The original documents are located in Box 34, folder "Transition Reports (1977) - Commerce Department: General Counsel" of the John Marsh Files at the Gerald R. Ford Presidential Library.

U.S. DEPARTMENT OF COMMERCE

BRIEFING HANDBOOK

GENERAL COUNSEL

1. THE GENERAL COUNSEL OF THE DEPARTMENT

Mission

The General Counsel is the chief law officer of the Department, the legal advisor to the Secretary and Under Secretary, and is responsible, either through the Office of the General Counsel or the heads of various other legal staffs in the Department, for furnishing all legal services to all organizational units in the Department and their heads.

The General Counsel provides advice and counsel to the Secretary and heads of organizational units to enable them to fulfill their operational responsibilities in keeping with applicable law, including those statutes administered by the Department which are listed in section 3 of this book. He is assisted by the Deputy General Counsel, other attorneys within the immediate Office of General Counsel, and other Departmental legal staffs assigned to various of the Department's organizational units.

A primary operational function of the General Counsel is to supervise and coordinate the development of the Department's legislative program, and to serve as the focal point within the Department for handling legislative matters, including other Governmental legislation which impacts upon the mission and responsibilities of the Department. In this legislative area, he works in close coordination with the head of the Department's Office of Congressional Affairs. Department Organization Order 10-6, attached hereto, describes in more detail significant functions of the General Counsel.

The Office of General Counsel provides direct resources to the General Counsel to assist him in certain areas of responsibility.

In the area of legislation, the Office of General Counsel is responsible for the preparation and review of the Departmental legislative program, expressions of official opinion on the merits of proposed or pending legislation, statements made before Congress concerning such legislation, and advice to the President on enrolled enactments and Executive Orders. Additionally, the Office of General Counsel is responsible for preparation and review of

Departmental comments on proposed environmental health, safety and energy regulations proposed by other Federal agencies.

During Fiscal 1976 (and the transition quarter), the Department received requests for comments on over 1,814 items of legislation, including approximately 472 requests from the Congress, and 154 enrolled enactments. It also received more than 135 requests to comment on agency regulations in the environmental and energy fields. Departmental witnesses testified at over 160 Congressional committee hearings (exclusive of appropriation hearings).

In the area of administration, legal services are provided to support such Department-wide activities as procurement, personnel, budget and appropriations, tort and other claims, property management, equal opportunity, security, internal organization, and rulemaking.

The Office of General Counsel in this area also provides substantial legal advice on matters involving conflict of interest questions, the census laws, advisory committees, the recommendations of the U. S. Administrative Conference, administrative law, the Privacy Act of 1974, and the Freedom of Information Act. Over 1200 procurement contracts and numerous grant documents are reviewed each year and legal assistance furnished on contract-related problems, including litigation.

In the area of domestic and international business, legal services are provided to the Domestic and International Business Administration and to the U. S. Travel Service. Regarding domestic business, counsel has furnished advice on antitrust, consumer protection, international expositions in the United States, energy, environment, and product liability issues as well as on the administration of the Department's Industrial Mobilization Program. Legal advice is given on such matters as restrictions on the export of energy products and legislation to extend and amend the Export Administration Act of 1969.

Regarding international commerce, the Office of General Counsel provides advice on matters involving the Arab Boycott of Israel, U. S. trade with the countries of the Middle East and with those countries having non-market

economies and questionable corporate practices by U. S. corporations abroad.

The Office of General Counsel also assists in litigation involving export licensing, restrictions against certain high-technology products and other aspects of the Export Administration Program, foreign trade zones and a special program which permits duty-free importation of certain scientific instruments when equivalent U. S. instruments are unavailable.

In the area of science and technology, the Office of General Counsel provides legal advice to the Assistant Secretary of Science and Technology, the National Bureau of Standards, the National Technical Information Service, the Offices of Telecommunications, Environmental Affairs, and Product Standards, and assists the legal staff of the Patent and Trademark Office. Advice covers such major areas as domestic and international standards, intellectual property, metric conversion, energy issues, consumer product performance characteristics, laboratory accreditation, telecommunications, environmental affairs and consumer technology.

In addition, the General Counsel is assisted in providing a full range of legal services to various organizational units of the Department through the heads of separate legal staffs assigned to those units, as specified below.

Statutory Authority

15 USC § 1508: "There shall be in the Department of Commerce a General Counsel, who shall be appointed by the President, by and with the advice and consent of the Senate."

The responsibilities of the General Counsel to implement this authority are set forth in Department Organization Order 10-6 and in other Department organization and administrative orders. (Copy attached.)

10-6

United States of America DEPARTMENT OF COMMERCE	DEPARTMENT ORDER NO. ~~104 (Revised)~~	
MANUAL OF ORDERS **Part 1**	DATE OF ISSUANCE June 20, 1963	EFFECTIVE DATE June 20, 1963

SUBJECT

OFFICE OF THE GENERAL COUNSEL

SECTION 1. PURPOSE:

The purpose of this order is to describe the organization and functions of the Office of the General Counsel of the Department of Commerce.

SECTION 2. ORGANIZATION:

.01 The position of Solicitor was established by the Act of March 18, 1904 (33 Stat. 135; 5 U.S.C. 592b; amended by Act of August 20, 1954; 68 Stat. 753. The title of Solicitor was changed to that of General Counsel by the Act of July 17, 1952 (66 Stat. 758)). The General Counsel is appointed by the President, by and with the advice and consent of the Senate, and reports and is responsible to the Secretary of Commerce.

.02 The Office of the General Counsel is a constituent unit of the Office of the Secretary, Department of Commerce, established for the purpose of providing the General Counsel with adequate staff and resources to enable him to fulfill his responsibilities and perform his statutory and assigned duties.

SECTION 3. THE GENERAL COUNSEL:

.01 The General Counsel is the chief law officer of the Department of Commerce, and legal adviser to the Secretary, the Under Secretaries, the Assistant Secretaries, and other officers of the Department, including bureau heads.

.02 The authority to render all legal services necessary to enable the Secretary and the heads of organization units in the Department to discharge their respective duties is hereby delegated to the General Counsel. This authority applies to all the legal activities of those bureaus having separate legal staffs.

.03 The authority delegated herein, or any part thereof, may be redelegated to appropriate officers and employees of the Department and shall be exercised in accordance with such delegations, regulations, policies, standards, procedures, and instructions as the General Counsel may issue or approve. Copies of any written delegations of authority made under this subsection shall be filed with the original signed copy of this order.

.04 The General Counsel supervises and coordinates the development of the legislative program of the Department. The General Counsel shall be the focal point within the Department for handling legislative matters, and shall advise the Secretary on such matters.

SECTION 4. FUNCTIONS OF THE OFFICE OF THE GENERAL COUNSEL:

.01 The functions performed by the Office of the General Counsel include, but are not limited to, the following:

1 The preparation, or examination for legal form and effect, of all public orders, rules, and regulations issued by the Department of Commerce, including documents submitted to the Federal Register, and legal review of internal orders, rules, and regulations requiring the approval of the Secretary of Commerce;

2 The preparation, or examination for legal form and effect, of all legal instruments, such as contracts, cooperative agreements, leases, licenses, and bonds, entered into by the Department of Commerce.

3 The appearance on behalf of the Secretary of Commerce or Department of Commerce, or any officer or unit thereof, before regulatory commissions, independent boards, and similar tribunals and courts when such action appears to be appropriate, the preparation or review of pleadings, briefs, memoranda, and other legal documents necessary in proceedings involving the Department of Commerce, or requested by any other Government agency for use in proceedings;

4 The preparation or review of all papers relating to matters on which the opinion or advice of the Comptroller General is desired, except for determinations requested by certifying officers under the provisions of the Act of December 29, 1941 (55 Stat. 876; 31 U.S.C. 82d);

5 The preparation or review of all papers relating to matters on which the opinion of the Attorney General is desired; and

6 The preparation or review of all legislative proposals the enactment of which is deemed desirable by the Department of Commerce, expressions of official opinion as to the merits of proposed or pending legislation, statements concerning proposed or pending legislation to be made before committees of the Congress, and advice to the President with respect to enrolled enactments.

.02 The heads of the several primary organization units of the Department shall consult with and obtain clearance from the Office of the General Counsel as to the legal aspects of new and major programs.

.03 All personnel actions involving legal positions (other than patent attorney positions) in the Department of Commerce will be coordinated by the General Counsel as provided in administrative orders of the Department. All matters pertaining to the purchase of law books or legal supplies shall be subject to review by the General Counsel before action is taken thereon.

SECTION 5. EXCEPTION AS TO PATENT AND TRADE MARK MATTERS:

The General Counsel exercises no responsibility in connection with the issuance of patents or the registration of trade marks. In other matters, the General Counsel's authority with respect to the Patent Office is the same as in the case of other organization units which have legal staffs.

SECTION 6. EFFECT ON OTHER ORDERS:

This order supersedes Department Order No. 104 (Amended) of March 20, 1956.

Luther H. Hodges

Secretary of Commerce

USCOMM-DC - 3895

Brief Historical Background

In 1950, the Office of General Counsel, then known as Office of the Solicitor, consisted of ten attorneys with responsibility for a variety of legal matters, including legislation and administration, and direct legal services to the Secretary. At the same time, a number of organizational units within the Department had their own legal counsel and staffs who were not included within the Office of General Counsel of the Department.

In 1952, by legislation at the request of the then Solicitor, the title of the top Department legal officer was changed to General Counsel.

During the early fifties, the General Counsel made efforts to consolidate the functions of the Office of General Counsel and the other legal offices of the Department but was successful only with regard to the Bureaus of International Trade and of Domestic Commerce.

In 1962, with the establishment of the position of Assistant Secretary for Science and Technology, there was concomitantly established within the Office of General Counsel the position of Assistant General Counsel for Science and Technology to render legal services to the new Assistant Secretary. Also, when the two bureaus noted above were made responsible to an Assistant Secretary for Domestic and International Business, the position of Assistant General Counsel for Domestic and International Business was established in 1962 in lieu of two former Assistant General Counsels. It was at this time that the present organization of the Office of General Counsel was formed.

Continuing efforts to consolidate all legal functions of the Department were unsuccessful for a variety of reasons. One primary past difficulty was in justifying to former Congressman John Rooney, long-time Chairman of the Subcommittee of the House Committee on Appropriations, which had jurisdiction over the Department's budget, the necessary appropriation to support the then total of some 125 attorneys in the Department within the budget of the Office of the Secretary.

Consequently, various organizational units in the Department have continued to maintain their own legal staffs, paid from their own budgets.

Organization, Including Field Structure

General Counsel (J. T. Smith, II).

As indicated above, the General Counsel, who is appointed by the President by and with the advice and consent of the Senate, is the chief legal officer of the Department, personal advisor to the Secretary and Under Secretary, and is responsible for all legal services throughout the Department.

Deputy General Counsel (Homer E. Moyer, Jr.).

The Deputy General Counsel assists the General Counsel in the foregoing responsibilities.

Assistant General Counsels.

Within the immediate Office of General Counsel there are four operating divisions, each headed by an Assistant General Counsel:

Administration: 14 attorneys
Assistant General Counsel: Alfred Meisner
Domestic and International Business: 13 attorneys
Acting Assistant General Counsel: Kent N. Knowles
Science and Technology: 10 attorneys
Assistant General Counsel: Robert B. Ellert
Legislation: 6 attorneys
Assistant General Counsel: William V. Skidmore

Certain operating units have on their rolls a legal staff of attorneys who are professionally accountable to the Department's General Counsel. These operating units, together with the title and name of the principal units legal officer, are:

EDA: 22 attorneys
Chief Counsel: William F. Clinger
MARAD: 26 attorneys
General Counsel: Samuel B. Nemirow
NFPCA: 2 attorneys
Legal Advisor: Joseph Moreland

NOAA: 31 attorneys
General Counsel: William C. Brewer, Jr.
OMBE: 4 attorneys
Chief Counsel: John Topping
PAT: 12 attorneys
Solicitor: Joseph F. Nakamura

The Office of General Counsel also includes one Special Assistant to the General Counsel (Donald W. Smiegiel) and an attorney on the President's Executive Interchange Program (Gregory E. Good, Jr.), who serves as an assistant to the General Counsel and Deputy General Counsel.

There is no field organization as such within the Office of General Counsel. However, certain of the Department's organizational units do have legal field staffs as indicated:

EDA - 12 attorneys (2 attorneys in each of 6 regional offices)
MARAD - 1 attorney
NOAA - 6 attorneys (with 2 additional planned)

2. BIOGRAPHIES OF PRINCIPAL OFFICIALS

BIOGRAPHICAL SKETCH OF

JOHN THOMAS SMITH II

Appointed General Counsel, United States Department of Commerce, February 27, 1976.

Recent Experience

Mr. Smith was associated with the Washington, D.C. law firm of Covington & Burling from February 1974 until February 1976, where his practice included general commercial matters, litigation, and corporate representation before a range of federal agencies including the Labor Department's Occupational Safety and Health Administration, the Environmental Protection Agency, and the Department of Housing and Urban Development.

Previously, he was associated with Commerce Secretary Elliot L. Richardson in his three prior Cabinet positions as his executive assistant.

Employment Background

Covington & Burling, Washington, D.C., 1974-1976; Executive Assistant to the Attorney General, May 1973-October 1973; Assistant to the Secretary of Defense, January 1973-May 1973; Executive Assistant to the Secretary of Health, Education and Welfare, September 1972-January 1973; Special Assistant to James B. Cardwell, Assistant Secretary, Comptroller, HEW, 1971-1972; Program Analyst, Office of Planning, Programming and Budgeting, Central Intelligence Agency, 1970-1971; Officer, U.S. Air Force, 1968-1970 (assigned to CIA, 1969-1970); CIA, August 1967-February 1968.

Education

Yale College -- 1964 -- bachelor of arts degree in history; Yale Law School -- 1967 -- JD degree

Date and Place of Birth: October 22, 1943, New York City, New York

Marital Status and Residence: Smith, his wife, the former Linda Carol Kridel, and two sons reside in Washington, D.C.

November 1976

HOMER E. MOYER, JR.

Legal and Professional Experience

Deputy General Counsel, Department of Commerce (since April 1976)

Covington & Burling, Washington, D.C. (August 1973 - April 1976)
Litigation experience before U.S. Supreme Court, U.S. District Courts, and District of Columbia courts in areas of constitutional law, federal-state relations, civil rights, wage-price controls, welfare, environment, antitrust, commercial agreements.

Public Law Education Institute, Washington, D.C. (May 1971 - June 1973)
Fellow of the Institute; primary author of Justice and the Military, a 1300-page treatise on military law published in March 1973.

Office of the Judge Advocate General of the Navy, Washington, D.C. (March 1968 - Feb. 1971)
Federal appellate court appearances; administrative and trial court litigation; legislative and regulatory drafting; presentations on military justice; speech writing for JAG and Deputy JAG; legal articles; White House Military Social Aide.

Awards: 1969 Navy Judge Advocates' Writing Award; Presidential Service Badge; Joint Services Commendation; Navy Commendation.

Education

Yale Law School, LL.B., 1967; Thomas Swain Barristers Union; Thurman Arnold Moot Court; Phi Delta Phi.

Emory University, B.A., Economics, 1964; Phi Beta Kappa; Omicron Delta Kappa; Senior Class President; Sigma Chi fraternity president; Atlanta Rotary Club Award; Lockheed Leadership Scholarship; B. Sch. Honor Council; College Council; Interfraternity Council; founder, Bench and Bar; intercollegiate soccer; seven intramurals.

Personal Data

age: 34 (born Nov. 20, 1942, Atlanta, Ga.) health: excellent
married (1974), no children
residence: 1575 - 44th Street, N.W.
Washington, D. C. 20007
(202) 337-6565

U.S. DEPARTMENT OF COMMERCE

Office of Secretary
(Bureau)

Date November 19, 1976

Personnel Resume

Name Alfred Meisner Date of Birth September 21, 1917

Home Address 6503 Marjory Lane Home Telephone 229-5593

Bethesda, Maryland 20034

Veteran Status of Incumbent U.S. Army (5 points)

Title, Grade and Organization

Assistant General Counsel for Administration, GS-16
Office of General Counsel

Duties and Responsibilities - In charge of unit which provides legal services (1) supporting Department-wide management and organization, personnel, procurement, appropriations, security, equal opportunity, claims, and other administrative and house-keeping activities; (2) covering general administrative law, Freedom of Information, Privacy, and other special statutes; (3) as chief counsel to Bureau of Census and BEA.

Education - College of City of New York - School of Business Administration, BBA 1938; Columbia University Law School, LL.B. 1941

Experience

(Bar admissions - N.Y. State, U.S. Supreme Court)

1941-1942 Research assistant and attorney in private law firms
1942-1943 Compliance trial attorney, War Production Board
1943-1946 U.S. Army, Ass't Staff Judge Advocate (1945-1946)
1946-1947 International affairs and claims attorney, U.S. Maritime Commission
1947-1950 Trial attorney for Food & Drug Admin., Federal Security Agency (now Department of Health, Education & Welfare)
1950-1963 Trial attorney and Deputy Ass't General Counsel for International Business, OGC, Commerce
1963-1970 Deputy Assistant General Counsel for Admin., OGC, Commerce
1970-date Ass't General Counsel for Administration, OGC, Commerce

Special Achievements and Awards Past Five Years

Department of Commerce Gold Medal Award 1971, several meritorious awards and commendations

U.S. DEPARTMENT OF COMMERCE

Office of General Counsel
(Bureau)

Date November 19, 1976

Personnel Resume

Name William V. Skidmore Date of Birth February 12, 1929

Home Address 7909 Orchid St., N.W. Home Telephone 726 8413

Washington, D. C. 20012

Veteran Status of Incumbent None

Title, Grade and Organization

Assistant General Counsel for Legislation
GS-17
Office of the General Counsel

Duties and Responsibilities - Manages a small staff which coordinates: development of the Department's legislative program; comment on legislative proposals from other Departments; clearance of Departmental testimony on legislation; negotiation of Departmental positions on legislation; and, performs similar functions respecting Departmental comments on proposed safety and environmental regulations.

Education

Princeton University - A.B. - 1951
Yale University - LL.B. - 1958
Lucknow University - Lucknow, U.P., India - Fulbright Fellow - 1957-58

Experience

Private

Associate in law firm of Curtis Buckley and Hilgendorff, Bridgeport, Conn. - 1958-1960

U.S. Government

Office of General Counsel - AID - Washington and abroad - 1960-1968
Office of Economic Opportunity - Washington, D. C. - 1968-1971
Office of Management and Budget (Legislative Reference Division) 1971-1975

Special Achievements and Awards Past Five Years

OEO Exceptional Service Award and Merit Increase

Acting Assistant General Counsel for
Domestic and International Business

U.S. DEPARTMENT OF COMMERCE

Office of the Secretary
(Bureau)

Date November 22, 1976

Personnel Resume

Name KNOWLES, Kent N. Date of Birth July 10, 1936

Home Address 3512 Duff Drive Home Telephone 703-578-4729

Falls Church, Virginia 22041

Veteran Status of Incumbent 5-point preference

Title, Grade and Organization
Deputy Assistant General Counsel for Domestic and International Business, GS-16, Office of General Counsel, Office of Assistant General Counsel for Domestic and International Business

Duties and Responsibilities
Legal adviser in the fields of international and domestic commerce a business policy. Provide counsel to the Asst. Sec. for Domestic and International Business and the Asst. Sec. for Tourism. Supervise staff of 9 lawyers. Assume all responsibilities and duties of Asst. General Counsel in his absence.

Education
A.B., Amherst College, 1957
J.D., Harvard Law School, 1963
Academy of Public International Law, The Hague, Holland (July-August 1963)

Experience
1 Oct. 1975 to date: Acting Assistant GC/DIB, except for May-July 19
1974-date: Deputy Asst. General Counsel/DIB, U.S. Dept. of Commerce.
1971-1973: Deputy General Counsel, Inter-American Foundation, Arling Va.
1968-1971: Regional Legal Adviser for Central America, U.S. Agency f International Development (resident in Guatemala)
1966-1968: Attorney (Far East), U.S. Agency for International Develo
1963-1965: Private practice of law, Burlingham, Underwood, Barron, Wright & White, New York, New York.
1957-1960: Officer, U.S. Navy.

Special Achievements and Awards Past Five Years
Special Achievement Award - July 1974

Assistant General Counsel for
Science and Technology

U.S. DEPARTMENT OF COMMERCE

Office of the General Counsel
(Bureau)

Date November 22, 1976

Personnel Resume

Name Robert B. Ellert Date of Birth May 29, 1921

Home Address 3099 Que Street, N.W. Home Telephone 337-8241

Washington, D.C. 20007

Veteran Status of Incumbent Veteran

Title, Grade and Organization
Assistant General Counsel for Science and Technology
GS-16
Office of the General Counsel, Office of the Secretary

Duties and Responsibilities: Responsible for the performance of all legal servic and advisory work in connection with the scientific and technological programs administered by the Office of the Assistant Secretary for Science and Technology. Serves, in effect, as chief legal officer for the Assistant Secretary for Science and Technology, the National Bureau of Standards, the Patent and Trademark Office, the National Technical Information Service, the Office of Telecommunications, the Office o Product Standards, and the Office of Environmental Affairs.

Education: B.A. College of William and Mary - 1946
J.D. College of William and Mary - 1949
Post Graduate Diploma in Law, Kings College, University of London - 1956
Hague Academy of International Law - 1960
S.J.D. George Washington University - 1962
Princeton Fellow in Public Affairs, Princeton University - 1970-1971

Experience: 1966-Present, Assistant General Counsel for Science & Technology, DoC
1975-1976, Acting Deputy Assistant Secretary for Product Standards, DoC
1965-1966, Senior Attorney, ESSA (now NOAA), DoC
1962-1965, Chief, Int'l. Affairs Branch, Hq., U. S. Army, Europe
1958-1962, Deputy Chief, Int'l. Affairs Div., Judge Advocate General's Office, Department of Army

Special Achievements and Awards Past Five Years
Gold Medal Award, Department of Commerce - 1974
Silver Medal Award, Department of Commerce - 1969
Princeton Fellow Award - 1970-1971
Member, American, Federal, and Virginia Bar Associations

3. MAJOR STATUTES, EXECUTIVE ORDERS AND DIRECTIVES

Following is a list, by division within the OGC, of the major statutes with which the respective divisions within the OGC are significantly involved:

Legislation

Authority for Legislative Clearance Process	OMB Circular No. A-19 (July 31, 1972)
Quality of Life Review for Environmental Regulations	OMB Memorandum dated October 5, 1971 Departmental Administrative Order 216-7 (January 17, 1972)

Administration

Administrative Procedure Act	5 USC 551-559
Freedom of Information Act	5 USC 552
Privacy Act of 1974	5 USC 552a
Federal Advisory Committee Act	5 USC App. I
Government in the Sunshine Act	5 USC 552b
Statute, Presidential Orders and Department Rules	18 USC 201-209 Executive Order 11222 Executive Order 11590 15 CFR Part O
Procurement Statute and Federal Procurement Regulations	41 USC Chapter 4 41 CFR Subtitle A, Chap. I
Basic Authorities of the Department Together With Delegation and Organization	15 USC 1501-1527 Reorganization Plan No. 5 of 1950 5 USC 1-301
Census Laws	13 USC 1-306
Statute Concerning Federal Employees and Civil Service Rules and Regulations	5 USC 2101-8913 5 CFR

Civil Rights Act of 1964	42 USC 2000d, 2000e (together with various Executive Orders concerning nondiscrimination in Federally-assisted programs contractor employment)

DIBA

Export Administration Act of 1969	50 USC App. 2401, et seq.
Defense Production Act	50 USC App. 2061, et seq.
Foreign-Trade Zones Act of June 18, 1934	19 USC 81a-81u
Act of July 19, 1940, as amended (Domestic Travel)	16 USC 18-81d
International Travel Act of 1961, as amended	22 USC 2121, et seq.

Science and Technology

Organic Act of the National Bureau of Standards (includes authority for the Office of Telecommunications)	15 USC 271-278h
Enabling Act for the National Technical Information Service	15 USC 1151-1157
Federal Non-nuclear Energy Research and Development Act of 1974, Section 14 (relating to NBS responsibility)	42 USC 5913 (Supp. V., 1975)

Economic Development Administration

Public Works and Economic Development Act Amendments of 1976	42 USC 3121, et seq.
Public orks Employment Act of 1976	42 USC 6701
Olympic Winter Games Authorization Act of 1976	90 Stat. 1336

Maritime Administration

Merchant Marine Act of 1936, especially Titles 5, 6, 8, 9 and 11	46 USC 1101, et seq.
The Shipping Act of 1916	46 USC, especially § 801, 802, 808 and 835

National Oceanic and Atmospheric Administration

Marine Mammal Protection Act of 1976	16 USC 1361, et seq.
Coastal Zone Management Act	16 USC 1451-1464
Fisheries Conservation and Management Act of 1976	16 USC 1801, et seq.
Marine Protection Research and Sanctuaries Act of 1972	16 USC 1431-1434 33 USC 1401, et seq.
Commercial Fisheries Research and Development Act of 1964	16 USC 779
Endangered Species Act of 1973	16 USC 1531-1543

Patent Office

Patent Laws	35 USC
Trademark Act of 1946	15 USC 1051-1127

National Fire Prevention and Control Administration

Organic Act of the National Bureau of Standards	15 USC 271, et seq.
Fire Research and Safety Act of 1968	15 USC 278f
Federal Fire Prevention and Control Act of 1974	15 USC 2201, et seq. 278(f), 278(g) and 42 USC 290(a)

Office of Minority Business Enterprise

Basic Authority	Executive Order 11625

4. RESOURCES

The annual budget for the Office of General Counsel for FY 1976 and estimated annual budgets for subsequent years are as follows (with number of positions indicated in parenthesis):

FY 1976 including transition quarter		FY 1977		FY 1977 Supp.	FY 1978	
Salaries						
(43)	$1,536,700	(47)	$1,306,200	None	(51)	$1,366,000
Reimbursable Projects						
(3)	83,800	(3)	106,000	None	(3)	106,800
TOTAL	$1,620,500		$1,412,200	None		$1,472,800

The ceiling of the Office of General Counsel is 48 permanent slots (against an authorization of 47) and four temporary slots. Recruitment for three attorney vacancies in OGC/DIBA is presently underway.

NOTE: The budget and ceiling figures for the Office of General Counsel are, for historical reasons relating to Congressman Rooney's personal views with respect to the need for Government lawyers, distorted in the following particular ways:

1. Because ceiling increases were precluded, a pattern of carrying OGC attorneys on the rolls of other components of the Department has developed over time;

2. The salaries and benefit ceilings for OGC are typically exceeded (and expected by the Budget Office to be exceeded);

3. Certain items in the budget, notably training, travel and supplies, are inappropriately low.

GENERAL COUNSEL

- Arab Boycott of Israel
- Disclosure of Boycott Reports
- Questionable Corporate Payments Abroad
- Amendments to the Clean Air Act
- Amendments to the Federal Water Pollution Control Act
- Secretarial Delegation of Rulemaking and Adjudication Authority
- Application of Davis/Bacon Standards to "Force Account" Projects Funded under the Public Works Act
- Consumer Communications Reform Act

ARAB BOYCOTT OF ISRAEL

Background: The Arab boycott of Israel has been a high intensity legal, political and legislative issue during the past 18 months. It has, however, existed since the founding of the State of Israel. It is often said to have three aspects: (i) the primary boycott whereby Arab countries refuse to do business directly with Israel; (ii) the secondary boycott whereby an Arab country may refuse to do business with a business concern of a third country because of that business concern's economic relations with Israel; and (iii) the so-called tertiary boycott whereby a firm may be asked to refuse to do business with other firms because of those firms' economic relations with Israel. The lines between these three manifestations of the boycott are not always clearly drawn, but the distinctions are useful for any discussion of the boycott.

In 1965, the Congress, in an amendment to Export Administration legislation, stated that it was the United States' policy to oppose the Arab boycott of Israel and to encourage and request U.S. business concerns to refuse to take any action, including the furnishing of information which would further or support this boycott. The law also requires that the Secretary of Commerce adopt regulations to implement the policy of the Act and that these regulations require that U.S. concerns report receipt of all "boycott requests" to the Department of Commerce.

This 1965 provision has been reenacted in subsequent extensions of Export Administration legislation. Because of a parliamentary impasse, the 94th Congress failed to extend the Export Administration Act which, therefore, expired on September 30, 1976. The President, however, as he has done on similar occasions in the past, extended the Department's Export Administration regulations pursuant to his constitutional authority and the authority of the Trading with the Enemy Act of 1917.

The substantial growth of Arab petrodollar wealth has made the Arab boycott of Israel the subject of greatly enhanced concern on the part of the Jewish community in the United States. Contrary to widespread public belief, boycott requests which discriminate on religious or ethnic grounds are extremely rare. The boycott is intended and generally applied solely as an economic weapon against Israel. There now exists concern that this economic weapon, relatively ineffectual in the past, may become effective.

During the 94th Congress, boycott-related provisions were proposed as amendments to the Tax Reform Act and to Export Administration extension legislation. Only the Tax Reform provision was enacted into law. However, both the House and Senate passed boycott-related provisions as amendments to the Export Administration Act extension. The Senate bill, authored by Senator Stevenson, was principally directed at the tertiary aspect of the boycott. It proscribed refusals to deal by one U.S. firm against another pursuant to a boycott-related request. The House bill, sponsored by Congressmen Bingham and Rosenthal, was directed at both tertiary and secondary aspects of the boycott. In the judgment of many, it would have made the conduct of business with a number of Arab countries virtually impossible -- unless those countries would have been willing, in response to the legislation, to moderate their boycott stands. An informally convened House/Senate Conference, seeking to reconcile the Senate and House approaches agreed, in the closing days of the last Congress, on a compromise bill. This compromise in effect marries the House and Senate approaches but provides certain specific exemptions to the broad prohibitions set forth in the House bill.

On October 7, 1976, President Ford directed that boycott reports subsequently filed with the Department of Commerce be made available for public inspection and copying. Reports previously were deemed to be confidential. Such prospective disclosure of boycott reports would have been required by both the House and Senate bills. It was an especially important feature of the Senate bill which was frequently described as a "disclosure" approach.

The disclosure of these reports has led to controversy and confusion over what constitutes "compliance" with the Arab boycott of Israel. Business concerns whose names have appeared in the media as "complying" with the boycott, as a result of this disclosure, have argued that they in no way actively boycotted Israel. Rather, they simply furnished informational certificates to Arab importers. Under the 1965 Act, simple furnishing of information, such as a certificate stating that goods being shipped do not have their point of origin in Israel, constitutes "compliance," since giving such information enables the Arabs to enforce their boycott. No civil or criminal penalty exists for such "compliance," but it does contravene stated national policy. On the other hand, the boycott amendment to the Tax Reform Act penalizes only the more active forms of boycott "compliance,"

i.e., where there is an actual agreement between an American firm and an Arab entity to boycott Israel or a blacklisted American firm.

Issue: Export Administration extension legislation should be addressed early in the new Congress. Boycott-related language will be proposed -- most probably the compromise agreed upon by the informal House/Senate Conference at the end of the last session of Congress. The Department of Commerce and the Administration must decide what position to take with regard to this proposed legislation.

Analysis of Issue: During 1976, the Ford Administration opposed enactment of any anti-boycott legislation, deeming it to be unnecessary, untimely, and possibly damaging to U.S. vital interests in the Middle East. Two days before Congress adjourned, the White House signaled that the Administration would be willing to accept legislation such as that which passed the Senate, providing its refusal to deal language were to be narrowed to forbid refusals to deal pursuant to an agreement or understanding but not to preclude unilateral business choice by U.S. firms. In addition, during the 94th Congress, the Administration introduced legislation which would forbid use of economic means to discriminate against any person on the basis of race, color, religion, sex or national origin. The Administration consistently opposed legislation which would seek to ban any compliance with the so-called secondary aspects of the boycott. The House/Senate compromise language exempts certain commonplace actions in compliance with the secondary boycott, but forbids others. A decision must be reached whether to support the House/Senate compromise or to seek to modify it prior to enactment. If the latter decision is made, proposed amendments should be developed.

Those designing any legislative approach on this subject should keep in mind that: (i) the Arab boycott countries consider the boycott to be a legitimate economic weapon against a belligerent country; (ii) it is doubtful that they would relax the boycott in response to U.S. legislative pressures; (iii) U.S. exports to Arab countries will total $7.5 billion in 1976, but this represents only about 15 percent of the combined import market of Arab countries; (iv) as has been demonstrated by the reports disclosed by the Department of Commerce during the past two months, the great majority of boycott requests do not involve discrimination against American citizens or agreements to refusal to deal by one U.S. firm against another -- rather, they involve simple factual certifications; and

(v) most importantly, the only means to end the Arab boycott of Israel is a permanent and lasting peace settlement in the Middle East -- the U.S.' ability to play a constructive role for peace depends upon our capacity to maintain the confidence of both the Arabs and the Israelis.

In light of the above-stated concerns, pains must be taken to see that whatever legislation is enacted is moderate and sensible.

Schedule: There is no ongoing Administration analysis of Arab boycott legislative options for the new Congress. The Congress may take up this issue as early as January. Informal work is proceeding, within the Department of Commerce, to define certain modifying amendments to the House/Senate compromise. This is an issue which the incoming Administration will need to address immediately.

DISCLOSURE OF BOYCOTT REPORTS

Background: The receipt of boycott-related requests must be reported to the Department of Commerce. The reporting of such requests has been mandatory for exporters since January 1, 1966, and for related service organizations (such as banks, freight forwarders, insurers and carriers) since December 1, 1975. Through mid-October of 1976, approximately 54,000 reports have been received by this Department.

Historically, the reports have been held confidential under the provisions of Section 7(c) of the Export Administration Act, which requires the Secretary of Commerce not to disclose the information unless he determines that "the withholding thereof would be contrary to the national interest." Accordingly, requests for the reports have uniformly been denied on the basis that the release would violate statutory assurances under Section 7(c) to the reporting entity, reflected on the reporting form itself, that the material would be treated as confidential.

The greatly increased concern over the Arab boycott of Israel during the past 18 months has led to requests from Congressional committees and the public for disclosure of these boycott reports.

The 94th Congress failed to enact legislation extending the Export Administration Act beyond its stated expiration date of September 30, 1976. However, both the House and Senate passed amendments which would have required only prospective disclosure of boycott reports. In accordance with the apparent Congressional intent, the President, on October 7, 1976, directed the Secretary of Commerce to make available to the public copies of all reports of boycott-related requests which were received by American firms on or after October 7, 1976. Pursuant to this Directive, approximately 1,380 such reports have been made public as of November 19.

Issue: Numerous Freedom of Information Act requests have been received for the roughly 53,000 boycott reports which are not subject to the Presidential Directive and have not been made public. Prospects are that this issue will be faced early and regularly by the new Secretary.

Analysis of Issue: New legislation extending the Export Administration Act is expected to be enacted early in the next Congress. Traditionally, such legislation has been made retroactive in effect to the date of expiration of the Act -- in this case October 1, 1976.

Until new Export Administration legislation is enacted, the Department has decided to deny requests for retroactive disclosure of boycott reports, i.e., disclosure of names of companies on reports filed prior to October 1, 1976. Technical legal issue may be drawn with this decision since Section 7(c) of the Export Administration Act is no longer in effect.

The Department has pending before the Comptroller General a request for an opinion as to whether the Department's appropriation bill, which appropriated funds under the Export Administration Act, in effect continues the authorizing legislation -- the Export Administration Act. The Comptroller General has recently ruled on two occasions that this indeed would be the outcome under similar circumstances. If the Comptroller General rules in our favor, then we may claim that Section 7(c) confidentiality exists, even after September 30, 1976.

An additional complexity will arise in March of 1977, when the provisions of the so-called Sunshine Act, passed by the 94th Congress, come into effect. These provisions limit the exception for statutorily exempt materials under the Freedom of Information Act. The sufficiency of Section 7(c) may be challenged. Even if Section 7(c) does not meet the test of the Sunshine bill, we would continue to argue, absent specific Congressional direction to the contrary, confidentiality should be continued to be accorded to reports filed with the Department, pursuant to a pledge of confidentiality, prior to October 1, 1976.

We believe this to be the correct outcome in a policy as well as a legal sense. Retroactive disclosure of these reports could stigmatize companies which, but for a pre-existing stigma, might choose to resist boycott requests under the current public disclosure policy.

Schedule: Requests by Bella Abzug and Ralph Nader for this information have been denied by the Office of Export Administration. Abzug and Nader have the right to appeal to the Secretary of Commerce. Other requests can be expected. As noted above, additional pressures will result

when the Sunshine bill comes into effect in March of 1977. Passage of new boycott-related legislation as part of the Export Administration Act extension, prior to March 1, 1977, if it addresses this issue, could help clarify the situation.

QUESTIONABLE CORPORATE PAYMENTS ABROAD

Background: During the past 18 months, SEC and legislative actions have forced disclosure of improper or illegal payments made by U.S. corporations to officials or agents of foreign governments. Because of public concern generated by these disclosures, the President established a Cabinet-level Task Force, chaired by the Secretary of Commerce, with a mandate to "conduct a sweeping policy review and make recommendations." The Task Force moved ahead on an expedited schedule in order to make legislative recommendations prior to the end of the 94th Congress. On June 14, 1976, after study of the Task Force's findings and recommendations, the President announced his intention to propose legislation addressing the problem and to place a high priority on efforts to achieve a binding multilateral agreement on the subject. On August 2, 1976, the President forwarded to Congress the Foreign Payments Disclosure Act, which would require disclosure to the Secretary of Commerce, with eventual public disclosure, of all payments made by American businessmen to foreign officials or government-owned or controlled entities in connection with the sale of products or services. At the same time, the President made clear that, in his judgment, the most desirable final solution would be an international agreement. To this end, efforts are currently being made under UN auspices for negotiation of an effective multilateral convention.

Issue: Whether the Department should support disclosure legislation, such as the Foreign Payments Disclosure Act, direct criminalization legislation, a combination of the two, or none at all.

Analysis of Issue: The Task Force considered in detail the different approaches, including simply the stepped-up enforcement of present law by the various responsible agencies, e.g., the SEC and IRS. The Task Force determined that existing laws were not sufficient to deal with the full scope of the problem of improper corporate payments abroad, and thus legislation was indeed necessary. With regard to direct criminalization, the Task Force concluded that, while this would constitute the most effective rhetorical response to the problem of improper corporate payments abroad, it would be difficult, if not impossible, to enforce such a law in the absence of multilateral (or at least bilateral) treaties. In the full and fair prosecution or defense of a

typical criminal action in which guilt must be proved "beyond a reasonable doubt," it may well be necessary to call witnesses and subpoena documentary information beyond the reach of U.S. judicial process. Such unenforceable criminal laws can, themselves, have a corrosive effect on society.

The most effective legislation for the present time, in the opinion of the Task Force, would be disclosure legislation, which would not suffer from the problems of proof inherent in a direct criminalization approach, and which, moreover, would not be bogged down by attempted fine-line distinctions between criminal and noncriminal payments. Thus, all payments would be disclosed without regard to their legality. Failure to disclose would be penalized by civil and criminal sanctions.

Schedule: It is anticipated that the Congress will address such legislation in 1977. Some acceptance of the "criminalization" approach may be the price that must be paid for comprehensive disclosure legislation. The new Administration should analyze the desirability and compatibility of combining the two approaches.

The first meeting of an 18-nation working group, under United Nation's auspices, met in New York, November 15-19, to begin discussions of a possible international agreement to curb illicit payments in international commerce. Additional meetings of the working group have been scheduled for January 31-February 11 and March 28-April 8. The working group has been charged to "elaborate in detail the scope and contents of an international agreement to prevent and eliminate illicit payments in whatever form, in connection with international commercial transactions," and to report to the UN's Economic and Social Council (ECOSOC) by August, 1977.

Amendments to the Clean Air Act

Background

The Clean Air Act (CAA) Amendments of 1970 provided for an ambitious program to clean up the nation's air by 1975, or 1977 at the latest. National standards were to be set for ambient concentrations of pollutants based upon health (primary standards) and welfare (secondary standards). In order to meet these standards and generally to improve air quality, national standards of performance were to be set for new sources of pollution and states were to develop State Implementation Plans to control pollution from existing sources. National mobile source standards were to be set for motor vehicles to reduce emissions of HC and CO by 90% by 1975 and of NOx by 90% by 1976. These dates were subsequently extended to 1977 and 1978, respectively, because of the industry's difficulty in meeting them.

A judicial decision interpreting the CAA requires EPA and the states to take action to prevent the degradation of the quality of air in so-called clean air areas - areas where the national ambient standards are not currently exceeded. No specific guidance was provided as to what these actions should be.

Industry has been having difficulty in meeting the standards set under implementation plans by the statutory deadlines. The ambient standards and plans to meet them are also said to prevent or severely limit economic growth in "dirty areas" where the standards are currently exceeded. Auto companies have not been able to meet interim deadlines and have applied for and received some delays. It is generally agreed that the ultimate NOx standard cannot be met and that the strict deadline for auto emission clean-up locks companies into the single, most immediately promising technology by precluding technological research and development of alternate engine and emission equipment. New fuel economy standards make tighter emission control much more difficult. EPA regulations to prevent significant degradation of clean air areas have been attacked on the one hand by environmentalists as not covering enough pollutants from enough sources as stringently as necessary and by industry on the other as tantamount to a no-growth policy which will result in economic stagnation. Such considerations led the 94th Congress to consider legislation which would extensively revise the CAA. There was considerable divergence of views in Congress concerning he need for various amendments and the form they should take. The Senate and the House passed bills differed significantly. Proposed compromises with major stationary source industries and the auto companies were ultimately rejected by the Conference Committee and the bill died in a Senate filibuster at the end of the Session.

Issue

Departmental response to any Clean Air Act amendments offered in the 95th Congress. Major provisions of potential legislation may include:

1. Auto emission standards
2. Prevention of significant deterioration in clean air areas.
3. Industrial expansion in dirty air areas.

Analysis of Issues

1. Some amendment of the NOx auto standards must pass by mid-summer or auto companies will be forced to produce non-qualifying cars or shut down. No manufacturer can meet the present CAA standards for the 1977 cars which will go on sale in late summer. A bill providing for relaxed standards over several years would provide industry a fixed, realistic schedule which would allow for development of alternative approaches such as diesel and stratified charge engines and would assist in meeting fuel economy standards. Congress may consider auto standards separately from other CAA amendments; it may consider only a one year extension of current standards leaving the question of future standards open; or they may consider another omnibus bill such as the one last Congress. Commerce has supported the Dingell-Train approach of a five year, two step approach to meeting the statutory standards with adjustments to the ultimate NOx standard.

2. Significant deterioration legislation may involve issues such as designation of certain areas where no growth will be allowed, such as national parks, buffer zones around such areas, designation of other areas where some growth may be allowed, the amount of growth, the level and type of control technology required, etc. Commerce has advocated that any system to prevent significant deterioration should be carefully analyzed prior to enactment to determine optimum trade-offs between environmental protection and adequate economic growth. Prior legislation involved only brief studies of the potential effect upon the public utility industry.

3. Unless some provision is made for economic growth in current facilities and construction of new facilities, economic growth in so-called dirty areas, where the ambient standards are exceeded, will end. The more restrictive significant deterioration rules for clean

areas become, the more acute this problem becomes, if national economic growth is to continue. Commerce has supported allowing expansion in nonattainment areas where the primary, health-based standards are not exacerbated. Emission trade-offs should be allowed between old and new facilities and between sources on a regional basis.

Schedule

Department activities are dependent upon Congressional initatives, both as to timing and subject matter.

AMENDMENTS TO THE FEDERAL WATER POLLUTION CONTROL ACT

Background

The Federal Water Pollution Control Act (FWPCA), as substantially amended in 1972, provided for a comprehensive program of water pollution control which would provide fishable-swimmable water by 1983 and the elimination of the discharge of pollutants by 1985. To reach these goals, standards were to be set for categories of industrial discharges requiring the application by 1977 of the best practical control technology (BPT) balancing cost with effluent reduction. By 1983 these industries would be required to achieve the best available technology (BAT) for controlling pollution. Publically owned sewage treatment works were required to achieve secondary treatment by 1977. Standards would also be set for toxic pollutant discharges and for all new sources. The standards would be applied to individual dischargers through a National Pollution Discharge Elimination System (NPDES) permit process.

Effluent Guidelines for industry, which were to be published in the first year after enactment, (1973), are still being published. Further, over 200 suits have been filed challenging the standards and there have been a large number of administrative and legal proceedings contesting permits issued under the standards. As a consequence, a large number of industrial dischargers will not have BPT in place by the 1977 deadline. Sewer plants, hampered by a lack of funding and an inefficient sewer grants program, will not meet the deadline in large numbers. It has also been found that costly treatment will be required under the statute in certain instances where is little or no environmental benefit, such as basic oxygen demand treatment for open ocean discharges. Permit writing authorities have little flexibility in applying standards and this leads to unnecessary cost in pollution control.

It has also become clear that the 1985 goal of no discharge cannot be met in many instances and in others can be met only through disproportionate expenditures. Other deficiencies have become apparent such as the unworkability of the toxic pollutants section of the Act.

The FWPCA provided for the creation of a National Commission on Water Quality to study implementation of the Act and to recommend "mid-course corrections". The Commission issued a final report in 1976 making some major legislative recommendations to improve FWPCA. These were based upon the conditions mentioned above and included such things as granting extensions and allowing for modification of the 1977 requirements, redefining the 1985 goal and granting extensions and allowing modifications of the 1983 requirements designed to meet that goal and improving the sewage treatment facilities program.

Issue

Department position on amending the FWPCA in the 95th Congress. Major issues may include:

1. Redefining the 1985 goal (currently no discharge);
2. Authorizing extensions of the 1977 BPT deadline in certain instances;
3. Allowing flexibility in applying BPT plant-by-plant or category by category;
4. Extending or modifying the 1983 BAT requirement on cost/benefit basis;
5. Amending toxic pollutant standards section to make it workable;
6. Providing for flexibility in pretreatment standards;
7. Revising penalty section for discharge of hazardous substances from vessels to make it workable;
8. Adding a workable wetlands protection provision; and
9. Revising of the sewer grants program extensively.

Analysis of Issue

1. While it is clear that the 1985 no discharge goal cannot be met and should probably be changed to emphasize the conservation and reuse of resources, there will be resistance to so doing. It may be more practical to keep the goal as a long term objective and reorient the 1983 BAT requirements, as EPA suggests; however, Commerce supports a legislative change.

2. Legally sanctioned extensions of the 1977 BPT requirements are desirable; however, EPA believes that they can use Compliance Orders under which firms missing the deadline but attempting good faith compliance will not be prosecuted. Commerce favors amendment giving statutory support for such extensions.

3. Flexibility in issuing permits would mitigate regional and community economic impacts in may instances at proportionately small environmental costs. EPA has attempted to accommodate such circumstances administratively in some cases, but have had their legal authority challenged. Commerce favors specific amendment to provide such flexibility.

4. Application of BAT in 1983 will result in only marginal gains over the 1977 BPT requirements and is very questionable on a cost/ benefit basis. EPA has been considering applying only toxic controls under BAT and leaving the control of common pollutants at approximately the 1977 level. Commerce favors an amendment giving specific authority to fixing BAT at a reasonable level.

5. There is general agreement that the toxic pollutants section is generally unworkable and must be amended or deleted from the Act. It could be used to control only very toxic substances, with other toxics controlled under BAT, or could be extensively rewritten. Commerce would prefer the latter approach basing control levels upon water quality considerations.

6. Because of the variability of industrial flows which go to public treatment works and the variability of these works themselves, national pretreatment standards are excessively rigid. Legal authority should be provided for adjusting pretreatment standards for individual situations. Commerce favors allowing the public treatment facility to play a dominant role in specifying the pretreatment required of industrial flows which it treats.

7. There is general agreement that the current penalties section applying to vessel discharges of hazardous substances is not workable. Commerce favors amendment.

8. There has been two years of controversy over the Corps of Engineers program to control dredge spoil and fill disposal and to attempt under these provisions to control the filling of wetlands. The current provision was designed to control discharge of pollutants rather than to protect wetlands. Broad jurisdictional claims by the Corps have resulted in opposition from agricultural interests which fear government permitting of many of their activities not located in true wetlands. Commerce favors deleting the current provisions and replacing them with a narrowly tailored wetland protection provision.

9. A more responsive sewer grant program is broadly favored. Commerce supports amendments to effectuate this.

Schedule

OMB is working with an interagency task force to attempt to develop at least on a staff level, an Executive Branch bill amending FWPCA. Identification of the issues and options for resolving them will be accomplished by December 1, 1976. Commerce will submit an issue and options paper by that deadline. Additional staff work and policy consideration of an Administration initiative should take place in the first and possibly the second quarter of 1977.

Congressional initiatives in this area could come during the first two quarters of 1977 and the Department would have to respond as seems necessary or desirable.

SECRETARIAL DELEGATION OF RULEMAKING AND ADJUDICATION AUTHORITY

Background: All authorities to administer the Department and all functions assigned to it are properly vested in the Secretary by statute or other law. Any legislation giving authority directly to subordinates is undesirable. There are at present very few of these latter instances. The Secretary then delegates his authority to other officers, with power to redelegate. These delegations may be made with or without specified reservations or restrictions.

A variety of statutes administered by the Department involve in their implementation: (1) rulemaking -- substantive or procedural, (2) adjudications, or (3) other determinations -- all of which affect the public or segments thereof. Some of these rules or determinations need take into consideration issues or interests which are of concern from a Secretarial viewpoint -- e.g., impact on U.S. relations with other governments, Federal - State relationships, other national policy effects, or substantial economic or political effects. The Secretary may wish in such instances to participate in the decisional process, either by retaining the decisional authority or to be consulted before decisions are made.

However, under existing law, i.e., essentially court decisions, the Secretary or other officials may be foreclosed from such participation in numerous instances unless the delegation or the rules expressly provide for such retention of authority. The General Counsel is presently examining for consistency and appropriateness, the delegations of authority made by the Secretary through the years, and whether in all instances the delegations reflect a desirable assignment of decisional responsibilities. Preliminary analysis shows wide diversity between delegations and the degree of authority retained by the Secretary. The logic for this diversity is not apparent.

Issue: From this reexamination, and an assessment from past experience or contemplated impact, do each of the Departmental delegations now provide for involvement of the Secretary to the extent he may deem such involvement appropriate or necessary?

Analysis of Issue: The question is particularly relevant in those situations where the authority involves regulatory functions or financial assistance programs. While the Secretary should not be involved with minor or routine

decisions, he may well wish to be involved when particular rules of general applicability or specific determinations have significant public impact with respect to which he wishes to retain some say.

The Secretary also may wish, in specific instances, to make sure that the subordinate official to whom final decision-making authority is delegated is on a high enough level (i.e., no redelegation beyond such official). The delegation document also may have to consider whether and in what circumstances an appeal from a decision below may be properly made to the Secretary before final administrative action is deemed to have occurred, from which aggrieved persons may then go to court.

The newly-enacted Government in the Sunshine Act (P.L. 94-409), which circumscribes ex parte communications, also needs to be considered in those instances where Departmental proceedings are to be made on a record after a hearing (formal rulemaking or adjudication).

Each statute (or Executive order) giving authority to the Secretary needs be examined in view of the various considerations, including how "activist" a Secretary may wish to be or should be.

Schedule: A preliminary review of this subject should be completed by January 20, 1977 so that the incoming Administration can have the benefit of our analysis of outstanding delegations and their implications for effective Secretarial performance. Actual decision with regard to the implications of this analysis should, of course, be made by the new Secretary, with advice from the Departmental staff.

Application of Davis-Bacon Standards to "Force Account" Projects Funded Under Programs of the Economic Development Administration.

BACKGROUND: EDA administers the Public Works and Economic Development Act of 1965. Section 712 provides as follows:

> "All laborers and mechanics employed by contractors or subcontractors on projects assisted by the Secretary under this Act shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended (40 U.S.C. 276a-276a-5)." (Emphasis supplied)

By a letter dated April 1, 1976, the Secretary of Labor advised the Secretary of Commerce that he had made a ruling for purposes of Title X of the Public Works and Economic Development Act on the meaning of the term "contractor" as used in Section 712. His definition covered many Title X grant recipients who performed construction work by the direct hire of a work force, so-called "force account" projects, rather than by the entrance into contracts with independent contractors. Previous to this ruling there had been a long standing interpretation that public bodies carrying out work on a "force account" basis were not subject to Davis-Bacon wage rate requirements.

The Secretary of Labor requested that a copy of his letter be sent to each of the participating granting and lending agencies under the Title X Program. The Secretary of Commerce did so, but accompanied each copy with a copy of his return letter in which he stated his opinion that the Secretary of Labor had no authority retroactively to impose Davis-Bacon wage standards to projects under the Title X program. There the matter stood, until the Secretary of Labor by his letter of October 27, 1976, advised the Secretary of Commerce that his ruling on the meaning of the term

"contractor" for §712 purposes applied not just to Title X of the Public Works and Economic Development Act, but to the entire Act. Moreover, he advised that his interpretation applied to the Local Public Works Capital Development and Investment Act of 1976, Public Law No. 94-369 (also administered by EDA) because the language of Section 109 of that Act is the same in substance as the language of Section 712. His rulings would raise substantially the cost of "force account" projects assisted by EDA, and consequently reduce the number of persons who can benefit from employment pursuant to this Act.

ISSUE: The question is whether the Secretary of Labor has authority to determine that grantees under the Acts administered by EDA who are carrying out project work on a "force account" basis are "contractors" within the meaning of the appropriate provisions of the Act, and may therefore be required to pay Davis-Bacon wage rates.

ANALYSIS OF ISSUE: The Department of Labor's analysis, as expressed in the two letters of the Secretary of Labor, is that Congress intended, as demonstrated by the language of Section 109 and Section 712 and language in the Conference Report that accompanied Title X, that Davis-Bacon labor standards apply to construction work assisted by EDA grants. Therefore, the Secretary of Labor, according to his statutory authority to prescribe standards and regulations, can provide a definition for "contractor" within the meaning of Section 109 and Section 712.

EDA recognizes the authority of the Secretary of Labor to prescribe <u>appropriate</u> standards and regulations as authorized by Reorganization Plan No. 14 of 1950 and 40 USC §276c, but denies that his determination to include grantees carrying out "force account" work within the definition of "contractor" is within that authority. EDA maintains that the relevant provisions use the word "contractor" because Congress intended to

exclude work done by direct employment from the provisions of the Davis-Bacon Act. This intent is evidenced by the decades-long recognition by Congress of the distinction between work done by contract and direct employment. The distinction has also been recognized in an opinion of the Attorney General, in a federal court case, and in rulings by the Department of Labor.

SCHEDULE: The Department of Commerce is requesting that the Attorney General give an opinion to settle the matter. Assuming the Attorney General resolves the matter, if his decision is to have any effect on this year's program, it is imperative that we receive it by December 15, 1976, because that it when project approval begins.

DoC Position before 95th Congress on
Consumer Communications Reform Act

Background: Within the past decade, both the FCC and the Antitrust Division of the Justice Department have increasingly brought about two forms of private competition with AT&T and the other traditional communications common carriers:

(1) Competition for private line services from specialized common carriers; and

(2) Interconnection of customer provided equipment with the nationwide switched telephone network.

During the second session of the 94th Congress, a controversial bill entitled the "Consumer Communications Reform Act" (CCRA) was introduced in both houses of the Congress. It would have severely limited--and possibly eliminated--both types of competition. The bill received strong support from the traditional common carriers, but was opposed by the FCC and industries competing with the traditional common carriers because of the adverse effect it would have on competition.

Issue: The CCRA will very likely be reintroduced in the 95th Congress, and, if so, the Department will be expected to comment on it. In such event, the issue facing the Department is what position it should take on the proposed legislation, including recommendation of a constructive alternative, if possible.

Analysis of Issue: Upon introduction of this bill and request for comment, the Department's Office of Telecommunications (OT) will prepare a recommended Department position on the bill, which, because of the bill's controversial nature, will require careful attention and review by the Assistant Secretary for Policy, the Chief Economist and the General Counsel. The OT recommendation will be based upon a small study of the probable effects of one or more alternative sets of industry structure/regulatory limitations, which could be

imposed by the Congress, or perhaps the FCC, to achieve a more balanced position between the current extremes now being advocated by the interested parties.

Schedule: OT is tentatively expecting to complete its study in March or April of 1977. A more detailed decision concerning the study's depth and duration will be made in December, following completion of preliminary analysis now under way and determination of FY 77 personnel ceilings for OT.

Appendix: The attached Abstract of Secretarial Correspondence, dated June 18, 1976, from the Assistant Secretary for Science and Technology provides further information on this issue with regard to the bill introduced in the 94th Congress. For brevity, Tabs A, B, and C referenced in the Abstract are not attached.

U.S. DEPARTMENT OF COMMERCE

ABSTRACT OF SECRETARIAL CORRESPONDENCE

	The Secretary		The Under Secretary

JUN 18 1976

From: Assistant Secretary for Science and Technology

Subject: Briefing Paper on the "Consumer Communications Reform Act of 1976" for Meeting With the Telephone Company Officials, June 21, 1976

Background

Within the last decade both the FCC and the Justice Department have placed increasing pressure on the major common carriers to permit not only competition via specialized common carriers but also interconnection of non-telephone owned and leased equipment.

The Department of Commerce must formulate a position on the "Consumer Communications Reform Act of 1976" which is a bill that represents the telephone companies' reaction to the above. AT&T undoubtedly wants to acquaint the Secretary of Commerce with the telephone industry's perspective in regard to that bill.

Outline of the Issues

In the area of intercity transmission, specialized common carriers provide private line service (service in which the intercity line is dedicated solely to one user, individual or corporate) in competition with telephone company private line service. Where a user's volume of traffic between two cities is large enough, private line service is less expensive than ordinary toll service.

In 1968, the FCC (relying upon a narrower 1956 decision) authorized interconnection of privately owned terminal equipment to the switched telephone network. The telephone companies responded to the decision by requiring interconnection through a telephone company provided dial and protective connecting arrangement. In 1975, the FCC authorized direct connection of customer provided terminal equipment (certified to it by the manufacturer as meeting FCC technical standards to protect the telephone network), but that

CONTROL NO.

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	John Richardson	AGC/S&T				

decision has been stayed pending review by the Fourth Circuit Court of Appeals.

Prior to these decisions, interstate toll rates were based primarily on distance, rather than cost. Basic local telephone service rates were kept low, in part by charging above cost for extension telephones and business services, and by transferring some revenue from interstate toll service to local telephone companies. The FCC's authorization of competition from specialized common carriers, and sale of interconnect equipment, pressures the telephone companies toward cost-based rates. There is much controversy concerning how high some rates might have to go and this issue needs more study. In general, economists favor cost-based rates, but many state regulatory commissions prefer rates based on judgmental and political factors (value of service based rates), as we have had in the past. The telephone industry, because of its concern over the potential effects of competition and cost-based rates, has prepared legislation known as the Consumer Communications Reform Act of 1976.

Current Status

The telephone companies, having been frustrated in dealing with the Executive Branch (Justice Department, OTP) as well as by FCC regulation, have been driven to seek relief directly from the Congress.

On March 4, 1976, Mr. Roncalio introduced the telephone industry legislation (H.R. 12323). While there are two versions of the bill, the thrust in both is the same: (1) elimination of alleged "cream skimming" competition by specialized common carriers; and 2) regulation of interconnection of non-telephone company equipment at the state level, rather than at the present federal level.

To date approximately 12 Senators and 138 Representatives have either sponsored or co-sponsored the bill.

The OTP* (see Tab A) and the FCC in a message to Congress (see Tab B) have directly opposed the bill.

The Defense Department has unofficially informed this office that the need for an integrated national security communication system will require them to support the bill.

The three million American stockholders of AT&T are being lobbied to write their representatives on the issue. This obvious political pressure cannot be overlooked.

*OTP has changed to a "neutral" position since this was written.

The supporters of the bill, besides AT&T, (see Tab C) include the United States Independent Telephone Association (USITA), National Association of [State]Regulatory Commissioners (NARUC), and the Communications Workers of America (CWA).

Opposition to the bill on the industrial side includes the Ad Hoc Committee for Competitive Telecommunications (a specialized common carrier association), and the North American Telephone Association (interconnect equipment manufacturers).

Recommendations

For the past month this office has met with the major parties in support and opposition to the "Consumer Communications Reform Act of 1976."

Both parties, although denying any compromise positions, will in the future certainly have to reassess their options. Already the chances are that Congress will not seriously consider this bill until 1977.

It is recommended that you take a wait and see attitude, but offer your good offices for further discussion between the opposing parties, those issues of direct concern to this office can be highlighted, such as telecommunications innovation.

I have instructed John Richardson of the Office of Telecommunications to continue, on my behalf, further discussions with the respective industrial points of view. I asked Assistant Secretary Darman to urge at the White House meeting that no position be taken at this time to allow further time to analyze the issue and to search for alternatives to the extremes of enacting the legislation in its present form, or doing nothing, and allowing the present course of competition to continue. At that meeting the decision was made that the administration would take no position at this time.

6. CONGRESSIONAL OVERSIGHT

The Office of General Counsel is not charged with carrying out any legislative programs and is therefore not subject to Congressional oversight, except to the extent of justification for Congressional appropriations. The General Counsel, of course, assists in preparing testimony to be given by the Secretary or other Department representatives to Congressional oversight committees and, as part of the legislative clearance process, is responsible for clearance within the Department and with OMB of all Congressional testimony.

7. OTHER MAJOR OUTSIDE CONTACTS

The following are the various organizations in which the respectively indicated divisions of the OGC hold membership or participate, or with whom significant contact is maintained.

Through litigation, the OGC has extensive contact with the Justice Department, private attorneys, public interest groups and various Federal agencies.

Additionally, through the legislative comment process, the OGC has continual contact with OMB and other Federal agencies.

The Assistant General Counsel for Administration serves as the Department's representative to the Administrative Conference of the United States. In addition thereto, he:

(1) provides legal counsel on a variety of matters to Regional Economic Development Commissions;

(2) coordinates with the Justice Department on final determinations concerning Freedom of Information Act requests; and

(3) functions as liaison between the Department and the Comptroller General.

The Assistant General Counsel for Science and Technology serves as the Department's representative on the Executive Subcommittee to the Committee on Government Patent Policy of the Federal Council for Science and Technology.

We assume that the important outside contacts of the Office of Chief Counsel will be covered in the separate submissions of their respective bureaus and such contacts are therefore not included in this section.