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Questions and Answers

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QUESTIONS AND ANSWERS

Compiled by
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"Questions and Answers" is a forum for the exchange of solutions, suggestions, and differences of opinion about problems that arise in the daily operation of law libraries. We welcome questions in all areas of library and information service, including reader services, technical services, and administration. Questions should be directed to Nicholas Triffin, Hamline University School of Law, 1536 Hewitt Ave., St. Paul, MN 55104. The compilers will attempt to provide prompt answers to every question submitted, regardless of whether it is chosen for publication.

Question:

Are there any federal standards of conduct regarding the writing of articles or books by federal government officials, particularly Justice Department employees?

Answer:

Although I thought that any standards would be by executive as opposed to legislative decree, I began the search with the annotated federal codes. A note to 5 U.S.C. § 7301 includes the Code of Ethics for Government Service.¹ The Code sets forth, in very general terms, rules of conduct which would make Clark Kent proud to be both a federal bureaucrat and a writer. Section 7301 includes the statement that "[t]he President may prescribe regulations for the conduct of employees in the executive Branch."

The explanatory notes to section 7301 mention Executive Order 11,222 (May 8, 1965). Section 202 of the Executive Order, which is entitled Prescribing Standards of Ethical Conduct for Government Officers and Employees, reads:

An employee shall not engage in any outside employment, including teaching, lecturing, or writing which might result in a conflict, or an apparent conflict, between

the private interests of the employee and his official government duties and responsibilities, although such teaching, lecturing, and writing by employees are generally to be encouraged so long as the laws, the provisions of this order, and Civil Service Commission and agency regulations covering conflict of interest and outside employment are observed.

Section 201(b) of the Order, which authorizes agency heads to establish regulations for their employees, led me to Title 28 of the *Code of Federal Regulations* (C.F.R.), the Justice Department.²

28 C.F.R. Part 45 sets forth the Justice Department's conduct standards for their employees. The regulations provide that: (a) employees shall not accept fees for a speech, public appearance, or writing that was prepared as part of one's official duties; (b) employees can not receive compensation for activities when the subject draws substantially on official data or ideas not publicly disseminated or is devoted substantially to the operations of the employees' department; and (c) teaching, lecturing, or writing that depends on information received as a result of government employment is not permitted whether or not the individual is compensated unless the public already has access to the information, or the Attorney General authorizes the dissemination.³

Knowing that the Civil Service Commission, now the Office of Personnel Management, was authorized to regulate government employees, I referred to Title 5 of the C.F.R. Title 5 prohibits activities "not compatible with the full and proper discharge of the duties and responsibilities of his

* Co-compiled in alternate issues of *Law Library Journal* by Nicholas Triffin, Director of the Law Library, Hamline University School of Law.

1. Act of July 3, 1980, Pub. L. No. 96-303, section 3, 94 Stat. 855 (noted at 5 U.S.C. § 7301 (1982)).

2. Executive Order 11,222 could also have been found using UNITED STATES PRESIDENT, CODIFICATION OF PRESIDENTIAL PROCLAMATIONS AND EXECUTIVE ORDERS (Jan. 20, 1961-Jan. 20, 1981) (Washington, DC: Office of the Federal Register, available from Superintendent of Documents, Government Printing Office).

3. 28 C.F.R. § 45-735-12 (1982).

Government employment."⁴ Title 5 continues, "Employees are encouraged to engage in teaching, lecturing, and writing that is not prohibited by law, the Executive Order, this part, or the agency regulations. . . ."⁵

Finally, an opinion of the Office of Legal Counsel of the United States Department of Justice responded to a White House request for advice "regarding the legality and propriety of presidential appointees writing articles and books for publication, whether with or without compensation."⁶

Federal employees engaging in outside activities should also take note of Public Law 87-849, which prohibits activities presenting a conflict of interest.⁷

Question:

Our library received two volumes of the *Opinions of the Office of Legal Counsel of the United States Department of Justice*. How do these opinions differ from the *Opinions of the Attorney General*?

Answer:

The Attorney General has broad authority to delegate responsibilities.⁸ Consequently, the Office of Legal Counsel (OLC) prepares the formal opinions of the Attorney General, the opinions the Attorney General actually signs; renders informal opinions and legal advice to federal agencies; assists the Attorney General in performing his or her functions as advisor to the President; advises, prepares, and makes revisions to proposed executive orders and proclamations; and approves proposed orders of the Attorney General.⁹

Volume 1 of the *Opinions of the Office of Legal Counsel*, which is published by the Government Printing Office, includes opinions rendered by the OLC in 1977. Volume 2, published in 1981, reports opinions from 1978 and also includes selected opinions issued to the White House. (Although you may receive a third volume, there are no plans to continue this series.) Only those opin-

ions that the addressee agrees to have published are reported.¹⁰

Unlike the *Opinions of the Attorney General*, the *Opinions of the Office of Legal Counsel* are not signed by the Attorney General. There are no official guidelines concerning when the Attorney General should sign an opinion; such decisions are made on an ad hoc basis. Political clout may be involved. If the request for an opinion from the OLC is made at the cabinet level or by the President, the opinion usually will be signed by the Attorney General. In recent years the Attorney General has issued fewer and fewer formal opinions. An official in the OLC told me that fewer formal opinions are issued because the office function of OLC has been upgraded and because opinions requested of OLC often involve highly technical matters. As stated in the 1980 *Annual Report of the Attorney General*, opinions signed by the Attorney General "ordinarily involve issues of major significance."

The Judiciary Act of 1789 empowered the Attorney General to advise the President and heads of executive departments, in addition to the responsibility of representing the government in cases before the United States Supreme Court.¹¹ Although the Attorney General has no statutory obligation to give legal opinions to independent regulatory agencies, the Attorney General is not prohibited from doing so. The current policy is to give opinions to independent agencies if the requesting agency agrees to consider the opinion binding.

Theodore Olson, Assistant Attorney General for the Office of Legal Counsel, in remarks to the Federal Legal Council, indicated that the President and department heads seek legal advice from OLC for three reasons: to help avoid litigation; to provide additional support for administrative actions because the opinions provide considerable weight in court should litigation ensue; and to resolve disputes within the executive branch.¹²

The Office of Legal Counsel typically receives two types of questions. Often a department head wants to know what powers or duties flow from a statutory grant of authority. At other times, a

4. 5 C.F.R. § 735.203(a) (1983).

5. 5 C.F.R. § 735.203(c) (1983).

6. 2 Op. Off. Legal Counsel 361 (1977) (No. 78-81, Memorandum Opinion of the President).

7. Act of Oct. 23, 1962, Pub. L. No. 87-849, 76 Stat. 1119 (codified as amended at 18 U.S.C. §§ 201-218, 281, 282 (1976)). FEDERAL ETHICS HANDBOOK (Michie Ed. Staff 1981) (Charlottesville, VA: Michie/Bobbs-Merrill) added nothing to the information at hand.

8. 28 U.S.C. § 510 (1976).

9. 5 C.F.R. § 0.25 (1983).

10. 28 U.S.C. § 521 (1976) obligates the Attorney General to print those opinions that the Attorney General considers valuable for preservation.

11. Ch. 20, § 35s, 1 Stat. 92-93 (1789).

12. Executive Order 12,146, 3 C.F.R. 409 (1979) established the Federal Legal Council and grants authority to the Office of Legal Counsel to resolve interagency disputes.

department head poses questions of constitutional dimensions. The OLC, however, tries to avoid passing on the constitutionality of acts of Congress except when prerogatives of the executive and legislative branches conflict.

The Attorneys General have not always agreed on the extent to which executive officers are bound by, and may rely upon, their opinions. Early opinions indicated that the opinions were advisory in nature and therefore could be ignored by the receiving officer.¹³ Later opinions stressed the "practical effect" that should be given to the opinions of the Attorney General and stated that executive officers should consider themselves bound by the opinions.¹⁴ The most recent opinion on reliance focused on the binding nature of the opinions of the Attorney General and declared that executive officers may rely on these opinions despite contrary decisions by the Comptroller General.¹⁵ Many commentators consider *Smith v. Jackson*¹⁶ to have held that executive officers may properly rely on opinions of the Attorney General and that the opinions are binding upon such officers absent subsequent reversal by the Attorney General or the courts. Other commentators caution that this interpretation cannot be definitively deduced from *Smith v. Jackson*.

Federal courts, however, are not bound to follow the opinions of the Attorney General, although the courts accord substantial weight to the opinions.¹⁷

The Office of Legal Counsel believes that its unsigned opinions have the same legal force as a formal opinion of the Attorney General. The OLC maintains that when the OLC acts pursuant to a delegation of authority from the Attorney General, OLC opinions have the same practical weight as an opinion of the Attorney General. One commentator suggests, however, that an "informal opinion does not carry the same authority that attaches to a formal opinion."¹⁸

Several authors have written on the authority of Attorney General opinions.¹⁹ The formal opin-

ions of the Attorney General were discussed previously in this journal.²⁰

Question:

What is a legislative veto? I was taught that only the President had veto powers.

Answer:

You can't believe everything that you read or are taught. According to Theodore B. Olson, Assistant Attorney General for the Justice Department's Office of Legal Counsel, the legislative veto is a:

statutory provision under which Congress, or a unit of Congress, is purportedly authorized to adopt a resolution that will impose on the Executive Branch a specific requirement to take or refrain from taking an action. . . . Such a provision contemplates a procedure under which one or both Houses of Congress, or a committee of one House, may . . . overrule, reverse, revise, modify, suspend, prevent or delay an action by the President or some other part of the Executive Branch.²¹

"Congressional veto," "one-house veto," and "two-house veto" are other terms used to describe such Congressional action. Using the two-house veto, both houses of Congress can, by

OF JUSTICE OF THE UNITED STATES 126-175 (1927); H. CUMMINGS & C. MCFARLAND, *FEDERAL JUSTICE* 78-92, 108-10, 511-20 (1973); H. M. HART & H. WESCHLER, *FEDERAL COURTS AND THE FEDERAL SYSTEM* 70-74 (1973); Nealon, *The Opinion Function of the Federal Attorney General*, 25 N.Y.U. L. REV. 825 (1950).

20. *Impact of Law Officers on American Law*, in *Proceedings of the 67th Annual Meeting of the American Association of Law Libraries Held at St. Paul, Minnesota, June 22-26, 1974*, 67 LAW LIBR. J. 482 (1974). For history and further information on the functions of the Office of Legal Counsel, see Wozencraft, *OLC: The Unfamiliar Acronym*, 57 A.B.A. J. 33 (1971).

21. *Congressional Review of Agency Rulemaking: Hearings Before the Subcomm. on Rules of the House of the Comm. on Rules of the House of Representatives*, 97th Cong., 1st Sess. 5-6 (1981) (statement of Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel). For more detailed discussion of the legislative veto, see *Consumers Energy Council v. Federal Energy Regulatory Comm'n*, 673 F.2d 425 (D.C. Cir. 1982) (U.S. appeal pending) (229 footnotes); *Atkins v. United States*, 556 F.2d 1028 (Ct. Cl.), *cert. denied*, 434 U.S. 1009 (1978); Watson, *Congress Steps Out: A Look at Congressional Control Over the Executive*, 63 CAL. L. REV. 983 (1975).

13. 17 Op. Att'y Gen. 332, 333 (1972); 5 Op. Att'y Gen. 387, 390 (1951).

14. 38 Op. Att'y Gen. 176, 180 (1935); 37 Op. Att'y Gen. 562, 563 (1934); 26 Op. Att'y Gen. 81, 87 (1906); 20 Op. Att'y Gen. 648 (1893).

15. 42 Op. Att'y Gen. 406 (1969).

16. 241 F. 747, 773 (1917), *aff'd*, 246 U.S. 388 (1918).

17. *Harrison v. Vose*, 50 U.S. (9 How.) 372 (1850).

18. D. DEENER, *THE UNITED STATES ATTORNEY GENERAL AND INTERNATIONAL LAW* 75 (1957).

19. *See, e.g., A. LANGELLUTIG, THE DEPARTMENT*

concurrent resolution, affect an executive agency's actions.²² At other times action by only one house,²³ or even a committee of one house,²⁴ may have the same effect.

Not surprisingly, the executive branch does not look favorably upon the legislative veto, especially veto provisions that apply to agencies under the direct supervision and control of the President. Since the administration of Herbert Hoover, every President has expressed the opinion that the legislative veto violates several constitutional principles.²⁵ The executive branch has argued that the legislative veto violates article I, section 7, clauses 2 and 3 of the United States Constitution because all congressional bills must be presented to the President for approval or veto and that by using the legislative veto, Congress avoids this requirement. Citing the same constitutional provisions, the executive branch has also contended that the one-house and committee vetoes violate the principles of bicameralism—the requirement that both houses of Congress must act in order to legislate. The executive branch has further maintained that the legislative veto contravenes the principle of separation of powers.²⁶

Although Ronald Reagan has criticized agency abuses of administrative powers and has attempted to limit agency rule-making,²⁷ his administration continues the executive branch's opposition to the legislative veto.

On June 23, 1983, the United States Supreme Court held unconstitutional the legislative veto provision in section 244(c)(2) of the Immigration and Nationality Act.²⁸ The Court's action will probably preclude further use of the legislative veto by Congress and will invalidate provisions in nearly two hundred federal statutes.²⁹

22. See, e.g., 15 U.S.C. § 1410b (d) (1) (1976).

23. See, e.g., 31 U.S.C. § 1403 (b) (1976).

24. See, e.g., 43 U.S.C. § 1714 (e) (1976).

25. President Wilson vetoed two measures passed by Congress because they contained legislative veto provisions. See 59 CONG. REC. 7,027 & 8,069 (1920).

26. See K.C. DAVIS, ADMINISTRATIVE LAW TREATISE § 2.6 (1978 & Supp. 1982).

27. See, e.g., Exec. Order No. 12,291, 3 C.F.R. 127 (1982).

28. *Immigration and Naturalization Serv. v. Chadha*, 103 S. Ct. 2764 (1983).

29. See *id.* at 2810-11 (White, J., dissenting) ("Today's decision strikes down in one fell swoop provisions in more laws enacted by Congress than the Court has cumulatively invalidated in its history."). Justice White's dissent also includes a list of journal articles both favorably and unfavorably disposed towards the legislative veto. *Id.* at 2797 n. 12 (White, J., dissenting).

Question:

I've heard the word "wunderlich" used but have no idea what it means. Can you help?

Answer:

Your first inclination would probably be to look up the term in *Black's Law Dictionary*, although you would not have any luck. You would also be unsuccessful with the indexes to *Corpus Juris Secundum* or *Words and Phrases*. However, "wunderlich" is listed in the index to *American Jurisprudence 2d* and can also be found in the *Federal Quick Index 3d* (part of the *ALR Federal* series).

The word wunderlich is more appropriately used in reference to the Wunderlich Act.³⁰ (Had you known it was an act, either *Shepard's Acts and Cases by Popular Name* or the popular name tables in *United States Code, United States Code Annotated*, or *United States Code Service* would have helped.)

The Wunderlich Act was passed by Congress in 1954 to overcome the United States Supreme Court's decision in *United States v. Wunderlich*.³¹ In that case, the Court narrowed the circumstances under which judicial review of administrative decisions in government contract disputes cases was appropriate.

Government contracts typically include "disputes clauses." In such a clause, the parties agree that administrative decisions regarding any disputes under the contract are final. Prior to the *Wunderlich* decision, however, the United States Court of Claims overturned administrative decisions if the decisions were fraudulent, arbitrary, capricious, or so grossly erroneous as to imply bad faith. The Court of Claims believed that an administrative decision was arbitrary (and perhaps rendered in bad faith) if the decision was not supported by substantial evidence. The Supreme Court narrowed the scope of judicial review by the Court of Claims by imposing the fraudulent test. This test required that the Court of Claims find conscious wrongdoing by the administrative agency before the Court of Claims could overturn the administrative decision. Congress responded with the Wunderlich Act, which reestablished the standard of review used by the Court of Claims prior to the Supreme Court's decision.

For a recent treatise on the legislative veto, see B. HINKSON CRAIG, *THE LEGISLATIVE VETO: CONGRESSIONAL CONTROL OF REGULATION* (1983).

30. Ch. 199, 68 Stat. 81 (1954) (codified at 41 U.S.C. §§ 321-322 (1976)).

31. 342 U.S. 98 (1951).

Government contract disputes are initially decided by a contracting officer in the agency which let the contract. Determinations of the contracting officer are then reviewable by a contract appeals board. Although not all administrative agencies have their own contract appeals boards, each agency has a procedure for the handling of such matters.

In Commerce Clearing House's *Contract Appeals Decisions* are listed fourteen agencies that have internal contract review boards. Agencies without their own boards may delegate review responsibilities to one of the existing boards. Also included in *Contract Appeals Decisions* are brief biographies of the members of the boards and the rules of practice for each board. These rules specify the procedures which parties must follow to appeal the determination of the contracting officer. The Office of Management and Budget's Office of Federal Procurement Policy established "Uniform Rules of Procedures for Boards of Contract Appeals" to make the procedural rules of the various appeals boards more consistent. The Uniform Rules can be found in the CCH service.

The Contract Disputes Act of 1978³² governs the procedures by which contractors (and now government agencies) may resolve government contract disputes. However, all researchers should know that the Court of Claims (as well as the Court of Customs and Patent Appeals) was abolished, effective October 1, 1982, by the Federal Courts Improvement Act of 1982.³³ In their place Congress established the United States Claims Court and the United States Court of Appeals for the Federal Circuit.³⁴

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32. 41 U.S.C. §§ 601-612 (Supp. III 1979).

33. Pub. L. No. 97-164, 96 Stat. 25 (1982) (codified as amended in scattered sections of 28 U.S.C.).

34. For an overview of the jurisdictional changes as a result of the Federal Courts Improvement Act, see Schwartz, *Two New Federal Courts*, 68 A.B.A. J. 1091 (1982).

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Question:

To attend the 1982 AALL Annual Meeting, I traveled from Washington, D.C., to Detroit via the Pennsylvania and Ohio Turnpikes. For income tax purposes, I need to know what the tolls were for my trip. Can you help?

Answer:

The toll on the Pennsylvania Turnpike from Breezewood (where you entered) to Gateway (the westernmost exit) was \$3.85. You paid \$3.60 to the collector outside Toledo for your jaunt from Eastgate (clever name) on the Ohio Turnpike.

Addresses and phone numbers for state transportation departments can be found in either the *National Directory of State Agencies*³⁵ or the *State Executive Directory*.³⁶ The Pennsylvania Department of Transportation was able to give me an answer from their headquarters in Harrisburg, while the Ohio Department of Transportation, based in Columbus, referred me to the Turnpike Commission in Cleveland. The national headquarters of the American Automobile Association, located in Falls Church, VA, also had this information available.

While on the subject, I became somewhat interested (as opposed to burning with curiosity) about other sources of information regarding toll facilities. A valuable source of information is the International Bridge, Tunnel and Turnpike Association

(IBTTA). Both the *Encyclopedia of Associations*³⁷ and *Transportation Information Sources*³⁸ clued me in to the IBTTA.

The *Government Research Centers Directory*³⁹ included a listing for the Commerce Department's United States Travel Service. Although the directory indicated that the Travel Service offers tourism data for use by state, local, and federal agencies, as well as the travel industry, the Travel Service only provides information regarding international travel. (The service might be of use if, someday, we have our annual meeting in Paris.)

Finally, the *Federal Yellow Book*⁴⁰ led me to the Department of Transportation's Federal Highway Administration. The FHA's Public Affairs Office (I contacted them first, because I wasn't able to find an office that dealt with toll facilities) suggested the Interstate Management Branch. That branch, part of the Federal Aid Division, which is itself part of the Office of Engineering (are you following this?), was extremely helpful. The branch provides state-by-state charts on U.S. toll roads, bridges, tunnels, and ferries, as well as a study of the bonded indebtedness of toll roads.

37. ENCYCLOPEDIA OF ASSOCIATIONS (D. Akey 17th ed. 1982) (3 vol. Detroit, MI: Gale Research).

38. TRANSPORTATION INFORMATION SOURCES (K. Metcalf ed. Gale's Management Information Series Part 8, 1965) (Detroit, MI: Gale Research).

39. GOVERNMENT RESEARCH CENTERS DIRECTORY (A. Kruzas & K. Gill 2d ed. 1982) (Detroit, MI: Gale Research).

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35. NATIONAL DIRECTORY OF STATE AGENCIES (N. Wright & G. Allen, comp. 1982) (Arlington, VA: Information Resources Press, biennial).

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