferation through the provision of financial assistance. Section 824(c) states that "[i]f the President determines, in writing after opportunity for hearing on the record, that a United States person or a foreign person has engaged in prohibited activity . . . the President shall, by order, impose the sanctions described in [Section 824(d)]." In turn, Section 824(d) lists the sanctions that "shall be imposed pursuant to any order issued under [Section 824(c)]." Those sanctions are a ban on dealings in government finance, and a prohibition on "commenc[ing] any line of business in the United States in which the person was not engaged as of the date of the order; or on "conduct[ing] any business from any location in the United States at which the person did not conduct business as of the date of the order." Section 824(e) provides for judicial review of orders issued by the President under Section 824(c). Section 824(h) permits the President to "waive the continued application of any sanction imposed on any person pursuant to an order issued under subsection (c) if the President determines, and certifies in writing to the Congress, that the continued imposition of the sanction would have a serious adverse effect on the safety and soundness of the domestic or international financial system or on domestic or international payments systems."

Ms. Carlson told us that Section 824 was an eleventh hour addition to the Act, and that it caught the Administration off guard. We also learned that some members of Congress, including Rep. Lee Hamilton, Chairman of the House Foreign Affairs Committee, had expressed misgivings about Section 824, and that they were willing to seek to modify the provision at the earliest possible date. The draft signing statement noted these points. It also identified substantive objections to Section 824, including the rather extreme sanctions in Section 824(c) and the provision for judicial review of presidential action. The draft did not couch these objections in constitutional terms, however. The draft did state that the presidential determinations in Section 824(c) were discretionary. Ms. Carlson told us that the State Department had taken this position on the theory that the provision would be unconstitutional if it mandated that the President make the determination.

Richard Shiffrin and I discussed Section 824 with Deputy Assistant Attorney General Jeff Powell, and, in a separate conversation, with Alan Krezcko, the Legal Adviser to the National Security Council. We all agreed that the provision calling for judicial review of the presidential determination was extraordinary. Richard and I told Ms. Carlson that we were unaware of any comparable provision.[2] More to the point, we stated that the provision arguably interfered with the President's conduct of foreign affairs. Yet, in the absence of judicial review, the extreme sanctions contemplated in Section 824(c) might themselves be unconstitutional.[3] And even with judicial review, a court might not uphold the sanctions.

As for the question whether the President has discretion to make the determination, we told Ms. Carlson that it has been OLC's position that statutory language calling on the President to make foreign policy-related "determinations" that lead to the imposition

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2 Mr. Krezcko also said that he was unaware of any such provision.

3 One of the sanctions is a ban on entering <u>any</u> business in which the person on which the sanction is imposed previously had not been engaged. In our view, this could be an unconstitutional deprivation of liberty or a taking.

of sanctions is not discretionary.[4] Apparently, each statute that we have reviewed on this subject also contains broad waiver provisions that permit the President to avoid imposing sanctions altogether if he concludes that it is in the national interest to do so. The existence of such waiver provisions has been central to our analysis. We have stated that those provisions would have little meaning if the President has also had wide latitude to decline to make determinations in the first instance. Moreover, we have said that the broad waiver provisions alleviated the constitutional concern that would otherwise arise from construing the presidential determination provisions as mandatory. In short, the waiver provision gave the President constitutionally sufficient discretion to conduct foreign affairs because he can avoid imposing sanctions.

By contrast, the waiver provision in Section 824(h) of the Act is quite narrow. Because Section 824(h) speaks to waiver of "continuation" of the sanctions, the provision presumably only kicks in after sanctions have been in effect for some period of time. Given the limits of the waiver provision, there is a good argument that the President must have discretion to refrain from making the Section 824(c) determination. If that were not the case, then the determination and waiver provisions of the Act, when taken together, arguably amount to impermissible interference with the President's conduct of foreign affairs.

In the end, however, we concluded that the signing statement need not expressly refer to the issue of whether the presidential determination specified in Section 824(c) is discretionary or mandatory. Our reasoning was as follows:

- The judicial review and sanction provisions are so offensive that they offered enough constitutional grist for the mill in the signing statement.

- Many members of Congress had apparently realized that Section 824 presents a myriad of practical and constitutional problems, and had advised the Administration that they were willing to work towards rectifying them soon.

- The question of whether the determination provision is mandatory or discretionary is a difficult one. Any explicit statement about it could cause

4 Our most recent memorandum on the subject was written in July 1993 by Paul Colborn and Jacques deLisle in response to a request from Mr. Krezcko regarding whether presidential determination provisions in the Export Administration Act of 1979 and the Foreign Assistance Act of 1961 are discretionary or mandatory.

unnecessary acrimony between the White House and Congress.

All told, these factors led us to conclude that it was sufficient for the signing statement to say that, "in light of the constitutional and practical problems" posed by the provision, "the President "would refrain from making any determinations"- under Section 824, This sentence was phrased in such a way so as to hint that the determination was in fact discretionary. I spoke with Mr. Krezcko, and he told me that he agreed with our approach. At the suggestion, of his client however, a subsequent draft of the signing statement employed slightly different language. It said that the President would not be "compelled" to make any determinations under Section 824. This revision reflected a somewhat more explicit expression of the view that the presidential determination was discretionary.

II. <u>International Broadcasting</u>

Title III of the Act was originally a separate bill known as the International Broadcasting Act. It was introduced in the Senate in 1993, and subsequently incorporated into the Act.

Title III reorganizes and consolidates the international broadcasting initiatives of the United States government. Previously, some of these activities were carried out by the Board of International Broadcasting ("BIB"). Title III of the Act abolishes the BIB. Section 304 of the Act establishes in its place a nine-member Broadcasting Board of Governors (the "Board"), which is housed within USIA. The Board consists of 8 members appointed by the President by and with the advice and consent of the Senate; the ninth member is the Director of the USIA. The President shall designate one of the members (other than the USIA Director) as Chairman of the Board. Exclusive of the USIA Director, the 8 other Board members serve for a term of three years. In addition, not more than 4 of the 8 appointed members shall be of the same political party.

Section 305 lays out in some detail the functions of the Board. Among those functions is the direction and supervision of all international broadcasting activities of the United States. This exceeds the functions formerly exercised by the BIB.

Section 307(a) establishes an International Broadcasting Bureau (the "Bureau") within the USIA. It further states that the Bureau's function is to carry out all nonmilitary international broadcasting activities of the United States. The Conference Report indicates that the Act declines to specify in detail the structure, organization, and responsibilities of the Bureau, leaving that task to the Board. Section 307(b) provides for the appointment of a Bureau Director by the Chairman of the Board, in consultation with the Director of the USIA and with the concurrence of the majority of the Board.

In reviewing Title III, we identified two constitutional concerns: (a) the requirement that not more than 4 of the 8 appointed members of the Board can be of the same political party; and (b) the manner of appointment of the Bureau Director.

A. Political Balancing Requirements

Political balancing requirements of the sort contained in Section 304 of the Act are common features of statutes creating "independent agencies." Such agencies are headed by officers who are insulated from presidential control through statutory tenure protections that limit the President's ability to remove them from office before the expiration of their prescribed terms. But the Board is an entity within USIA, which is not an independent agency: both the Director of the USIA and the members of the Board are clearly removable by the President at will. The requirement that no more than 4 of the 8 appointed members of the Board be from the same political party is therefore incongruous. Indeed, we are unaware of any statute in which such requirements are imposed with respect to the appointment of officers who are clearly removable at will.[5] More fundamentally, as a constitutional matter, we advised the State Department that the requirement arguably trammels the President's exercise of discretion in appointing officers who are answerable to him.[6]

We discussed the question of whether and how the signing statement should treat the political balancing requirements with Ms. Carlson, two officials of BIB, (Richard McBride and John Lindberg), and Ron Peterson and Annette Rooney of OMB. We all

5 There are a number of statutes setting up agencies that are silent with respect to the President's power to remove the agency heads, but that contain political balancing requirements and other trappings that would suggest that the agency is intended to be an independent agency, insulated from presidential control. By statutory mandate, the membership of the now-abolished BIB was politically balanced. The statute did not speak to the removability of BIB officers. It could be argued that BIB was an independent agency. But even if that is a correct characterization of BIB, it does not describe the Board, because it is part of an entity, the USIA, whose head clearly serves at the pleasure of the President.

6 Our files indicate that although we did not write a formal bill comment at the time, we raised these concerns in communications with the Office of Legislative Affairs of the Justice Department in connection with a June 1993 review of the separate legislation that eventually became Title III of the Act.

agreed that this was a sticky issue. Title III of the Act -- apparently including the political balancing requirements -- is not something that was forced upon the Administration. To the contrary, it was the Administration's idea. It would therefore be odd for the President to complain in a signing statement about the constitutionality of provisions for which his Administration pressed. Accordingly, we recommended that the signing statement not say anything about the political balancing requirements.

B. Appointment of Bureau Director

The Appointments Clause prescribes the manner of appointment of "Officers of the United States." The Clause distinguishes between "principal officers," who must be appointed by the President and confirmed by the Senate, and inferior officers, who may be appointed by "the President alone, the Courts of Law, or the Heads of Departments." It is unclear from the face of the statute as to whether the Bureau Director is an officer, or a mere employee. The Bureau Director's functions are not specified in Title III, and the legislative history makes plain that is up to the Board to define his or her duties. The problem is that if the Bureau Director is an inferior officer,[7] his appointment by the Chairman of the Board is inconsistent with the Appointments Clause. The Chairman of the Board is not the "Head of a Department:" the Board is an entity within USIA, and the "Head" of that Department is the Director of the USIA.[8]

The BIB officials with whom we spoke were familiar with the history and purpose of Title III of the Act. They were also generally familiar with the distinction between "officers" who must be appointed in conformity with the Appointments Clause, and other government employees who may be appointed in any manner. The officials stated that, as they understood it, the Bureau Director was probably meant to be an officer. However, we recommended to the State Department and OMB that the signing statement not address this possible Appointments Clause problem. Again, we were influenced by the fact that Title III was originally an Administration bill. Furthermore, in the event of litigation challenging some action of the Bureau Director in which an Appointments Clause attack is made, we believe that there is a defensible argument that the Bureau Director is not an officer. This argument would be predicated on the rather cursory statutory language defining the Bureau Director's functions, and the statement in the legislative history indicating that Congress left it to the Board to specify those functions. The argument would be

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7 He clearly is not a principal officer.

8 We apparently did not raise this concern when we reviewed Title III in 1993.

undermined if the Board ends up defining the Bureau Director's function in such a way that he plainly is an officer.