The Lawyer in the Executive Branch of Government

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The federal government has expanded so much in recent years, both in the number of its personnel, and in the number of functions it performs, that to refer to the executive branch as if it were a homogeneous group of departments and agencies is highly misleading. On the other hand, those structures have some features in common. Many of the larger executive departments, for instance, exercise a certain quasi-judicial power—as in Boards of Contract Appeals. Many of the larger departments promulgate rules which can and do have the force of law, and may be regarded as performing a quasi-legislative function. A substantial number of government lawyers spend much of their time in litigation before these boards, the regulatory agencies, or the courts. However, for the most part, the day-to-day routine of the government lawyer is not typically of an adversary nature. Every legal decision necessarily raises the possibility that it may ultimately be attacked in some form or other; however, the decisions with which this paper will deal are not attacked so much in proceedings which are adversary as in those which are investigative. And the culmination, in general, tends to strengthen the executive, rather than the reverse, for time is on its side; the modern world is too complicated to be run by a legislature.

QUESTIONS OF DELEGABILITY OF AUTHORITY

In general, a lawyer who works in the executive branch of the federal government has as his function the furnishing of advice to one client or to several clients. Since the head of an executive department generally delegates a large portion of his authority to his various assistant secretaries, it is normal for each division of the legal office to provide legal advice to one or more assistant secretaries. Under the Secretary of Defense, for example, there is an Assistant Secretary for Administration, an Assistant Secretary (Comptroller), an Assistant Secretary (International Security Affairs), an Assistant Secretary (Installations and Logistics), an Assistant Secretary for Manpower, an Assistant Secretary for Public Affairs, and an Assistant Secretary for Systems Analysis, as well as various other officials with specifically designated functions. These functions are set forth in considerable detail, but with fairly general policy statements to cover any possible gaps in delegations of authority and published in the *Federal Register*. A very commonly recurring question for a government lawyer, therefore, is whether a particular assistant secretary has been delegated the authority to take a specific action, or whether the action must be taken by the secretary personally. Sometimes the question arises as to whether the function is in fact delegable. In an earlier era, before the vast proliferation of governmental functions and authorities which has recently taken place, lawyers generally took a more restrictive view of this question than they would today; some, in fact, would take the position that unless the words "or his designee" were included in the authorizing statute, delegation was not permissible. Today most lawyers would probably take a more liberal view, and might even consider that unless the specific language of the statute prohibited delegation, a delegation was authorized.

In the case of the Department of Defense, the law now provides an answer of fairly universal application to questions of this type. The 1962 amendments to the National Security Act[1] provide that "There is a Secretary of Defense, who is head of the Department of Defense . . ." and "The Assistant Secretaries shall perform such duties and exercise such powers as the Secretary of Defense may prescribe."[2] Furthermore, "One of the Assistant Secretaries shall be the Comptroller of the Department of Defense and shall, subject to the authority, direction and control of the Secretary" perform his various specified functions. However, counterbalancing this broad authority for delegation, there is the provision that "Except as otherwise specifically provided by law, an Assistant Secretary may not issue an order to a military department unless (1) the Secretary of Defense has specifically delegated that authority to him in writing; and (2) the order is issued through the Secretary of the military department concerned, or his designee."[3]

The foregoing quotations clearly indicate the political pressures which are involved in the delegation and exercise of authority. While the problem of delegation has probably never received such widespread attention from Congress and the public in the case of other agencies, it is nevertheless an important one, and one which government lawyers are confronted with almost every day. More generally, the typical question which the government lawyer must answer is not merely whether the statute authorizes a specific action by a designee, but whether it authorizes the action at all. Perhaps the most basic difference between advising a private client and advising a government client arises from the fact that the government is one of limited powers. Accordingly, while the lawyer in private practice would consider a particular contract legal unless it violates some specific prohibition, the government lawyer would proceed from the opposite premise, and look to see whether it was specifically authorized. And the authorities are often diffuse, not to say obscure. Under U.S.C. 10: 4774, the construction of certain types of housing may be undertaken, provided that the area of each housing unit does not exceed a specified limitation; however, this figure may be exceeded by ten percent "outside the United States." Does the benefit of this greater limitation extend to Alaska or Hawaii or Guam? The first two would be excluded from it, under a definition in the U.S.C. 10: 101, but the third would be included. The questions of statutory interpretation arising under provisions as simple as those just cited arise constantly, but often without any clear answer being readily ascertainable. Thus, besides providing for this additional ten percent area for individual units in certain areas, the statute generally authorizes "Not more than fifteen percent of the family quarters constructed from appropriate funds" to be of a larger size. But it does not state what the fifteen percent applies to—the total of all houses constructed everywhere, or all houses constructed in a particular year, or all those at a particular base. Many such questions of statutory interpretation have no real solution other than reasonableness. However, the government lawyer is perpetually aware, as will be indicated below, that his interpretation may be tested—not, in all probability, before the Attorney General or the courts, but more likely before the committees of Congress or the Comptroller General.

From this brief discussion, and even from an examination of the statutes themselves, it might be concluded that the provisions just cited authorize the construction of housing, but this is emphatically not the case. In point of fact, they are merely limitations on the construction of housing authorized elsewhere, and the housing to which they are applicable is authorized nowhere in the United States Code. For the United States Code contains only the permanent law of the United States, and construction programs are generally authorized on an annual basis, so that the enabling legislation must generally be found either in the slip laws or in the Statutes at Large. This may seem

reasonably simple, and in principle it is, at least for those government lawyers who are familiar with the system, but to the private practitioner who only once or twice in his career becomes involved with it, this is only a further source of confusion. For often these annual statutes contain a certain amount of material which should probably be considered as permanent law, but, because of the context, the codifiers have failed to include it in the United States Code. Accordingly there is frequently a very real question as to whether certain provisions of law, enacted in connection with the authorization of a particular program, remain effective after that program has been completed.

THE LEGISLATIVE PROCESS

The fact that executive departments go before the Congress on a regular basis to seek new legislation is one of the most important aspects of the practice of law in the federal government. Most lawyers outside the government merely attempt to interpret the law, and perhaps stretch it a little bit here and there—they rarely try to amend or repeal it. But the executive branch each year issues a series of legislative proposals, generally numbering several hundred, which are coordinated through the Bureau of the Budget and ultimately submitted to the Congress. While changing the law is not necessarily an easy process (and there are a number of proposals which have been regularly introduced into Congress over a period of thirty years or more), the fact that the lawyer is in a position where he can see changes take place, and where he can see *how* they take place is likely to give him a somewhat different attitude towards the process. And there are probably very few lawyers with an extensive background in legislation who have not seen a statutory provision eased quickly over the usual congressional hurdles where a particularly powerful lobby has sponsored it. This is not intended to imply either that the procedures a bill must undergo prior to enactment are basically dilatory in purpose or function, or that they are abandoned at the slightest suggestion of congressional interest. The point is merely that the government lawyer who processes legislation has some familiarity with these procedures, and occasionally has some opportunity to slow them down or speed them up.

The whole problem of getting legislation through Congress is a major one for any large executive department, and many of the departments have separate legislative counsels to deal with it. It may be that most of the bills in which it is interested go to only a few congressional committees, but legislative counsel cannot safely rely on this. For one thing, a skilled lobbyist representing private interests in a legislative conflict with the government will be more likely to get his bill referred to a committee with which the

government's legislative counsel is not especially familiar. In one case, where such a proposal was defeated in the Armed Services and Banking and Currency committees, it subsequently appeared, in somewhat different form, in the Judiciary Committee. Since approximately 20,000 bills are introduced in the House of Representatives during each congress, and approximately one-fifth this number are introduced in the Senate, it is clearly impossible for the legislative counsel to keep track of all pending legislation, and he must rely to a great extent on his contacts with counsel for the various congressional committees.

One point which leads to considerable complications for the federal government, and which often is not sufficiently recognized by private practitioners, is that the authorization and appropriation processes are for the most part entirely separate. (Under special circumstances, such as those necessitating additional funds for the prosecution of the war in Vietnam, a law may be enacted which provides both authorization and appropriations; this is highly unusual, however, and the procedures followed in the case of such legislation are exceptional.) In other words, after an executive department obtains authorization for proceeding with a particular program—through legislation which has been referred to, and has been favorably reported by, the Foreign Relations, Armed Services, or Interior and Insular Affairs committees, for example—it is then necessary, to the extent that appropriated funds are required to carry out the program, to obtain them via an appropriations act, which is legislation that must be reported out by the appropriations committees. This dichotomy has not generally been adopted by state governments, but it is an extremely important matter for legislative counsel in the federal government, since his department must deal with at least these two sets of committees annually—and probably far more frequently. (There is no space here to discuss adequately the phenomenon of "supplemental" appropriation bills and similar matters.) And there is an almost continual conflict between them. A prime example of these complexities is the policy behind this colloquy:

> MR. SILKETT: Project applications and plans [for watershed projects] are first submitted to the Governor of a State or his designated representative, and the applications are sent for review to the subcommittee on agricultural appropriations of the Senate and the House.
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> MR. POAGE (Chairman): They are sent to whom?
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> MR. SILKETT: To the subcommittee on agricultural appropriations in the Senate and the House.
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> MR. POAGE: Why do you send them to the Appropriations Committees and do not send any of them to the legislative committees?

> MR. SILKETT: In the conference report on the Agricultural Appropriations Act of 1964, the conferees asked that the appropriate committees of Congress be advised of any activities before commitments were made, and upon inquiry we were advised that the appropriate committees were the Subcommittees on Agricultural Appropriations.
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> MR. POAGE: I want to get back to the thing that disturbs me; that is, the Appropriations Committee's action in writing substantive law in reports. I think it is a dangerous practice. [Hearings before the Subcommittee on Conservation and Credit of the Committee on Agriculture, House of Representatives, dated March 28, 1966, on bills to amend the Bankhead-Jones Farm Tenant Act, at pp. 10-11.]

This dialogue is a much more open discussion of the intercommittee conflict than one usually finds, but the problem is everywhere apparent. Thus, for example, section 420 of the Act of August 3, 1956[4] deals with the same subject matter as section 512 of the Act of August 7, 1956.[5] The provisions are by no means identical, and perhaps not even entirely consistent, but they were adopted by different committees of the Congress and enacted only a few days apart. Unless a problem like this is so acute that the legislative counsel wishes to recommend a veto or take other heroic action, he is likely merely to let the two bills become law and worry about questions of interpretation later. He may recommend that the President, when he approves the legislation, comment briefly on the subject, but this too would be fairly unusual.

The rules which the two houses of Congress have made internally applicable to legislation[6] are so numerous, and so complicated, that an attorney working in the executive branch generally has no opportunity to be more than casually familiar with them, but they do constitute an important part of the legislative process, and to some extent are necessarily utilized in pursuit of its programs. Thus, for example, a provision in the Budget of the United States for 1970[7] relating to payments which had regularly been made to the State of Oregon over a period of years pursuant to permanent authorizing legislation, added the qualification "That the distribution of receipts for the current fiscal year . . . shall not exceed a total amount of $24,000,000 . . ."[8] although in preceding years the payments, made in accordance with a statutory formula, had exceeded this amount. Normally it is against the rules of the House of Representatives to amend substantive law in an appropriation bill; however, an exception is made for provisions which "retrench expenditures" (See Cannon; Precedents in the House of Representatives, H. Doc. 610, 87th Cong.: 21-22). While these rules often seem extremely technical, and are probably unfamiliar to lawyers who are not regularly involved in the legislative process, failure to follow them can easily result in the defeat of a legislative proposal.

CONSTITUTIONAL QUESTIONS

It will be noted from the colloquy previously quoted from the House Committee on Agriculture that objection was made to "writing substantive law in reports." Although a law of Congress, of course, must be passed by both houses, frequently there are restrictions written into committee reports which, if followed, may seriously impede effective action by the executive branch. The extent to which these restrictions are followed naturally depends at least as much on political considerations as on legal ones. It is rarely argued seriously that what is set forth in a committee report is in effect the law, but as one experienced legislative counsel has stated, "It's not so much what the law says, as what the Committee wants." This attitude is probably fairly widespread even now, but perhaps less so than formerly, and a strong president frequently makes it a matter of policy that the executive departments regard themselves as free to act.

Thus an Attorney General's Opinion of 1957 ruled unconstitutional a statutory provision prohibiting certain types of real estate conveyances and other transactions unless the executive departments concerned "come into agreement" with the cognizant congressional committees. The Attorney General cited and briefly analysed a number of similar provisions, all of them designed to give particular committees of Congress control over certain types of executive action, and some of them regarded as sufficiently serious by the President to warrant a veto. The Attorney General quoted at considerable length, and apparently associated himself with, the views stated by the president in the course of vetoing a previous bill:

> I do not believe that the Congress can validly delegate to one of its committees the power to prevent executive actions taken pursuant to law. Furthermore, the negotiation and execution of a contract is a purely executive function.[9]

In other words, the veto message had suggested two grounds of unconstitutionality: that the action which was sought to be controlled was essentially an executive action, so that presumably it must be taken by the executive branch; and, secondly, that in any case, even if congressional approval could be required, the right to give such approval could not constitutionally be delegated to a committee.

It is unfortunate that neither the veto message nor the Attorney General's Opinion made a clear choice between these alternative grounds, but in any event the result seems to be correct. They are cited here mainly for their practical significance. For the attorney in the executive branch must always be aware that, in complying with the desires of the congressional committees with which he works on a daily basis, there are constitutional limits to such

cooperation which may be more than theoretical. In the case just cited, the principle was clearly more than theoretical, for the President, having in his possession an Attorney General's Opinion which no one was paying any attention to, explicitly informed the various executive departments that they must follow this opinion, and not, in the future "come into agreement" with congressional committees. Not only this, but, at least in the case of the statutory provision which was the specific subject of the opinion, action must be taken to repeal it. The executive department at which the Attorney General's Opinion was specifically directed did not particularly relish the prospect of going before congressional committees to seek the repeal of legislation in whose enactment it had acquiesced, and with whose provisions it had willingly complied, on the grounds that it was unconstitutional; it informally suggested that such action might appropriately be taken by the Department of Justice, which was, after all, the final authority on questions of constitutionality within the executive branch. Or, alternatively, the Bureau of the Budget might submit the necessary legislation, since it dealt with a problem which was common to a number of executive departments. In any event, the offending provision of law was amended without undue difficulty, and an examination of section 511 of the Act of June 8, 1960,[10] together with the provision it amended, provides an interesting example of the substitution of a constitutional law for an unconstitutional one, although unfortunately the record does not indicate how this important transformation was brought about. The range of possibilities for legislation of this type is virtually limitless, and the Attorney General's Opinion does not make entirely clear what specific provisions a government lawyer may conscientiously acquiesce in as being constitutionally permissible, but it may be that the solution adopted by the 1960 statute, which replaced a "coming-into-agreement" provision with a reporting requirement, will set the pattern for future cases.

The problem of how far to cooperate with congressional committees can at times become extremely acute. Cooperation generally involves far more than merely supplying information, and in fact regularly takes the form of writing committee reports on legislation. In at least one instance, an attorney for an executive department was asked to write language for a committee report to the effect that a particular action taken by the department was illegal—an action which the attorney had previously ruled upon and found legal. In the last analysis, of course, there should be some point at which the attorney must clearly identify himself with the branch of the government for which he works, but the way in which legislation is currently drafted and processed can make the separation of powers on a personal level extremely difficult. Frequently, of course, an attorney in the executive branch is asked to provide a "drafting service" for a congressman or a congressional committee—that is, to prepare legislation in which his department is not interested or even actively

opposes, and which the congressman will introduce without administration support.

Problems of constitutionality recur with some degree of regularity, and the usual question is the authority of Congress or of the President. One of the most dramatic examples of this type of problem may be found in Opinions of the Attorney General 41: 313, where the attorney general ruled that the President had the power, under the constitution and the laws of the United States, to call the National Guard into federal service, and to use the guard, as well as the regular armed forces of the United States to the extent necessary, in order to overcome resistance to federal court orders desegregating schools. The opinion sets forth at considerable length a detailed chronological account of the Little Rock disorders, and it is a significant commentary on the state of the nation at that time that the opinion was dated November 7, 1957, but was not released for publication until December 29, 1958. The published opinion is presumably an extension and elaboration of the one which must have been furnished the president with comparatively little delay, at the outbreak of violence, and it is sufficiently leisurely in style to relate latter-day exigencies to the language of Alexander Hamilton in *The Federalist*:

> The legislatures, courts, and magistrates, of the respective members, will be incorporated into the operations of the national government as far as its just and constitutional authority extends; and will be rendered auxiliary to the enforcement of its laws. [Opinions of the Attorney General, 1958: 323]

Citing a good deal of judicial precedent, and interspersing his citations with a running account of the inflammatory actions taken by the state of Arkansas, the attorney general concluded "that the mere existence of a threat of violence would be insufficient to justify the Governor in taking action to nullify the order of the Federal court by the use of force" (p. 318) and that "The obligation which the Federal Constitution imposes upon State officers to uphold Federal law is in accord with their primary responsibility to maintain order within the State."

Other constitutional questions arose during the height of the government's various security programs, and in a number of instances the government's policies were invalidated by the courts. In the cases of Harmon v. Brucker and Abramowitz v. Brucker, the Supreme Court held that the Army could not constitutionally award a soldier a dishonorable discharge on the basis of preinduction activity which had been fully disclosed at the time of induction. The entire security program appears to have evoked vigorous opposition from a number of government lawyers, and in some cases the oral argument before the Supreme Court was not made by the Solicitor General's Office, as would normally have been the case.

While, as one might surmise, published legal opinions are generally in support of the executive action ultimately taken, a significant and long-standing dispute between Congress and the executive branch has been considerably illuminated by recent research disclosing an Attorney General's Opinion, withdrawn shortly after it was rendered, which has remained unpublished for almost thirty years. The dispute relates to the President's authority to "withdraw" public lands—i.e., to close them to public entry for mining, agriculture, and other purposes authorized by law. The Attorney General concluded in his opinion of July 25, 1940, that "prior to the enactment of the withdrawal act (in 1910), the President had authority to withdraw lands from the public domain and reserve them for public purposes, after they had been opened by the Congress to private acquisition. United States v. Midwest Oil Company, 236 U.S. 459, and authorities therein cited." However, the withdrawal act of June 25, 1910[11] provided that the President might "*temporarily* withdraw from settlement, location, sale or entry any of the public lands of the United States" (italics added). Accordingly, the question had frequently been raised—and has been even subsequent to the opinion—as to whether the President had only the temporary withdrawal authority provided by the 1910 statute, or whether he could properly make permanent withdrawals. The precise question before the Attorney General, however, was whether the President—and, by delegation, the Secretary of the Interior—could withdraw certain lands in Oregon "from all forms of appropriations under the public-land laws, including the mining laws". Since section 2 of the 1910 statute provided "that all lands withdrawn under the provisions of this Act shall at all times be open to exploration, discovery, occupation and purchase under the mining laws of the United States," the Attorney General concluded that "the act of June 25, 1910, as amended, defines and limits the President's general power of withdrawal, and that the proposed order, being in conflict with section 2 of that act, is unauthorized under such general power."

However, as indicated, the opinion cited above was subsequently withdrawn, and a year later the same Attorney General handed down an opinion concluding that the President could properly issue withdrawal orders without subjecting them to the restrictions contained in the 1910 statute. In reaching this result, the Attorney General stated:

> All that the act of 1910 expressly does is to authorize such temporary withdrawals, subject to certain limitations. It expressly negatives no power possessed by the President with respect to permanent withdrawals. Since the power of permanent withdrawal and reservation for public use then existed and was recognized by the Congress when the 1910 act was passed, and since neither from the terms of the act nor from the circumstances surrounding the enactment is there to be divined an attempt to take away such power, I am of the opinion that the act may not properly be construed as covering the full authority of the President, but must be considered

only as affirming the authority which had been brought in question, namely that to make temporary withdrawals.[12]

It is noteworthy that this point has never been finally determined by the courts, but in fact this is true of many administrative interpretations of the law. To some extent, this may be because the language of the authorizing statutes under which the government operates is itself somewhat imprecise. For example, it might seem that the phrase "inconsistent with interests of national security," as used in section 303 of the Act of August 10, 1959[13] is sufficiently vague as to be susceptible of almost any interpretation. The administrative interpretation of this language has in fact been challenged, on at least one occasion, but, as might be assumed, the challenge has not been through the courts, or by any private party, but by a congressional committee. It is simply not the type of legal problem that is likely to come before the courts. A similar, but in some respects more specific, phrase is that contained in U.S.C. 10, 2304(a)(1), which authorizes the negotiation of certain contracts (as opposed to awarding them on an advertised competitive basis to the lowest responsible bidder), where "it is determined that such action is necessary in the public interest during a national emergency declared by Congress of the President." The phrase "necessary in the public interest" is so broad as to encompass almost any interpretation; on the other hand, it would appear not too difficult to ascertain whether a national emergency has been declared. In point of fact, the emergency declared at the time of the Korean action remained in effect far longer than is generally realized, and the cited statutory provision was relied upon for a very substantial period of time. Eventually the use of this authority was considerably limited, largely by agreement with the congressional committees.

PROCUREMENT BY NEGOTIATION

In fact, the relatively recent introduction on a large scale of procurement by negotiation has resulted in a fairly stupendous body of administrative law, as well as a vast number of congressional hearings. Just as the passage of the Wagner Act or the Securities and Exchange Act may be said to have opened up enormous new areas for regulatory proliferation and legal expertise, the series of statutes inaugurating the era of procurement by negotiation virtually revolutionized government contracting. The revolution took place rather later than those brought about by the other statutes mentioned, but is still sufficiently ancient at present writing to be accepted by all except a few protesting voices which, in one way or another, have attempted to slow it down.

It would be pointless to attempt even a superficial discussion of the procedures and limitations of procurement by negotiation, but the problem looms so large in the experience of so many government lawyers that it may be fruitful to include a brief introduction to the subject:

> From the initial enactment in 1861 of what later became section 3709 of the Revised Statutes down to World War II, government contracts for the procurement of supplies and services were entered into for the most part by means of formal advertising—that is to say, by the solicitation of competitive bids and formal award to the lowest responsible and responsive bidder. And despite certain exceptions to the strict requirement of Rev. Stat. sec. 3709, whether those exceptions grew out of interpretations of that law by the Comptroller General or out of a few specific statutory authorizations for negotiation, it is unquestioned that until the enactment of the First War Powers Act late in 1941 the use of negotiation as a method of procurement—that is to say, a method of procurement unencumbered by the formalities and procedures applicable to advertised procurement and designed to give scope to the use of normal purchasing practices in the making of procurement contracts—was rare.[14]

The public interest in utilizing advertised procurement procedures wherever possible is clear; on the other hand, the difficulties of obtaining complex and sophisticated equipment through competitive bids are enormous, and these two elements of public policy are continually in conflict, particularly in those departments, like the Department of Defense, whose requirements are of a very specialized nature. Although the trend to the negotiation of contracts has been widely criticized, the matter is not a simple one. Furthermore, although a policy of advertised procurements is supposed to permit wide participation by large numbers of competent contractors as well as reduce the cost to the government, there are other policies which have the effect of limiting the number of bidders.

An interesting example of this is the policy spelled out by the Congress in the Small Business Act of 1953.[15] In section 202 of that statute there is a declaration that "the essence of the American economic system of private enterprise is free competition. It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect insofar as is possible the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts for supplies and services for the Government be placed with small-business enterprises, and to maintain and strengthen the overall economy of the Nation." In accordance with this policy, section 214 of the 1953 statute provided that "small-business concerns within the meaning of this title shall receive any award or contract or any part thereof as to which it is determined by the [Small Business] Administration and the contracting procurement agency (A) to be in the interest of mobilizing the Nation's full productive capacity." In order to carry out this policy, procedures were devised for the

setting aside of contracts, or portions thereof, to be performed by small business. However, when the Small Business Administration requested that the Department of Defense set aside, for performance by small business, housing contracts to be executed pursuant to title IV of the Housing Amendments of 1955,[16] that Department demurred, citing two legal objections. First, since the Small Business Act of 1953 referred specifically to "contracts for supplies and services," it was not clear whether construction contracts were subject to the provisions of the Act; and, secondly, the Housing Amendments of 1955 specifically provided that "before the Secretary [of Defense] shall enter into any contract as authorized by this section for the construction of housing, he shall invite the submission of competitive bids after advertising" (Housing Amendments, 1955: 651).[17]

Where there are differing views on matters of this kind between various agencies of the federal government, it is common practice to submit the dispute to the Comptroller General, and this was done. The Comptroller General adopted the view taken by the Department of Defense, holding that the Housing Amendments of 1955 required "unrestricted advertising," and that, in addition, there was doubt as to whether the Small Business Act of 1953 was applicable to construction contracts.[18] Subsequently, the Act of July 18, 1959[19] completely revised the Small Business Act, and specifically referred to "contracts for maintenance, repair, and construction."[20] Accordingly, the Small Business Administration again referred the question to the Comptroller General, and this time received a favorable opinion. The Comptroller General indicated that the revised Small Business Act clearly had application to construction contracts, but made no reference to the other problem of whether the setting aside of contracts could be regarded as "unrestricted advertising."[21]

The case is interesting not only because it reflects the kind of considerations which must inevitably affect legal decisions, inside the government as well as outside, but because the two policies which were at variance were important and praiseworthy objectives based on statutory directives. The conflict between effecting what is, at least theoretically, the least expensive procurement, and administering some other policy is a constantly recurring theme within the government. When the legislative counsel obtains comments from within his department on bills providing prevailing-wage or other welfare benefits for some particular class of contractor employees, he will regularly find that procurement offices oppose the legislation for the additional costs it will impose, while the labor experts will take the position that the new benefits are meritorious if not actually essential. Likewise, in making comments on Tariff Commission recommendations, the branch of the department which deals with international matters is likely to oppose increasing tariffs or reducing quotas on the grounds that such action will impair relationships with

some historic ally, while the office which is concerned with maintaining the domestic industry will conclude that, in the particular case, relief is absolutely critical. Conflicting policy considerations of this type occur almost daily, and lawyers are almost inevitably involved in them, although the issue does not always resolve itself into a legal one; even where it does, as indicated above, the solution may not depend on legalities.

FEDERAL SUPREMACY AND PROPERTY RIGHTS

In other types of conflict, the Federal Government finds itself opposed to the states. In Miller v. Arkansas (1956), a contractor who was constructing facilities for the Department of the Air Force was convicted by the State of Arkansas for not obtaining a state license from the Contractors Licensing Board. The United States Supreme Court, in a per curiam decision, held that the state licensing requirement conflicted with Federal procedures for determining the competence of its contractors, and accordingly reversed and remanded. It is significant that the Court not only cited the Armed Services Procurement Act, which provided that awards of advertised contracts "shall be made . . . to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered", but that it also quoted at length from the Armed Services Procurement Regulations, which set forth the criteria to be considered in qualifying a contractor. These criteria included such things as the contractor's financial resources, organization, and performance record. The Court also considered the state standards which had been promulgated for the same purpose. After reviewing the two lists, whose similarity was indeed striking, the Court concluded:

> Mere enumeration of the similar grounds for licensing under the state statute and for finding 'responsibility' under the federal statute and regulations is sufficient to indicate conflict between this license requirement which Arkansas places on a federal contractor and the action which Congress and the Department of Defense have taken to insure the reliability of persons and companies contracting with the Federal Government. [Accordingly] the Arkansas contractor licensing requirements would give the State's licensing board a virtual power of review over the federal determination of 'responsibility' and would thus frustrate the expressed policy of selecting the lowest responsible bidder. [190]

By the same token, the Supreme Court had, many years before, exempted a Federal mail carrier from obtaining a state driver's license (Johnson v. Maryland, 1920).

The federal government seems to get the long end of the stick in a number of fairly disparate situations. One question which recently has produced a good deal of controversy relates to the grazing of livestock on public lands, for the United States has effectively asserted the right to cancel the permits of ranchers who have used the public lands for generations, without the payment of compensation. In this latter case, it may be well to state at the outset, no very convincing argument has been raised against the government's legal rights; but the arguments on policy grounds have been vehement and almost continuous.

The nub of the issue is, as stated in Osborne v. U.S., that "A grazing preference is not a right." This is not only true now; it is a rule that dates from the earliest court decisions. Nevertheless, in order to present the equities on both sides of the case, it is useful to quote the Osborne case at somewhat greater length, since it discusses in detail:

> the applicable legal history of stock grazing on the public lands of the United States. In the pioneer or 'emigrant' days of Western America immense areas of unappropriated and otherwise unused territory were freely used by stockmen for grazing. The government not only refrained from objecting to this practice but in various ways encouraged it and in time this privilege, to use the words of the Supreme Court in Buford v. Houtz, 133, U.S. 320, 326, 10 S. Ct. 305, 307, 33 L. Ed. 618, became "... an implied license, growing out of the custom of nearly a hundred years...." This license was held to be the basis of various rights as between the licensee and other private individuals but not as between the licensee and the government. The same idea is expressed in Light v. United States, 220 U.S. 523, 31 S. Ct. 485, 487, 55 L. Ed. 570, wherein, after reciting the practice, it is said:
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> > "And so, without passing a statute, or taking any affirmative action on the subject, the United States suffered its public domain to be used for such purposes. There thus grew up a sort of implied license that these lands, thus left open, might be used so long as the government did not cancel its tacit consent.... Its failure to object, however, did not confer any vested right on the complainant, nor did it deprive the United States of the power of recalling any implied license under which the land had been used for private purposes."

This quotation from the Osborne case sets forth what is believed to be not only the majority rule but the correct one. However, some of the decisions go quite a long way towards turning the privilege or preference into a right. While it may be possible to reconcile all the cases, the official position of the Department of the Interior appears to treat them as inconsistent:

> The thesis ... that the holder of a grazing permit has a "right" as against the United States to the continuance or renewal of the permit, cannot be accepted. Notwithstanding McNeil v. Seaton, 281 F.2d 931, 934 (1960), and Red Canyon Sheep Co. v. Ickes, 98 F.2d 309, 315 (1938), the grazing permits issued under section 3 of the Taylor Grazing Act are only or merely privileges withdrawable at any time by the United

States; Oman v. United States 179 F.2d 738 (1949); Fauske v. Dean, 101 N.W. 2d 769 (1960); Bowman v. Udall, 243 F. Supp. 672 (1965, aff'd 364 F. 2d 767, cert. denied, 385 U.S. 878). [Department of the Interior, 1968: 21]

Consequently, the plaintiff in the Osborne case, having been deprived of his right to use the federal lands, had no constitutional right to a judicial determination of just compensation. He did, however, have a statutory right, because of the facts of the particular case, to such amounts "as the head of the department . . . using the lands shall determine to be fair and reasonable," although "such payments shall be deemed payment in full," and "nothing herein shall be construed to create any liability not now existing against the United States" (Act of July 9, 1942).[22] Furthermore, the court recognized that grazing permits were valuable, noting that "numerous instances are to be found where permits issued by a sovereign are highly valuable as between private parties but which may be revoked by the sovereign without the payment of compensation."

A similar statement may be found in the decision of the Court of Appeals for the District of Columbia in the leading case of Red Canyon Sheep Co. v. Ickes (1938: 315):

> We recognize that the rights under the Taylor Grazing Act do not fall within the conventional category of vested rights in property. Yet, whether they be called rights, privileges, or bare licenses, or by whatever name, while they exist they are something of real value to the possessors and something which have [sic] their source in an enactment of the Congress.

The Taylor Grazing Act (June 28, 1934)[23] was intended "to promote the highest use of the public lands," to protect the federal range which had already been vastly overgrazed and depleted; it authorized the Secretary of the Interior to establish grazing districts, and to determine, in effect, where and how much grazing was to be permitted. Pursuant to this authority he has issued the Federal Range Code, a complex and comprehensive set of regulations describing the grazing practices which will be allowed, and establishing the basis on which grazing preferences will be granted. There have been administrative adjudications covering large areas of the public domain. And where there is an administrative determination that conditions of soil, climate, etc., mean that a rancher must remove some of his livestock from the public range, a reduction is ordered. Where the determination is well founded, the reduction of grazing privileges is not only consistent with the purposes of the Taylor Act, it is also in accord with the law as it existed prior to that statute, which the cited cases clearly demonstrate.

On the other hand, this situation has led to a number of congressional hearings, where not all the views expressed were entirely sympathetic to the

government's position. The government, moreover, while modifying its regulations in some respects so as to make the reduction of grazing privileges a less drastic procedure than it previously had been, has consistently reiterated its position that permittees do not have vested rights. In one recent hearing it was pointed out by the Director of the Bureau of Land Management that:

> there is nothing in the Taylor Grazing Act that requires or contemplates that a needed adjustment in grazing use be withheld merely because the adjustment would adversely affect the income from private ranching operations. Nor can the adverse effect on a rancher's private operations be made the basis for modification of a district manager's decision determining the rate of use to be permitted on the Federal range. [Transcript of Proceedings, Subcommittee on Public Lands of the Committee on Interior and Insular Affairs, 1963: 761]

It is perhaps noteworthy that the foregoing statement was not made in oral testimony, but was provided for the record; and, further, that the Director who made it did not remain in office for very long.

Moreover, although the Department of the Interior has consistently maintained its position that protection of the federal range was paramount, even at the expense of grazing permittees, it has recognized that in some situations compensation should be paid. The Department itself has made active efforts to improve the range, but has also endeavored to encourage its permittees to do likewise, and clearly this is made more difficult where the permittee has no compensable interest in any improvements he may have constructed. The Department has, however, attempted to reconcile the conflicting policies of encouraging range improvements by permittees and refusing to recognize any vested rights.

> The Department has provided by regulation that any third party proposing to acquire public land with range improvements on it shall agree to compensate the range operator for the current value of his interest in the improvement. The act of July 9, 1942, authorizes compensation when public lands are allocated for national defense purposes. Without specific statutory authority, now lacking, the Department cannot compensate for range improvements when the privilege is cancelled in connection with non-national defense Government use of the land. During the 87th Congress, the Department requested enactment of legislation to authorize such compensation. The Executive Communication which accompanied H.R. 3387, 88th Congress and testimony before the House Subcommittee on Public Lands explained the problem. At the public hearing, livestock industry witnesses withheld support, apparently on the basis that grazing tenure would be weakened if provisions were made for compensation upon discontinuance. [Department of the Interior, March 29, 1968: 19]

While general legislation authorizing the Secretary of the Interior to make such compensation has not been enacted, bills to this effect have been introduced in subsequent congresses. The department has endorsed the

concept of compensating permittees for range improvements, but not for the value of the permits themselves. On the other hand, in certain limited situations compensation has been provided by law for these, too. This has been done under the 1942 statute, cited above; although the statute left the amount of compensation entirely to administrative discretion, and did not require payment for permit values, such payments have generally been made, and the practice is clearly consistent with the statutory authority. While there are obvious difficulties in the way of evaluating a permit which is legally terminable but is likewise almost routinely renewable, the rather vague principle of the 1942 statute has been incorporated by reference in the Navajo Indian Exchange Act (September 2, 1959)[24] which provides that:

> The secretary of the Interior shall compensate persons whose grazing permits, licenses or leases covering lands transferred to the Navajo Tribe pursuant to this section are cancelled because of such transfer. Such compensation shall be determined in accordance with the standard prescribed by the Act of July 9, 1942, as amended [43 U.S.C. 315q].

The Department of the Interior has not resisted making payment for permit values to Indians, but has thus far argued against extending the principle to other permittees.

The fact that legislation of the type mentioned by the Department of the Interior has been reintroduced is sufficient indication that the law in this area is still developing, that the continuing battle for the use of the federal range is by no means over. But to some degree this is true of all the problems mentioned: hearings have regularly been held, and will continue to be held, on the proper use of negotiation in the award of government contracts; on the withdrawal of public lands; and even on the authority of the President. While it would be presumptuous to suggest that even the temporary or interim solutions to these problems are provided by the executive branch of the government, this is considerably closer to the truth than would have been the case a generation ago.

CONCLUSION

Although during Theodore Roosevelt's administration, the submission of draft legislation by the President was so unusual that Congress felt justified in ignoring his proposals, the practice is now routine. The lawyer in the executive branch therefore drafts the bills in which his department is interested, does his best to get them enacted into law, interprets them and administers them; even more significantly, perhaps, when there is an apparent gap in

authority, the tools at his disposal are fairly impressive. Thus, in the short term, and possibly in the long run as well, a president will have an easier time trying to exercise withdrawal authority his attorney general told him he does not have than Congress will have trying to force an attorney general to use wiretap authority he believes unconstitutional. In the perpetual power struggle between Congress and the President, the latter does not often come in second, and the victories, such as they are, are for the most part legal ones.

NOTES

1. See U.S.C. 10: 133(a).
2. See 136(b).
3. See 136(c).
4. See Stat. 70: 991, 1019.
5. See Stat. 70: 1091, 1111.
6. The rules in the two houses are of course not the same; the most notorious difference is probably the rule in the Senate permitting filibusters.
7. The cited provision was in the budget submitted by President Johnson; it was subsequently amended in President Nixon's budget.
8. Budget: 556; see also explanation on 557, note 4.
9. Opinions of the Attorney General (1957) 41: 300, 309.
10. See Stat. 74: 186.
11. See Stat. 36: 847, as amended, U.S.C. 43: 141-143.
12. See Opinions of the Attorney General, 40: 73, 77. For a copy of and an extended discussion of the earlier opinion, see Study of Withdrawals and Reservations of Public Domain Lands prepared for the Public Land Law Review Commission, at 113, and Appendix B. The latter opinion has frequently been criticized, but appears never to have been judicially overturned.
13. See Stat. 73: 302, 316.
14. See Navy Contract Law (1959), Second Edition: 12.
15. See July 30, 1953, Stat. 67: 230.
16. See Stat. 69: 635, 646.
17. See Stat. 69: 635, Section 403(a).
18. See Comp. Gen. 37: 271.
19. See Stat. 72: 384.
20. See Act of July 18, 1959, Stat. 72: 384.
21. See Comp. Gen. 38: 326.
22. See Stat. 56: 654, U.S.C. 43: 315q.
23. See Stat. 48: 1269, as amended (U.S.C. 43: 315 et seq.)
24. See Stat. 72: 1686.

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FAUSKE v. DEAN (1960) NW 2d 101: 769.
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