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BERNARD SANDERS, VERMONT,
INDEPENDENT

August 4, 2000

John H. Thompson
Associate Director for Decennial Census
Bureau of the Census
Suitland Federal Center
Suitland and Silver Hill Roads
Building 2, Room 3586
Suitland, MD 20233

Dear Mr. Thompson:

This letter is in response to the solicitation of public comment on proposed regulation Docket No.: 00609172-0172-01, RIN 0607—AA33.

The Commerce Secretary has determined that he has the authority to issue a regulation that divests himself of obligations vested in him by the United States Congress by statute. Specifically, the regulation would give unreviewable authority to the Director of the Bureau of the Census, based on a recommendation of an internal Executive Steering Committee comprised of Census Bureau employees, to release adjusted numbers on the 2000 Census.[1]

[1] This of course assumes that the position of the U.S. Department of Justice in *Virginia v. Reno* is correct and "the Census Bureau has yet to determine which set of block level data—adjusted or unadjusted—it will release to satisfy its obligations under 13 USC § 141 (c)". Defendants' Motion to Dismiss or Stay Proceedings, *Virginia v. Reno*, Doc. No.1:00CV00751, 9 (June 19, 2000). The alternative position is also possible. That is, by proposing this regulation the Secretary has already exercised his discretionary authority and decided to statistically adjust the 2000 Census results and the only questions are "operational." As a result, the position taken by the Department of Justice would be incorrect and the issue would be ripe for a judicial decision. We do not need to address propriety of the Department of Justice's statement as to the ripeness of this issue for judicial decision except to say that either the Secretary must either be able to exercise the discretion given him by the Act, or he has made a final agency decision.

The Commerce Secretary has no such authority. Generally, regulations can not supercede statutes passed by the United States' Congress.

This proposed regulation is a clear violation of the final decision-making responsibility vested in the Commerce Secretary under 13 U.S.C. §195. [This opinion is supported by legal analysis of the American Law Division of the Congressional Research Service (CRS), an arm of the Library of Congress. I include the CRS legal analysis as part of this submission.] The regulation also fails to meet the standards of good government and the lines of authority as established under the Hoover Commission in 1949.

The Bureau of the Census is contained within the Commerce Department. As such, the Commerce Secretary has the ultimate responsibility for supervising the actions of the Bureau. This authority was granted to the Commerce Secretary in Title 13.

Section 4 provides that "The Secretary shall perform the functions and duties imposed upon him by this title, may issue such rules and regulations as he deems necessary to carry out such functions and duties, and may delegate [emphasis added] the performance of such functions and duties and the authority to issue such rules and regulations to such officers and employees of the Department of Commerce as he may designate."

While it is common practice and managerially sound for an agency head or Department Secretary to delegate authority of decision-making in many different matters to his subordinates, there is a serious difference between *delegating* duties, functions and authority to a subordinate, and *divesting* oneself of final review and reversal power over the exercise of that delegated authority.

The mere fact that a subordinate has knowledge in a particular area that is not held by the Secretary does not give the Secretary cause to divest to the subordinate unreviewable authority. For example, a Navy Admiral may posses more technical knowledge of a naval warfare than the Secretary of Defense. However, while the Secretary would look to him and other subordinates for expert advice, the ultimate decision of whether to go to war would be that of the Secretary of Defense and ultimately the Chief Executive.

If the Commerce Secretary believes he cannot, or should not, be responsible for the final release of adjusted numbers, then he should ask that Congress remove the Census Bureau entirely from the Commerce Department and make it a separate agency. Otherwise, with respect to the Census Bureau, what more important purpose does the Commerce Secretary serve other than to oversee the census and the subsequent release of the final numbers as mandated by the Congress? The point, however, is that the decision to vest this authority lies with the Congress; and the Congress has given final decision-making authority exclusively to the Secretary, not the Director of the Census Bureau.

On June 30, 2000, I wrote to the Secretary of Commerce asking for a legal opinion justifying the divestiture of the Secretary's statutory authority under Section 195 of Title 13. The Commerce Department General Counsel's response, dated July 14, 2000 was evasive, disingenuous and unpersuasive. If the Secretary has authority to vest unreviewable authority for the sampling decisions in the Census Director, he could do it by secretarial order. If he has no authority to divest himself of such authority, his action can in no way be buttressed legally by making it part of a notice and comment rulemaking. [I include my June 30 request and the Department's July 14 response as part of this submission.]

Moreover, it makes no sense to argue that the Secretary may retrieve his authority by instituting another rulemaking proceeding revoking his delegation. If the original delegation is truly legal and effective, the Census Director's sampling decision will have immediately gone into effect and it would be perhaps months before the rescission would become effective. If this is not an escape from responsibility, it would be difficult to conjure up a better example.

Further, the General Counsel, in his July 14 response, asserts that just because the proposed rule "states that the Director's decision would not be subject to review or reconsideration, does not mean that the Secretary would escape responsibility for that determination." This assertion simply defies logic. The words of the proposed rule actually state that the Director "shall make the final determination" which "shall not be subject to review, reconsideration or reversal by the Secretary." Reviewing courts normally presume legislative language, even administrative legislation, is to be accorded its plain meaning.

Additionally, the Commerce General Counsel's opinion particularly (and exclusively) relies on the Secretary's general statutory authority under 13 U.S.C. 4 to promulgate rules "he deems necessary to carry out" his statutory functions and duties, and to "delegate such functions and duties" to subordinate officers and employees. Applicable judicial precedent, however, makes it abundantly clear that general statutory authority to promulgate rules to effectuate statutory missions or to delegate secretarial responsibilities provides no lawful basis to alter, amend, abolish or transfer statutory authorities, responsibilities and functions ultimately vested in an agency head. Thus the courts have consistently held that reliance on general authority to administer an area of statutory regulation will not sustain an agency head's actions reaching beyond congressionally granted authority. See, e.g., *American Petroleum Institute v. EPA*, 52 F. 3d 1113, 1119 (D.C. Cir. 1995) ("EPA cannot rely on its general authority to make rules necessary to carry out its functions when a specific statutory directive defines the relevant functions of EPA in a particular area."); *Natural Resources Defense Council v. Reilly*, 976 F.2nd 36,

41 (D.C. Cir. 1992) ("In the past, we have not allowed the general grant of rulemaking power...to trump the specific provision of the Act.").

The courts have also repeatedly rejected the contention that a general grant of authority that does not specifically negate the existence of claimed administrative power presumptively validates that claim. See e.g., *Background Against Dumps v. EPA*, 100 F. 3d 147, 150-51 (D.C. Cir. 1996) ("[W]ere the courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely the Constitution as well.") (emphasis in original); *Ethyl Corp. v. EPA*, 51 F. #d 1053, 1060 (D.C. Cir 1995) ("To suggest, as the [agency] effectively does, that...any time a statute does not expressly negate the existence of a claimed administrative power [it is available to the agency]...is both flatly unfaithful to the principle of administrative law... and refuted by precedent."(emphasis in original); *Railroad Labor Executives' Assoc. v. National Mediation Board*, 29 F. 3d 655, 671 (D.C. Cir. 1995) (same).

Finally, I requested the General Counsel provide analogous examples to support his assertion that "the same approach has been taken for innumerable decisions made throughout the Federal Government." His July 28 response lists seven examples, none of which are analogous. The American Law Division of the Congressional Research Service reviewed the proffered examples, and found, "In sum, our review of the seven regulatory provisions submitted by the General Counsel indicates that none are directly analogous to the proposed Census rule. Indeed, the proffered examples might be said to stand in direct opposition to the proposal in that they demonstrate that when Congress wants to allow delegations of regulatory power vested in an agency, it knows how to do it."

I have received no example in which a federal statute vests exclusive final decision-making authority with respect to discreet subject matter in an agency head, and the agency head, by either internal order or through informal rulemaking, delegates that decision-making authority to a subordinate whose decision will be the final agency decision and will not be reviewable, reconsidered, or reversible by the agency head. Such an exception, or deviation from statute would only be legal if the Congress amended that statute. [I include my July 18 request, the Department's July 28 response, and the CRS analysis as part of this submission.]

Interestingly, this Administration has understood the importance of the traditional manner in which authority is delineated in the federal government. In his signing statement on October 5, 1999, the President stated:

> . . . As the Hoover Commission concluded half a century ago, the accountability of a Cabinet Department head is not complete without the legal authority to meet the legal responsibilities for which that person is accountable. The Act's provisions summarized above skew that authority. These provisions blur the clear and unambiguous lines of authority intended by Presidential Decision Directive 61, and impair the Secretary of Energy's ability to assure compliance at all levels with the Department of Energy with instructions he may receive in meeting his national defense responsibilities under the Atomic Energy Act.

The lessons of the Hoover Commission are instructive: There should be clear unambiguous lines of accountability and authority between the Chief Executive, his or her Cabinet Secretaries and their subordinates. The Hoover Commission felt it necessary to provide more structure and control in the Executive Branch of government. " . . . [W]e must reorganize the Executive Branch to give it simplicity of structure, unity of purpose, and the clear line of executive authority that was originally intended."

The recommendations of the Hoover Commission stand in stark contrast to the proposed regulation by the Commerce Secretary. The Commission's recommendations included:

- Create a more orderly grouping of the functions of Government into major departments and agencies under the President.
- Establish a clear line of control from the President to those department and agency heads and from them to their subordinates with correlative responsibility from these officials to the president, cutting through the barriers which, in many cases, made bureaus and agencies partially independent of the Chief Executive.
- Permit the operating departments and agencies to administer for themselves a larger share of the routine administrative services, under strict supervision and in conformity with high standards.

Even in previous censuses where a Commerce Secretary delegated the Bureau Director the authority to a make a 'decision' regarding the release of adjusted numbers, this, in essence, was a recommendation by the Bureau Director. The Commerce Secretary has never divested by regulation unreviewable final authority to the Director of the Census Bureau to release adjusted numbers. Certainly, if Bureau Directors had possessed this ability in the past, there would be no need for a regulation.

The proposed regulation is neither legal under 13 U.S.C. §195, nor sound public policy. It should be withdrawn immediately.

Sincerely,

Dan Burton
Chairman
Committee on Government Reform

Hal Rogers
Chairman
Subcommittee on Commerce, Justice, State

Dan Miller
Chairman
Subcommittee on the Census

Thomas M. Davis
Member
Subcommittee on the Census

Mark E. Souder
Member
Subcommittee on the Census

Paul Ryan
Member
Subcommittee on the Census

Enclosures:

Letter from Dan Miller to Hon. William M. Daley dated June 30, 2000
Letter from Andrew Pincus to Dan Miller dated July 14, 2000
Letter from Dan Miller to Hon. William M. Daley dated July 18, 2000
Letter from Andrew Pincus to Dan Miller dated July 28, 2000
Congressional Research Service legal analysis dated June 16, 2000
Congressional Research Service legal analysis dated August 4, 2000

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BERNARD SANDERS, VERMONT,
INDEPENDENT

June 30, 2000

The Honorable William M. Daley
Secretary of Commerce
U.S. Department of Commerce
Washington, D.C. 20230

Dear Mr. Secretary:

On June 13, 2000, you proposed a regulation that would delegate the decision to produce statistically adjusted census counts from the Secretary of Commerce to the Director of the Census Bureau (*see Federal Register Vol. 65, No. 119*). According to the proposed regulation, the Director's decision would be subject to neither review nor reversal by the Secretary of Commerce. The pertinent statute, 13 U.S.C., repeatedly vests authority over the census in the Secretary of Commerce, not the Director of the Census Bureau and his subordinates.

The legal opinion accompanying the proposed regulation, prepared by Andrew Pincus and dated June 12, 2000, fails to address the fundamental legal question raised by your proposal. Namely, does the Secretary of Commerce have authority to divest himself of responsibility vested in him by Congress? Preliminary review of administrative law suggests he does not have this authority.

Please provide the Subcommittee on the Census with an additional legal opinion, justifying the divestiture of the Secretary's statutory authority in this manner. In order to allow sufficient time for Congressional and public review of said opinion, please provide it no later than July 14 (three weeks prior to the deadline for public comment on the proposed regulation). Thank you for your cooperation.

Sincerely,

Dan Miller

Dan Miller
Chairman
Subcommittee on the Census

cc: The Honorable Carolyn B. Maloney
The Honorable J. Kenneth Blackwell, Co-Chairman, Census Monitoring Board
Johnnie Frazier, Inspector General, Department of Commerce
J. Christopher Mihm, Associate Director, General Accounting Office
Janet Norwood, Chair, Panel to Review the 2000 Census

GENERAL COUNSEL OF THE
UNITED STATES DEPARTMENT OF COMMERCE
Washington, D.C. 20230

July 14, 2000

The Honorable Dan Miller
Chairman, Subcommittee on the Census
Committee on Government Reform
U.S. House of Representatives
Washington, D.C. 20515-6143

Dear Mr. Chairman:

Thank you for your recent letter to Secretary Daley seeking information on the legal basis for the Secretary's proposed delegation of authority to the Director of the Census for making certain determinations concerning the census. Specifically, your letter states that Congress vested authority over the census in the Secretary of Commerce and you seek a legal opinion justifying the Secretary's "divestiture" of his statutory authority. The Secretary asked that I respond to your request.

On June 13, the Commerce Department issued a proposed rule setting forth how the Bureau of the Census will carry out its responsibilities to report tabulations of population to States and localities pursuant to the Census Act, Title 13, United States Code. See 65 FR 38368 (June 20, 2000). Among other things, the proposed rule would delegate to the Director of the Census authority to make a determination regarding the methodology to be used in calculating the tabulations of population reported to States and localities pursuant to 13 U.S.C. 141(c). This delegation of authority to the Director was included in the proposed rule because the Secretary believes the decision turns entirely on operational and methodological issues within the scientific expertise of the Bureau of the Census. He also believes it important to avoid even the appearance that considerations other than those relating to statistical science were being taken into account in connection with this decision.

Section 4 of Title 13, United States Code, clearly provides the Secretary authority to issue the proposed rule and to include in that proposal the delegation of authority at issue. That section provides that:

> The Secretary shall perform the functions and duties imposed upon him by this title, may **issue such rules and regulations as he deems necessary** to carry out such functions and duties, and **may delegate the performance of such functions and duties** and the authority to issue such rules and regulations to such officers and employees of the Department of Commerce as he may designate. (Emphasis added)

This statutory language provides the Secretary with broad authority to take the steps he deems appropriate to carry out his responsibilities under the law. Further, Congress did not establish any

particular limitations on the Secretary's ability to delegate the performance of his functions and duties under the Census Act. As such, the Secretary may delegate any authority of his choosing, including the authority to determine the methodology to be used in calculating the tabulations of population reported to States and localities pursuant to 13 U.S.C. 141(c).

The proposed delegation of authority contained in the Department's proposed rule in no way constitutes a "divestiture" of the Secretary's statutory responsibility or authority. By referring to this proposal as a divestiture you appear to be suggesting that the delegation, if adopted in a final rule, would be irrevocable. That simply is not the case. If the delegation of authority is adopted in a final rule, this, or any future, Secretary of Commerce could seek to revoke that delegation through the rulemaking process. If a rule revoking the delegation satisfied the procedural and substantive requirements of the Administrative Procedure Act and other applicable legal standards, it would be effective. Further, the fact that the Secretary seeks to authorize the Director of the Census to make a determination under the Census Act, and states that the Director's decision would not be subject to review or reconsideration, does not mean the Secretary would escape responsibility for that determination. The Secretary is merely codifying his position that a scientific determination should be made by scientists and that he is prepared to accept whatever determination is made by the head of the scientific bureau in which the particular knowledge and experience for making that determination lies. The same approach has been taken for innumerable decisions made throughout the Federal Government.

I trust this letter provides the information you seek. Please do not hesitate to contact me should you need further information or have additional questions.

Sincerely,

Andrew J. Pincus

cc: The Honorable Carolyn B. Maloney

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BERNARD SANDERS, VERMONT,
INDEPENDENT

July 18, 2000

The Honorable William M. Daley
Secretary of Commerce
U.S. Department of Commerce
Washington, D.C. 20230

Dear Mr. Secretary:

Thank you for your July 14 response regarding the proposed regulation to delegate the decision to produce statistically adjusted census counts from the Secretary of Commerce to the Director of the Census Bureau (*see Federal Register Vol. 65, No. 119*). According to the proposed regulation, the Director's decision would be subject to neither review nor reversal by the Secretary of Commerce.

Preliminary review of administrative law suggests the Secretary does not have authority to divest himself of responsibility vested in him by Congress. My letter of June 30 requested an additional legal opinion, justifying the divestiture of the Secretary's statutory authority in this manner.

Your response, written by Andrew Pincus, cites Section 4 of Title 13, United States Code, as granting the Secretary broad authority to issue such regulations delegating the performance of his duties as he deems necessary. It further disputes the characterization of the proposed regulation as a "divestiture" of authority, and indicates the "same approach has been taken for innumerable decisions made throughout the Federal Government."

The Subcommittee, and experts with whom we have consulted, are unfamiliar with any example of a Secretary implementing a regulation granting exclusive decision-making authority, not subject to review, to an agency director. For the benefit of informed public comment on the proposed regulation, please provide the Subcommittee on the Census with specific examples of the regulations to which your letter refers.

In order to allow sufficient time for Congressional and public review of said examples, please provide them no later than July 20 (two weeks prior to the deadline for public comment on the proposed regulation). Thank you for your cooperation.

Sincerely,

Dan Miller
Chairman
Subcommittee on the Census

cc: The Honorable J. Dennis Hastert, Speaker
The Honorable Richard A. Gephardt, Minority Leader
The Honorable Carolyn B. Maloney
Johnnie Frazier, Inspector General, Department of Commerce
J. Christopher Mihm, Associate Director, General Accounting Office
Janet Norwood, Chair, Panel to Review the 2000 Census

GENERAL COUNSEL OF THE
UNITED STATES DEPARTMENT OF COMMERCE
Washington, D.C. 20230

July 28, 2000

The Honorable Dan Miller
Chairman, Subcommittee on the Census
Committee on Government Reform
U.S. House of Representatives
Washington, D.C. 20515-6143

Dear Mr. Chairman:

Thank you for your July 18 letter to former Secretary Daley seeking additional information concerning my letter to you of July 14. My earlier letter responded to your request for an explanation of the legal basis for the Secretary's proposed regulation that would delegate authority to the Director of the Census for making certain determinations concerning the census, including a justification of what you characterized as the Secretary's "divestiture" of his statutory authority. I explained how your characterization of the proposed delegation of authority as a divestiture of authority was incorrect and stated that the "same approach has been taken for innumerable decisions made throughout the Federal Government." Your second letter states that neither the Subcommittee nor experts with whom you have consulted are aware of such regulations and asked that we provide the Subcommittee with examples.

In numerous cases, agencies have promulgated regulations that establish a decisionmaking process that does not give an opportunity for involvement by the relevant Secretary even though the governing statute invests the decisionmaking authority in the Secretary. In those circumstances, as with the proposed rule, the regulation would have to be changed – in accordance with the requirements of the Administrative Procedure Act and other governing law -- to reinsert the Secretary into the decisionmaking process. Set forth below are citations to several examples.

1. Certain decisions of the Secretary of Agriculture under regulations codified at 7 CFR 1.411, 7 CFR 1.426, and 7 CFR 2.35 concerning the Forest Resources Conservation and Shortage Relief Act of 1990, 16 U.S.C. 620 *et seq.*

2. Certain decisions of the Attorney General under regulations codified at 8 CFR 3.38, 8 CFR 3.39, and 8 CFR 240.31 concerning the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*

3. Certain decisions of the Secretary of Labor under regulations codified at 20 CFR 802.406 and 802.410 concerning the following statutes:

   a. The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*;

   b. The Defense Base Act, 42 U.S.C. 1651 *et seq.*;

c. The District of Columbia Workmen's Compensation Act, 36 D.C. Code 501 *et seq.* (1973);

d. The Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.*;

e. The Nonappropriated Fund Instrumentalities Act, 5 U.S.C. 8171 *et seq.*; and

f. Title IV, section 415 and part C of the Federal Mine Safety and Health Act of 1977 (MSHA), Public Law 95-164, 91 Stat. 1290 (formerly the FCMHSA of 1969), as amended by the Black Lung Benefits Reform Act of 1977, Public Law 95-239, 92 Stat. 95, the Black Lung Benefits Revenue Act of 1977, Public Law 95-229, 92 Stat. 11, and the Black Lung Benefits Amendments of 1981, Public Law 97-119, 95 Stat. 1643, 30 U.S.C. 901 *et seq.*

For a specific example see regulations codified at 20 CFR 725.411, 20 CFR 725.421, 20 CFR 725.476, and 20 CFR 725.481 concerning determinations made under the MSHA which led to a final decision made under 20 CFR 802.406.

4. Certain decisions of the Attorney General under regulations codified at 21 CFR 1316.02 and 21 CFR 1316.67, concerning the Controlled Substances Act, 21 U.S.C. 801, and/or the Controlled Substances Import and Export Act, 21 U.S.C. 951.

5. Certain decisions of the Secretary of Housing and Urban Development under regulations codified at 24 CFR 180.670 concerning the Fair Housing Act, 42 U.S.C. 3601 *et seq.*

6. Certain decisions of the Secretary of Health and Human Services under regulations codified at 42 CFR 498.1, 42 CFR 498.2. 42 CFR 498.88, and 42 CFR 498.90 concerning the Social Security Act, 42 U.S.C. 301 *et seq.*

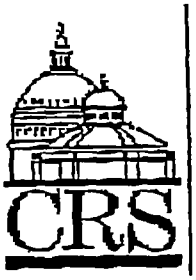
7. Certain decisions of the Secretary of Transportation under regulations codified at 49 CFR 1.43, 49 CFR 1.45, 49 CFR 1.56b concerning the Federal Aviation Act, 49 U.S.C. 41101. The decisionmaking process codified in the above stated regulations was upheld in an opinion of the Court of Appeals for the District of Columbia Circuit, See USAir, Inc. *et al.* v. Department of Transportation *et al.*, 969 F.2d 1256 (D.C. Cir. 1992).

I hope this information is responsive to your request.

Sincerely,

Andrew J. Pincus

cc: Honorable Carolyn B. Maloney



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Memorandum June 16, 2000

TO : House Census Subcommittee
Attention: Jane Cobb

FROM : Margaret Mikyung Lee
Legislative Attorney
American Law Division

SUBJECT : Legal analysis of proposed regulation regarding adjustment of the decennial census population tabulations reported to States and localities pursuant to 13 U.S.C. § 141(c)

This memorandum is in response to your request for an opinion about the legality of a regulation proposed by the Secretary of Commerce, William M. Daley, establishing the framework for the decision regarding the statistical adjustment of the decennial population tabulations reported to the States and localities for redistricting purposes pursuant to 13 U.S.C. § 141(c). This proposal is docket no. 00609172-0172-01, dated June 13, 2000 (apparently submitted but not yet formally reported in the Federal Register). The Administration has decided to consider releasing an adjusted set of population figures as the officially reported figures for use in redistricting by the States and localities. Due to the concerns and perception in some quarters that a decision to use statistical adjustment techniques may be motivated by political considerations and that an adjustment process itself may be subject to manipulation for political gain,[1] the Secretary of Commerce proposes a decision-making process which would delegate the ultimate decision to report adjusted figures to the Director of the Census Bureau, a professional and an expert in the statistical and demographic field, and would eliminate the Secretary's participation in the decision entirely, since he is the politically appointed cabinet officer who is not a statistical professional. In his letter of explanation accompanying the proposed regulation, the Secretary expresses the intention of insulating the final decision "from even the appearance of political tampering" and "to ensure public confidence in the final decision." You are concerned that the manner in which the Secretary proposes to delegate his responsibilities is impermissible legally.

Sections 4, 21, 141 and 195 of title 13, United States Code, establish the duties of the Secretary of Commerce and the Director of the Census Bureau generally and with regard to the tabulations reported to the States for redistricting and the use of sampling techniques in adjusting the census for purposes other than apportionment. Section 4 provides that the

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[1] D'Vera Cohn, *Clinton to Keep Political Appointees Out of Decision on Census*, Wash. Post, June 14, 2000, at A21.

"Secretary shall perform the functions and duties imposed upon him by this title, may issue such rules and regulations as he deems necessary to carry out such functions and duties, and may delegate the performance of such functions and duties and the authority to issue such rules and regulations to such officers and employees of the Department of Commerce as he may designate." Section 21 states that the "Director shall perform such duties as may be imposed upon him by law, regulations, or orders of the Secretary." Section 141 provides that the "Secretary shall . . . take a decennial census of population . . . in such form and content as he may determine, including the use of sampling procedures and special surveys. . . . tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be . . . reported by the Secretary to the President of the United States." Subsection 141(c) goes on to provide that "[t]abulations of population for the areas identified in any plan approved by the Secretary shall be completed by him as expeditiously as possible after the decennial census date and reported to the Governor of the State involved and to the officers or public bodies having responsibility for legislative apportionment or districting of such State." Finally, section 195 provides that "[e]xcept for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." Congress explicitly delegated to the Secretary of Commerce the authority and responsibility for a decision concerning the use of sampling and the reporting of tabulations for redistricting to the States. The Secretary may delegate such authority to the Director of the Census Bureau, but statutorily he is still the executive official accountable to Congress for decisions made pursuant to such authority.

The proposed regulation would add a new part 101 to title 15 of the Code of Federal Regulations, consisting of two sections. Section 101.1 delegates authority for the final decision concerning adjustment to the Director of the Census Bureau, with the recommendation of the Executive Steering Committee for A.C.E. [Accuracy and Coverage Evaluation] Policy, whose recommendation is to be made public in a written report. Section 101.2 requires that, if adjusted data are reported to the States, unadjusted data shall be released at the same time in the manner described in section 209(j) of Public Law 105-119, 111 Stat. 2440; the section also requires that, if the Director decides to report unadjusted data to the States, despite an Executive Steering Committee recommendation to report adjusted data, the adjusted data shall be released at the same time in the manner described in section 209(j) of Public Law 105-119. Subsection 101.1(a)(1) provides that the "Director of the Census shall make the *final determination* regarding the methodology to be used in calculating the tabulations of population reported to States and localities pursuant to 13 U.S.C. § 141(c) [emphasis added]." Subsection 101.1(a)(4) further provides that the "determination of the Director of the Census shall not be subject to review, reconsideration, or reversal by the Secretary of Commerce."

Although the Secretary may delegate the tasks associated with the decision to the Director, Congress delegated the authority to him and he cannot purport to divest himself of the final decision-making authority and responsibility. Subdelegation of power is not unlawful where the subordinate officer or executive body does not have the final word and decision on the function delegated to the superior officer or executive body by Congress and the superior

officer or body retains the final decision and review.[2] The supplementary information in the notice for the proposed regulation states that similar approaches to the adjustment decision process were followed for the 1980 and 1990 censuses.[3] However, the final decision following the 1990 census lay with the Secretary of Commerce, although he had the advice of experts, and the Federal Register notice of that decision was issued by the Secretary of Commerce.[4]

The decision regarding the 1980 adjustment was issued by the Director of the Census Bureau. This notice, the Departmental Organization Order 32-21 dated August 4, 1975, and the memorandum of the Secretary of Commerce to the Director of the Census dated May 12, 1980, the latter of which is reprinted in the Federal Register notices[5] of the process and final decision following the 1980 census, are cited as precedent for delegating authority to the Director of the Census Bureau, but the 1980 memorandum, at least, does not expressly delegate away the authority to make the final decision. In the memorandum, then-Secretary Klutznick appears to have retained final authority for the decision, never delegating *by regulation* to the Director *unreviewable, irrevocable* decision-making authority in the same manner as Secretary Daley. In his memorandum to the Director, reprinted as an appendix to the Departmental notice, the Secretary does state that the "culmination of this process should be a decision by the Director of the Census Bureau on whether and how any statistical adjustment should be made to 1980 census data"; "I do expect . . . you will be prepared to announce a decision on adjusting the census data for other uses [other than apportionment of the House of Representatives]"; and "I . . . shall expect you to take direct personal charge of this process."[6] However, the memorandum does not purport to be a regulatory delegation to the Director of unreviewable authority.

The possible invalidity of the unreviewable delegation of authority in the proposed regulation can be remedied by amending the language so that the Secretary of Commerce still retains his statutory authority for the final decision, at the same time delegating to the Director of the Census Bureau the authority to make the actual decision. Proposed subsection 101.1(a)(4) could be amended to read: "the Director of the Census may establish statistical adjustment-specific policies, unless disapproved by the Secretary of Commerce."[7] This language effectively eliminates the Secretary from an affirmative decision to report adjusted figures, but allows him to retain final decision-making power through his veto authority.

You also asked if there was a mechanism other than the normal comment period and oversight for registering Subcommittee reservations, concerns or disapproval of the proposed

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[2] *See National Labor Relations Board v. Duval Jewelry Company of Miami*, 357 U.S. 1, 7-8 (1958); *Equal Employment Opportunity Commission v. Exchange Security Bank*, 529 F.2d 1214, 1218-19 (5th Cir. 1976).

[3] Proposed Regulation in Docket No. 000609172-0172-01, June 13, 2000.

[4] *Id.* and *see also* 56 Fed. Reg. 33582 (1991).

[5] 45 Fed. Reg. 83110 (1980); 45 Fed. Reg. 69366 (1980).

[6] 45 Fed. Reg. at 83117.

[7] There is a precedent for such language in § 3212(d) of Pub. L. 106-65, 113 Stat. 112 (1999), which established the authority of the Administrator for the National Nuclear Security Administration.

regulation. The subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. 104-121, 110 Stat. 857-874 (found at 5 U.S.C. §§ 801-808), established a mechanism by which Congress can review and disapprove virtually all federal agency rules. 5 U.S.C. § 804 defines "rule" essentially the same as 5 U.S.C. § 551, with certain limitations inapplicable to the proposed regulation, as "the whole or a part of an agency statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy." Generally, there are requirements to report a covered rule to Congress. Congress has 60 days to review and disapprove the rule. If the rule is reported within 60 session days of Senate adjournment or 60 legislative days of House adjournment, the period during which a joint resolution of disapproval may be considered and passed is extended to the next session of Congress. Although various problems with the mechanism have limited its utility, nevertheless, it has proved effective on a couple of occasions as a means of pressuring agencies to alter or suspend a rule.[8]

If we can be of further assistance, please contact us.

[8] For a detailed discussion of the mechanism and its use, *see* CRS Report for Congress RL30116, *Congressional Review of Agency Rulemaking: A Brief Overview and Assessment after Three Years*, by Morton Rosenberg.

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Memorandum

August 4, 2000

TO : Honorable Dan Miller, Chairman
House Subcommittee on the Census,
Committee on Government Reform

FROM : Morton Rosenberg
Specialist in American Public Law

Diane Duffy
Legislative Attorney
American Law Division

SUBJECT : Assessment of Agency Precedents Submitted in Support of a Commerce Department Proposed Rulemaking That Would Divest the Secretary of His Statutory Authority With Respect to Sampling Decisions Under 13 U.S.C. 195

A proposed rule submitted by the Secretary of Commerce for public comment would delegate to the Director of the Census the authority to "make the *final determination* regarding the methodology to be used in calculating the tabulations of populations reported to the States and localities pursuant to 13 U.S.C. 143" and provide that "the determination of the Director of the Census shall not be subject to review, reconsideration, or reversal by the Secretary of Commerce." See 65 F.R. 38368 (June 20, 2000) (emphasis supplied). In our memorandum to you of June 16, 2000, after reviewing the statutory duties and responsibilities of the Secretary with regard to the tabulations to be reported to the States for redistricting[1] and the use of sampling techniques in adjusting the census for purposes other than apportionment,[2] we concluded that "Although the Secretary may delegate the tasks

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[1] Section 141 of Title 13 provides that the 'Secretary shall . . . take a decennial census of population . . . in such form and content as he may determine, including the use of sampling procedures and special surveys . . . The tabulation of total population by states under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be . . . reported by the Secretary to the President of the United States." Subsection 141(c) goes on to provide that "[t]abulations of population for the areas identified in any plan approved by the Secretary shall be completed by him as expeditiously as possible after the decennial census date and reported to the Governor of the State involved and to the officers or public bodies having responsibility for legislative apportionment or districting of such State."

[2] Section 195 of Title 13 provides that "[e]xcept for the determination of population for purposes of appointment of Representatives in Congress among the several States, the Secretary shall, if he

(continued...)

associated with the decision to the Director, Congress delegated the authority to him and he cannot purport to divest himself of the final decision-making authority and responsibility. Subdelegation of power is not unlawful where the subordinate officer or executive body does not have the final word and decision on the function delegated to the superior officer or executive body by Congress and the superior officer or body retains the final decision and review."

Thereafter, you wrote the Secretary requesting that he provide the legal authority upon which the proposed divestiture was based. The Commerce Department's General Counsel responded on July 14, 2000, on behalf of the Secretary, stating that the "broad authority" vested in the Secretary by 13 U.S.C. 4 to "issue such rules and regulations as he deems necessary to carry out such functions and duties [imposed upon him by Title 13]," and to "delegate the performance of such functions and duties and the authority to issue such rules and regulations to such officers and employees of the Department of Commerce as he may designate," provides the necessary legal basis for the proposed rule. The General Counsel also argued that the delegation authority was not a divestiture since it could be retrieved by simply revoking the rule by means of a future rulemaking proceeding. Finally, the General Counsel stated that "the same approach has been taken for innumerable decisions throughout the Federal Government."

On July 18, you again wrote the Secretary, this time requesting identification of examples of the analogous regulations referred to. The General Counsel responded on July 28 with seven examples of "regulations that establish a decisionmaking process that does not give an opportunity for involvement by the relevant Secretary even though the governing statute invests the decisionmaking authority in the Secretary. In those circumstances, as well the proposed rule, the regulation would have to be changed -- in accordance with the requirements of the Administrative Procedure Act and other governing law -- to reinsert the Secretary into the decisionmaking process."

You have asked that we review the proffered examples to determine whether they are in fact analogous to the proposed rule in question. Since you wish to submit a comment on the proposed rule before the expiration of the public participation period on August 4, this analysis is necessarily brief and summary in nature. Some of the citations and examples appear to require a further degree of extensive evaluation and analysis. However, based on our research, certain conclusions can be made. Our review is informed by well-established principles of constitutional and administrative law, and guided by the unique provisions of the proposed rule. First, the law.

As our June 16 memorandum indicated, the courts have held that divestiture of final decisionmaking authority with respect to duties and responsibilities vested by law in an agency head is appropriate only with the consent of Congress. *National Labor Relations Board* v. *Duval Jewelry Company of Miami*, 357 U.S. 1, 7-8 (1958); *Equal Employment Opportunity Commission* v. *Exchange Security Bank*, 529 F. 2d 1214, 1218-19 (5th Cir. 1976). Applicable judicial precedent has established that general statutory authority to promulgate rules to effectuate statutory missions or to delegate secretarial responsibilities by itself provides no

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[2] (...continued)
considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title."

lawful basis to alter, amend, abolish or transfer statutory authorities, responsibilities and functions ultimately vested in an agency head. Notwithstanding a broad grant of discretionary regulatory authority, where Congress has expressly assigned a regulatory function to an agency head in an enabling statute, the agency head is not permitted to divest himself of the ultimate responsibility for that function by delegating it to a subordinate. Thus the courts have consistently held that reliance on general authority to administer an area of statutory regulation will not sustain an agency head's actions reaching beyond congressional authority. See *e.g., American Petroleum Institute* v. *EPA*, 52 F. 3d 1113, 1119 (D.C. Cir. 1995)("EPA cannot rely on its general authority to make rules necessary to carry out its functions when a specific statutory directive defines the relevant functions of EPA in a particular area."); *Natural Resources Defense Council* v. *Reilly*, 976 F. 2d 36, 41 (D.C. Cir. 1992)("In the past, we have not allowed the general grant of rulemaking power. . . to trump the specific provision of the Act.") Moreover, the courts have repeatedly rejected the contention that a general grant of rulemaking authority that does not specifically negate the existence of a claimed administrative power thereby presumptively validates the claim for such a power. See *e.g.*, *Background Against Dumps* v. *EPA*, 100 F. 3d 147, 150-51 (D.C. Cir. 1996)("[W]ere the courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely the Constitution as well.")(emphasis in original); *Ethyl Corp.* v. *EPA*, 51 F. 3d 1053, 1060 (D.C. Cir. 1995)("To suggest, as the [agency] effectively does, that. . . any time a statute does not expressly negate the existence of a claimed administrative power [it is available to the agency] . . . is both flatly unfaithful to the principle of administrative law. . . and refuted by precedent.")(emphasis in original); *Railroad Labor Executives' Assoc.* v. *National Mediation Board*, 29 F. 3d 655, 671 (D.C. Cir. 1995)(same).

The proposed census delegation has the following salient characteristics: it delegates to the Census Director the substantive determination now vested in the Secretary by Section 195 of Title 13 as to the feasibility of using sampling techniques for the non-apportionment purposes of Title 13 and that determination is not subject to "review, reconsideration, or reversal" by the Secretary. The authority upon which this proposed action is based is the general authority of the Secretary to promulgate rules to effectuate the purposes of Title 13 and to delegate the performance of duties and functions vested in him to subordinate officers and employees. No provision of Title 13 specifically authorizes the Secretary to transfer his Section 195 function (or any other discrete function or responsibility vested in him) to a subordinate in a manner that leaves him without the ability to review, reconsider or reverse the subordinate's action. Finally the census delegation may only be retrieved by the Secretary by institution of a new rulemaking proceeding. In contrast, each of the seven examples proffered by the General Counsel is founded on either express or implicit congressional assent to establish an administrative scheme that would insulate to some degree, *adjudicatory* decisionmaking from secretarial control either to prevent potential political interference in sensitive decisions or to facilitate the prompt resolution of a heavy workload of routine adjudicatory claims or applications. A brief review of the seven examples underlines the uniqueness of the proposed Census rule, the differences in the features between the proposed rule and the examples proffered by the General Counsel, and the conformity of the seven examples with the guiding legal principles outlined above.

1. Certain decisions of the Secretary of Agriculture under regulations codified at 7 CFR 1.411, 7 CFR 1.426, and 7 CFR 2.35 concerning the Forest Resources Conservation and Shortage Relief Act of 1990, 16 U.S.C. 620 *et seq.*

The Forest Resources Conservation and Shortage Relief Act of 1990, *codified at* 16 U.S.C. 620 *et seq.*, is legislation designed to promote the effective management and conservation and forest resources to ensure sufficient supplies of forest resources or products essential to the nation. The CFR sections cited in the General Counsel's memo deal with the application process for approving acquisitions of unprocessed timber originating from a designated source area. The statutory requirements and procedures for the application process are found at 16 U.S.C. 620b(c), and the decisionmaking authority with respect to the granting of applications is vested in the Secretary with jurisdiction over the particular Federal lands. See 16 U.S.C. 620b(c). Under rules promulgated by the Secretary of Agriculture, 7 CFR 1.410 *et. seq.*, procedures are established for persons submitting source area applications. An application triggers a formal, on the record adjudicatory proceeding pursuant to 5 U.S.C. 556 and 557 presided over by an administrative law judge (ALJ). At the conclusion of the hearing the ALJ issues a recommended decision which may be appealed by the applicant to the Department's Judicial Officer (JO). The JO's decision is a final order of the Department and the applicant may seek judicial review thereafter. 7 CFR 1.412, 1.426.

The position of Judicial Officer of the Department was established by the Act of April 4, 1940 (the Shwellenbach Act), *codified at* 7 U.S.C. 450c-450g, "to act as the final deciding officer in adjudication proceedings subject to 5 U.S.C. 556 and 557." 7 CFR 2.35. At present the JO is responsible for hearing appeals arising from proceedings under some 50 statutes.

The Schwellenbach Act expressly authorizes the Secretary of Agriculture to delegate, as he deems necessary, "the whole or any part of any regulatory function which the Secretary is required or authorized to perform . . . to any officer or employee designated under this section . . . The Secretary may at any time revoke the whole or any part of a delegation or designation made by him under this section." 7 U.S.C. 450d. The Act also makes it clear that Congress intended that when the Secretary delegated his authority, the delegee for the period he has the authority stands in the place of the Secretary as a matter of law. Section 450e provides:

> Whenever a delegation is made under section 450d of this title, all provisions of law shall be construed as if the regulatory function or the part thereof delegated had (to the extent of the delegation) been vested by law in the individual to whom the delegation is made instead of in the Secretary of Agriculture. A revocation of delegation shall not be retroactive, and each regulatory function or part thereof performed (within the scope of the delegation) by such individual prior to the revocation shall be considered as having been performed by the Secretary.

Thus the final decisionmaking authority of the JO is markedly different from that of the proposed divestiture in that Congress made it clear that it intended the Secretary to relinquish his authority in an area, that the delegee of the authority was acting lawfully in the Secretary's stead, and that the delegation, in whole or part, could be retrieved at any time

based on the discretion of the Secretary without the need to go through a new rulemaking proceeding.

2. Certain decisions of the Attorney General under regulations codified at 8 CFR 3.38, 8 CFR 240.31 concerning the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*

Example No. 2 refers to certain decisions of the Attorney General under regulations codified at 8 CFR Parts 3.38, 3.39 and 240.31 issued pursuant to the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* These regulations govern a range of administrative and adjudicatory matters relative to aliens and establish a framework in which immigration judges (IJ) and the Board of Immigration Appeals (BIA) hear and decide matters involving issues of admissibility, exclusion, deportation, asylum, removal and any other proceedings that the Attorney General may assign to them. 8 CFR 3.10. The regulations set forth procedural and substantive requirements relating to filing finality of orders, jurisdiction, and other matters. With reference to the examples cited in Example No. 2, Part 3.38 governs appeals of decisions from the immigration judge level to the Board of Immigration Appeals. Part 3.39 provides that when certified to the Board, the decision of the IJ becomes final upon waiver of appeal, if no appeal is taken. Section 240.31 provides that in determining cases for further inquiry, as provided for in the Act, the IJ shall have the powers and authority conferred upon them by the Act, and the regulations. This section states further that subject to any specific limitations, IJs shall also exercise the discretion and authority conferred upon the Attorney General by the Act that is appropriate and necessary for the disposition of such cases.

The administrative framework for these immigration decisions is predicated on the statute and the broad grant of authority delegated to the Attorney General by Congress. 8 U.S.C. 1103 provides that the Attorney General shall be charged with the administration and enforcement of the Act and all other laws relating to the immigration and naturalization of aliens, except as provided otherwise. The Attorney General is expressly authorized by Congress to establish such regulations, issue such instructions, and perform other acts as she deems necessary for carrying out this authority. The Attorney General is authorized further to require or authorize any employee of the Immigration and Naturalization Service (INS) or the department to perform or exercise any of the powers, privileges, or duties conferred on the Attorney General or imposed by law.

The statute demonstrates that Congress intended for the Attorney General to possess and exercise broad powers relative to aliens and immigration matters. This is clearly seen in the delegations and powers enumerated in 8 U.S.C.1103. The administrative framework was crafted and promulgated in order to meet the objectives of the Act. For example, as seen in the regulations, immigration officers, immigration judges and the Board of Immigration Appeals make initial and appellate decisions relative to the aliens. The Attorney General's exercise of the delegation authority comports with the statute, particularly 8 U.S.C. 1103 which expressly provides that the Attorney General "may require or authorize any employee...to perform or exercise any of the powers ... or duties conferred or imposed by this chapter...." This original delegation to the Attorney General sets the groundwork for a multi-level administrative, adjudicatory process. For instance, under this scheme, the IJ's decision is final unless the appeal to the Board is made in accordance with 8 CFR Part 3.37-3.39. Among other things, the Board is authorized to affirm or dismiss, in whole or part, the immigration judge's decision. The Board's decision is final except in those cases that are reviewed by the Attorney General in accordance with 8 CFR 3.1(h). This

section provides in pertinent part that the Board shall refer to the Attorney General, those cases that:

> (1) The Attorney General directs the Board to refer to her; (2) The Chair or the majority of the Board believes the case should be referred to the Attorney General; (3) The Commissioner of the INS requests the case be referred to the Attorney General for review.

In any case reviewed by the Attorney General, a written decision must be rendered and transmitted to the Board. The regulations provide further that the Board may reopen and reconsider a case.

For our purposes, in analyzing the proposed census delegation, the immigration scheme is particularly informative. The immigration statute and the regulations show that Congress vested broad powers in the Attorney General to handle immigration matters and vested this authority in order to permit the Attorney General to implement a regulatory and adjudicatory scheme that was appropriate for the variety of claims and issues that arise under the statute. The statute permits the Attorney General to delegate and empower employees and officers and, at the same time, does not appear to limit the Attorney General's discretion or delegation power. In other words, the law does not expressly state that the Attorney General shall not delegate a particular matter as is the case with the census rule. And, the administrative adjudicatory scheme crafted by the Attorney General expressly retains the authority for the final review of the Board's decision in the Attorney General. Although the power is not used frequently, ultimate authority rests with the Attorney General.

These features can be compared and contrasted to those features found in the proposed census rule. There are important differences. Current law grants the Secretary of Commerce broad delegation powers under 13 U.S.C. 4, however, that authority is restricted later in 13 U.S.C. 195. This restriction on the delegation power cannot be ignored. The two sections must be read together when construing the Secretary's powers to delegate, and must be read in the context of the entire statute. Moreover, and with emphasis, it is noted that the census proposal is distinguishable from the immigration example because the Secretary of Commerce does not retain for himself the ultimate authority to make the final decision regarding the census sampling matter. The proposal flies in the face of what is authorized under the statutory provisions in Title 13, U.S. Code and is flawed to the extent that final authority for the decision is delegated to a subordinate officer and not retained by the Secretary. The immigration example is not similar to the fact pattern seen the proposed census rule and does not support the General Counsel's assertion that this is in example that supports the broad and unfettered delegation in the census context.

3. Certain decisions of the Secretary of Labor under regulations codified at 20 CFR 802.406 and 802.410 concerning the following statutes:

- **a. The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et. seq.*;**
- **b. The Defense Base Act, 42 U.S.C. 1651 *et. seq.*;**
- **c. The District of Columbia Workmen's Compensation Act, 36 D.C. Code 501 *et seq.* (1973);**
- **d. The Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.*;**

e. The Nonappropriated Fund Instrumentalities Act, 5 U.S.C. 8171 *et seq.*; and

f. Title IV, section 415 and part C of the Federal Mine Safety and Health Act of 1977 (MSHA), Public Law 95-164, 91 Stat. 1290 (formerly the FCMHSA of 1969), as amended by the Black Lung Benefits Reform Act of 1977, Public Law 95-239, 92 Stat. 95, the Black Lung Benefits Revenue Act of 1977, Public Law 95-229, 92 Stat. 11, and the Black Lung Benefits Amendments of 1981, Public Law 97-119, 95 Stat. 1643, 30 U.S.C. 901 *et seq.*

For a specific example see regulations codified at 20 CFR 725.411, 20 CFR 725.421, 20 CFR 725.476 and 20 CFR 725.481 concerning determinations made under the MSHA which led to a final decision made under 20 CFR 802.406.

Example No. 3 refers to the decisions of the Secretary of Labor rendered pursuant to 20 CFR 802.406 and 802.410. These regulations govern decisions of the Benefits Review Board (BRB), an administrative appellate body. This adjudicatory board renders decisions on appeals taken by any party from decisions or orders on claims for compensation or benefits under the specific acts enumerated above.

The BRB was established pursuant to 33 U.S.C. 921, the Longshore and Harbor Workers Act. This sections states: "There is hereby established a Benefits Review Board . . . [that] shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this chapter and the extensions thereof." The BRB's orders are based on the record and "shall be conclusive if supported by substantial evidence in the record considered as a whole." 33 U.S.C. 921(b). The Board may, on its own motion or at the request of the Secretary, remand the case to the ALJ for further action. Judicial review is authorized in the U.S. Court of Appeals.

Current law provides that the jurisdiction of cases that the BRB is authorized to hear includes claims arising under those statutes enumerated in Example No. 3 and set forth at 20 CFR Parts 801 and 802. Our examination reveals that Congress expressly established the BRB to render adjudicatory decisions necessary to resolve various compensation and disability claims, which were initially decided by administrative law judge (ALJ). While the Secretary is authorized to issue regulations as necessary to implement the BRB's statutory and regulatory functions, and is authorized to request that the BRB remand a decision to the ALJ, Congress clearly established an adjudicatory mechanism to handle the caseload and to insulate generally the decisions from secretarial influence. The administrative appellate process established by Congress was meant to ensure a fair and through process for claimants seeking compensation under relevant statutes.

The example does not support the General Counsel's assertion that the Secretary has been granted broad discretionary authority to delegate final decisionmaking authority to the BRB. On the contrary, Congress enacted legislation that established the BRB and then further defined the Secretary's role and authority in the context of the BRB's statutory functions and duties. The BRB example is distinguishable in important ways from the proposed census rule. The BRB actions are in an adjudicatory setting, the Secretary may request that a case be remanded, thus having continued review authority to some measure,

and the enabling statute clearly established the BRB and defined the adjudicatory mechanism needed to handle these cases. The census decision is a rulemaking, rather than an adjudication, in nature, and should be read in the context of the census legislation, that expressly restricts the delegation as far as the sampling decisions is concerned. Finally the census rule does not provide for an opportunity for the Secretary to review the final rule and issue it under his authority. Although the Secretary may revoke the rule and initiate a new rulemaking, this type and level of involvement does not appear to satisfy sections 4 and 195 of Title 13, U.S. Code.

4. **Certain decisions of the Attorney General under regulations codified at 21 CFR 1316.02 and 21 CFR 1316.67, concerning the Controlled Substances Act, 21 U.S.C. 801, and/or the Controlled Substances Import and Export Act, 21 U.S.C. 951.**

This example has references to the requirements and procedures for adjudicative administrative hearings conducted with respect to enforcement of the Controlled Substances Act and the Controlled Substances Import and Export Act. Under those Acts, the Attorney General is vested with a variety of broad powers in the area. She also has been explicitly authorized by statutes to delegate those functions and to issue rules. Under 21 U.S.C. 871(a), the Attorney General "may delegate any of her functions under this subchapter to any official or employee of the Department of Justice." Section 871(b) authorizes the Attorney General to promulgate and enforce any necessary rules and procedures to execute her functions. The Attorney General has delegated this authority under the Acts to the Administrator of the Drug Enforcement Agency (DEA). The reference to 21 CFR 1316.67 indicates that this example is confined to the Administrator's review of a formal rulemaking proceeding. This occurs after an ALJ has conducted an evidentiary hearing on the proposed rule and submitted his findings, conclusions, and recommendation and submitted the record to the Administrator. The Administrator is to publish in the Federal Register "his final order in the proceeding, which shall set forth the final rule and the findings of fact upon which the rule is based and the date it shall take effect." The rule is then subject to judicial review in the U.S. Court of Appeals. See 21 U.S.C. 877.

The explanation of the authority to delegate the particular functions would appear to distinguish it from the proposed census rule. Also differentiating the situation is the fact that the Attorney General's delegation was by internal departmental order and thus may be retrieved at the stroke of her pen. Withdrawal or alteration of the census delegation would require a subsequent rulemaking proceeding.

5. **Certain decisions of the Secretary of Housing and Urban Development under regulations codified at 24 CFR 180.670 concerning the Fair Housing Act, 42 U.S.C. 3601 *et seq*.**

Example No. 5 refers to certain decisions of the Secretary of Housing and Urban Development under regulations set forth at 24 CFR 180.670 concerning the Fair Housing Act (FHA), 42 U.S.C. 3601 *et seq*. Regulations at 24 CFR 180.670 govern the decisions made by an ALJ on claims alleging that the respondent engaged in discriminatory housing practices. The ALJ is authorized to issue the initial decision and may order appropriate relief. With respect to initial decisions in non-Fair Housing Act matters, where the ALJ finds that the respondent has failed to comply with statutory and regulatory requirements and issues an adverse decision, the initial decision must state that it will become final only upon the Secretary's approval. 24 CFR 180.670 (c)(1)(iii).

The Fair Housing Act (42 U.S.C. 3601 *et seq*), further authorizes the Secretary to delegate "any of his functions, duties, and powers to employees of [HUD] or to boards of such employees, including functions, duties, and powers with respect to . . . hearing, determining, ordering . . . or otherwise acting as to any work, business, or matter under this subchapter." 42 U.S.C. 3608. This section provides further that the person to whom such delegations are made with respect to hearing functions, duties and powers shall be appointed and serve in HUD in compliance with noted sections in title 5, U.S. Code.[3] The Secretary is authorized further to issue rules that prescribe rights of appeals from the ALJS' decisions to boards of officers or to himself, as appropriate and in accordance with the law. 42 U.S.C. 3608(c). The statute directs the ALJ to commence a formal hearing and make findings of fact and conclusions of law on the claim that the respondent engaged in a discriminatory housing practice. The Secretary is authorized to review "any finding, conclusions, or order issues" by the ALJ. 42 U.S.C. 3612(h). Any party aggrieved by the final order may seek judicial review in the appropriate federal court.

This example illustrates an instance where Congressional directions have been clear and complete. Congress enacted federal law to establish an administrative adjudicatory process through which claimants alleging discriminatory housing practices could avail themselves. The statute establishes procedures for rendering the initial decision and then provides for subsequent administrative, Secretarial, and federal court review of the decision. Current law enumerates the authority and functions of the judicial officers as well as the Secretary relative to these housing claims. While Congress prescribed and delegated to the Secretary broad authority to act in this context, it did not delegate to the Secretary unfettered discretion to assign the final decision making authority in a manner that would not comport with, or would frustrate the objectives of, the adjudicatory framework clearly established in the law. Thus, the discretionary authority delegated to the Secretary, such as that seen in 42 U.S.C. 3608, must be read in conjunction with the other provisions of the law and in the context of the legislative scheme that established the adjudicatory process. Moreover, as seen in the law and noted in the foregoing, the Secretary retains the authority to review the ALJ decision, thus retaining a certain degree of authority as defined and delegated to him by Congress.

The proffered example does not demonstrate a scenario whereby Congress has vested in a secretary unlimited authority to completely delegate final decisionmaking authority on a rulemaking matter to a subordinate or to a presiding officer. As is required when evaluating the proposed census delegation, the references in Example No. 5 must be read in the context of the entire statute – where the broad grant of secretarial authority must be read in conjunction with statutory provisions that curtail or affirmatively direct secretarial action and authority. Based upon a reading of the statute and its implementing regulations, the references in Example No. 5 are distinguishable from the proposed census delegation and differ on key features of the two scenarios.

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[3] 5 U.S.C. §§3105, 3344, 5372 and 7521.

6. Certain decisions of the Secretary of Health and Human Resources under regulations codified at 42 CFR 498.1, 42 CFR 498.2, 42 CFR 498.88, and 42 CFR 498.90 concerning the Social Security Act, 42 U.S.C. 301 *et seq.*

The referenced regulations prescribe the procedures for adjudicating claims of providers, suppliers and practitioners within the Medicare and Medicaid programs administered by the Health Care Financing Administration (HCFA) of the Department of Health and Human Services (HHS) who are affected by an adverse initial determination made by HCFA. See 42 CFR 498.3. The Departmental rules establish a decisional process that, after an adverse HCFA determination, provides an opportunity for an adjudicatory hearing presided over by an ALJ, a recommended decision, and review of the decision by the Departmental Appeals Board. The Appeals Board may issue a decision adopting, modifying or rejecting the ALJ's recommended decision. The Appeals Board's decision is a final agency action which may be appealed to a United States district court or, in the case of a civil monetary penalty, to a United States Court of Appeals. 42 CFR 498.88, 498.90.

The authority to establish the decisional process is to be found in 42 U.S.C. 1395hh and 1395ii. Section 1395hh directs the Secretary to "prescribe such regulations as may be necessary to carry out the administration of the insurance programs under this subchapter." *Id.* Rules that establish or change a substantive legal standard governing the scope of benefits, the payment for services, or the eligibility of individuals, entities or organizations to furnish or receive services or benefits cannot be effective unless promulgated by the Secretary.

Section 1395ii incorporates the requirements and authorities of 42 U.S.C. 405(a), (d), (e), (h), (i), (j), (k), and (l), substituting references in Section 405 to the Social Security Commissioner or the Social Security Administration with appropriate references to the Secretary or the Department of HHS, respectively. The pertinent, incorporated provisions of Section 405 are as follows. Section 405(a) gives full power and authority to the Secretary of HHS to make rules and establish procedures necessary and appropriate to carry out the Medicare and Medicaid programs and the Secretary is directed to "adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proof and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder." Section 405(h) provides that the "findings and decision of [Secretary of HHS] after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the [Secretary of HHS] shall be reviewed by any person, tribunal, or government agency except as herein provided." Section 405(l) provides that "The [Secretary of HHS] is authorized to delegate to any member, officer, or employee of [HHS] designated by the [Secretary] any of the powers conferred upon the [Secretary] by this section. . ."

The HCFA review process is plainly contemplated and expressly authorized by law and therefore is not analogous to the proposed Census Bureau delegation.

7. Certain decisions of the Secretary of Transportation under regulations codified at 49 CFR 1.43, 49 CFR 1.45, 49 CFR 1.56b concerning the Federal Aviation Act, 49 U.S.C. 41101. The decisionmaking process codified in the above stated regulations was upheld in an opinion of the Court of Appeals for the District of Columbia Circuit, *See USAir, Inc. et al* v. *Department of Transportation et al.* 969 F. 2d 1256 (D.C. Cir. 1992).

The referenced regulation deals with the process of application and award of international air routes by the Department of Transportation. Competing proposals are submitted to a Departmental ALJ who holds a formal, on the record hearing pursuant to 5 U.S.C. 556 and 557. At the conclusion of the hearing the ALJ prepares a recommended decision which is transmitted to a senior career official (SCO), who acts as the Department's decisionmaker authorized to issue its final decision.[4] But in fact there is another step in the decisional process. The Secretary's "exclusive" delegation of authority to the SCO is qualified by 49 CFR 1.43(c): "The Secretary reserves (and delegates to the Assistant Secretary for Aviation and International Affairs) only the authority to make discretionary review of any such decision and to approve it or remand it for reconsideration by the Designated Senior Career Official, with full written explanation of the basis for the remand." In the past, the SCO has been the Deputy to the Assistant Secretary for Aviation and International Affairs and, of course, the Assistant Secretary reports to and is directly responsible to the Secretary.

The reason for the establishment of the SCO finds its roots in the process of the abolition of the Civil Aeronautics Board and the transfer of its responsibilities for international carrier route selection to DOT. Over the years of gradual disestablishment and transfer Congress kept a close watch and with respect to international route selections was concerned that the change from a multi-member independent regulatory agency to a single-headed cabinet department would politicize the decisional process. When DOT proposed the so-called "insulated decisional process" by which the SCO is given authority to make the Department's "final" decision on route awards, the jurisdictional committee in the House expressed doubt as to the efficacy of the single SCO and suggested that DOT consider a multiple SCO scheme. But the committee determined that "Although we have problems with DOT's organizational plan we have decided not to legislate on this issue at this time in view of the strong plea of the Department that they be given flexibility in setting up the organization to administer their new responsibilities. However, we urge the Department to give serious consideration to adopting organizational measures which would give additional insulation." H. Rept. No. 98-793, 98th Cong., 2d Sess. 8-10 (1984).

The General Counsel's memo suggests that the appeals court's decision in *USAir Inc.* v. *Department of Transportation*, 969 F 2d 1256 (D.C. Cir. 1992), "upheld" the SCO decisionmaking process. This would appear to be a misleading characterization. The pertinent issue in the case was whether the Assistant Secretary's remand to SCO for reconsideration, which suggested that the SCO had not weighed certain factors correctly, had effectively mandated the SCO's reversal, contrary to his exclusive authority under the regulation. The appeals court noted the "unease" of some members of Congress "at the transfer of this function from a multi-member independent regulatory agency to an executive department" and commented, "But–and it is a very big but– under the regulation the Assistant Secretary retains authority to review the SCO's decision and to remand it for reconsideration" without specific recommendation but with a full written explanation of the basis for the remand. The Court concluded that while the "procedure does have an artificial quality, ... that

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[4] 49 CFR 1.56b provides: "The Designated Senior Career Official in the Office of Assistant Secretary for Aviation and International Affairs is delegated exclusive authority to make decisions in all hearing cases to select a carrier for limited-designation international route authority..." See also 49 CFR 1.43(c).

does not make it illegal. So long as a remand order does not purport to direct the result and there is no indication that the SCO understood that he was *compelled* to revise his decision, we do not see how a court could question his or the Assistant Secretary's *bona fides*." 969 F. 2d at 1261, 1262 (emphasis in original). It appears clear that the court's reference to "legality" was not to the lawfulness of the procedure but whether the possible intrusive nature of the Assistant Secretary's review tainted the decisional process. Since there was no direct command, or evidence that the SCO was compelled to reverse, compliance with formal requirements of the process was deemed sufficient to uphold the SCO's decision.

DOT's SCO process appears plainly different in certain key and important respects: the Secretary, through his political subordinate, has retained oversight and review authority over the SCO's decision; and there was strong, implicit ratification of the decisional process by a jurisdictional committee.

Conclusion

In sum, our review of the seven regulatory provisions submitted by the General Counsel indicates that none are directly analogous to the proposed Census rule. Indeed, the proffered examples might be said to stand in direct opposition to the proposal in that they demonstrate that when Congress wants to allow delegations of regulatory power vested in an agency, it knows how to do it. All the examples either expressly or implicitly authorize the delegations of the functions involved. All of the examples appear to allow the possibility that the delegations may be retrieved by an agency head order and not by means of a potentially lengthy rulemaking hearing. Finally, all of the examples involve adjudicatory decisionmaking which often requires a special degree of insulation or expedition that is not common with substantive duties such as is involved with the issue of sampling. One reason for the now universal administrative practice of vesting all functions and powers in federal agency heads and allowing delegation as necessary is to assure accountability and responsibility in decisionmaking. The accountability and responsibility in adjudicatory decisionmaking is provided by judicial review, which is true for each of the provisions reviewed.