United States
Office of Government Ethics
1201 New York Avenue, NW, Suite 500
Washington, DC 20005-3917

August 2, 2007

(b)(6) [redacted]

Dear (b)(6) [redacted]

This is in response to your letter dated June 20, 2007, in which you ask for advice as to how the Emoluments Clause of the Constitution might apply to an invitation you have received to address a group in (b)(5) [redacted] You asked whether you can make the presentation that is requested if you are uncompensated and (1) your expenses are paid by the sponsoring group, or (2) you pay your expenses out of your own pocket

As you probably remember from the last time you raised a similar question, this Office does not have authority to provide definitive written opinions on the applicability of the Emoluments Clause The Department of Justice (DOJ) is the primary authority for such opinions. We are happy, however, to provide you with guidance in the areas that are under this Office's authority and to provide some general information on the Emoluments Clause that may be of assistance to you. As you mentioned in your letter, there has been some recent additional guidance on the Emoluments Clause from the Office of Legal Counsel (OLC) at the DOJ This new guidance modifies the information we gave you when you last raised a similar issue with this Office two years ago

In your letter you indicate that you are currently serving as a special Government employee (SGE) on several advisory boards to the Federal Government including the (b)(6) [redacted]. You attach a copy of an invitation you received from the (b)(5) [redacted] to speak in (b)(5) [redacted] The invitation notes that the base funding for (b)(5) [redacted]

(b) (5) The invitation does not clearly indicate (b) (5)

As you may recall, OLC has indicated that SGEs may be subject to the Emoluments Clause of the United States Constitution. The Emoluments Clause, Article I, § 9, clause 8 of the Constitution, prohibits persons who "hold offices of profit or trust" in the Federal Government from having any position in or receiving any payment from a foreign government, except with the consent of Congress OLC has also indicated that travel reimbursements by foreign governments may constitute emoluments under the Emoluments Clause. When we last discussed a similar issue, OLC had recently opined in *Re Application of the Emoluments Clause to a Member of the President's Council on Bioethics* (March 9, 2005) (2005 Opinion), available at www.usdoj gov/olc/2005/050309, that service in a purely advisory position was not an "office of profit or trust" within the meaning of the Emoluments Clause OLC noted that to be an "office" a position must at least involve some exercise of Governmental authority, and an advisory position does not. Id

(b) (5)

at 10. However, OLC left open the question of whether access to classified information by members of an advisory board would change the analysis and lead to the conclusion that an advisory board position could be an "office" under the meaning of the Emoluments Clause OLC explained that "it is at least arguable that the authority to control and safeguard classified information does amount to the exercise of governmental authority sufficient to render employment with the federal government a public 'office.'" (b) (5) [redacted]

OLC has now opined in *Re: Application of the Emoluments Clause to a Member of the Federal Bureau of Investigation Director's Advisory Board* (June 15, 2007) available at http //www.usdoj gov/olc/2007/fbi advisory board opinion 061507 pdf that where members of an advisory board are given access to classified information solely to help them perform their advisory function, this access alone does not constitute a delegation of Governmental, sovereign authority that would result in their service falling under the restrictions of the Emoluments Clause [3] OLC indicated that this opinion applies to situations where the members of the advisory board have no discretionary authority to access, remove, disseminate, declassify, publish, modify, change, manipulate, or originate classified information In your discussion with this Office two years ago, you told us that you do have access to classified information in your service as an SGE in certain positions. Because you have told us that the boards on which you serve are advisory boards and that you serve only in an advisory capacity,

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[3] In the particular situation recently reviewed by OLC, the advisory board's sole role was to advise a senior Government official who was free to adopt, modify, or ignore the board recommendations. Board members had no decisional or enforcement authority, and exercised no supervisory responsibilities over other employees as a result of their positions on the board. Board members could not bind the United States or direct the expenditure of appropriated or non-appropriated funds. They did not represent or act on behalf of the senior Government official in any matter The board members did hold Top Secret security clearances and received access to classified information solely to help them perform their advisory functions. *Re: Application of the Emoluments Clause to a Member of the Federal Bureau of Investigation Director's Advisory Board at 1*

it appears that these board positions would not meet the definition of an "office" under the Emoluments Clause Under the new guidance from OLC, this conclusion would not change even if you are given access to classified information to help you perform the advisory functions. This conclusion assumes that the boards on which you serve do not have any delegation of Governmental, sovereign authority as described in the OLC 2005 Opinion and that, where you have access to classified information as part of your SGE service, it is solely to help you perform the advisory functions.[4]

In addition, the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct) contained in 5 C F.R part 2635 do not preclude you from making the presentation described above. At section 2635.807(a), the Standards of Conduct provide that a Federal Government employee, including an SGE, "shall not receive compensation from any source other than the Government for teaching, speaking or writing that relates to the employee's official duties." Under this regulation, compensation is initially broadly defined to include transportation, lodging and meals. However, the definition of compensation is narrowed for an employee who is not a "covered noncareer employee" as defined in 5 C F.R § 2636.303(a), and travel expenses are not included in the definition of compensation for these employees SGEs are specifically excluded from the section 2636 303(a) definition of "covered noncareer employee " You have indicated that travel expenses are the only remuneration offered for your proposed presentation for (b) (5) . Given that you are an SGE, and not a covered noncareer employee, the Standards of Conduct do not prohibit you from accepting the travel expenses being offered to you by (b) (5) [redacted]

Additionally, the limitations that apply to outside teaching, speaking and writing by SGEs are much narrower than those that apply to the rest of the Federal workforce. SGEs are not prohibited from accepting compensation for teaching, speaking and writing when the activity relates to the programs

[4] It is important to note that if a board on which you serve has delegated sovereign authorities, such as a veto power over some Government action, then it would not be a solely "advisory" board covered by the recent OLC guidance discussed above

or the general subject area of the SGE's agency.[5] In the situation you have described, (b) (5) [redacted] Additionally, none of the other criteria used to determine what is "related" to official duties is applicable to your proposed presentation.[6] Under these circumstances, we have concluded that your presentation does not "relate" to your official duties within the meaning of section 2635 807(a)

There is, however, some limitation on the use of any Government title you may have as a result of your service as an SGE. A Federal employee who is teaching, speaking or writing as an outside activity is not allowed to use his official government title or position to identify himself in connection with the speaking activity except that he may include his Government title or position as one of several biographical details when it is given "no more prominence than other significant biographical details." See 5 C F R § 2635 807(b)

In summary, based on the assumptions mentioned above and the facts set out in your June 20, 2007 letter, it appears that you may make the presentation to (b) (5) [redacted] with either of the

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[5] Section 2635 807(a)(2)(i)(E)(4) adds that if the SGE has not served or is not expected to serve for "more than 60 days during the first year or any subsequent one year period of that appointment the restriction applies only to particular matters involving specific parties in which the [SGE] has participated or is participating personally and substantially."

[6] For a detailed discussion of the limitations that apply to SGEs in these circumstances and a general summary of ethical requirements applicable to SGEs, you might be interested in OGE Advisory Opinion 00 x 1 which was issued by this Office on February 15, 2000. I have enclosed a copy of this opinion for your reference

two options you proposed Specifically, you may accept their payment of expenses or pay your expenses out of your own pocket.

I hope the above information is helpful to you. We appreciate your sensitivity to the ethics rules as you serve the United States as an SGE. If you have any further questions please do not hesitate to contact me

Sincerely,

Robert I Cusick
Director

Enclosure

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United States
Office of Government Ethics
1201 New York Avenue, NW , Suite 500
Washington, DC 20005-3917

Director

May 16, 2005

(b) (6) [redacted]

I received your letter of May 5, 2005, asking for advice as to how the Emoluments Clause of the Constitution might apply to your contemplated presentation of a workshop [redacted] (b) (5) [redacted]. As you probably remember from the last time we spoke, the Emoluments Clause is not a topic on which this Office can provide authoritative written advice, but we will be happy to consult with the Department of Justice about your situation, and call you or meet with you to provide such assistance as we can.

In your letter, you said that you serve on "various Government advisory boards." Could you give us a list of those boards, and a description of their functions? That information could be germane to your question. The FAX number here is 202-482-9237, if you'd like to get the information to us that way, or conversely, please don't hesitate to call me at 202-482-9292. In any event, please give us a telephone number where we may reach you, so that we can call you when we are ready to discuss this

Sincerely,

Marilyn L. Glynn
Acting Director

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United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

June 9, 1999

James H. Thessin
Deputy Legal Adviser &
Designated Agency Ethics Official
Department of State
2201 C Street, NW., Rm. 6419
Washington, DC 20520-6310

Dear Mr. Thessin:

Thank you for your letter of May 18, 1999, suggesting changes to the OGE Form 450 Confidential Financial Disclosure Report and the Standard Form (SF) 278 Public Financial Disclosure Report. Most of the changes you recommend relate to the SF 278, except for the suggestion that a section be added to both forms for filers to indicate "whether they receive income from foreign governments and/or are registered as agents of foreign principals under the Foreign Agents Registration Act." You cite concerns about possible violations by filers of both reports, particularly special Government employees, of the United States Constitution, art. I, § 9, cl. 8 (the Emoluments Clause), and 18 U.S.C. § 219, the general restriction against Government employees acting as agents of foreign principals. However, these matters are outside the scope of both OGE's jurisdiction and the Ethics in Government Act public and confidential financial disclosure systems as implemented by OGE's executive branch financial disclosure regulation at 5 C.F.R. part 2634. Thus, we do not intend to revise either the OGE Form 450 or the SF 278 to ask for this information.

Many other laws outside OGE's jurisdiction, such as the Hatch Act, also are of concern with respect to filers and all executive branch employees. The two OGE financial disclosure forms do not address such collateral matters, which can be handled by counseling and information dissemination provided in accordance with such other laws and authorities. If the foreign agents restrictions are of special concern at the State Department (State) for filers of the SF 278 and OGE Form 450 reports, State's instruction package to filers could include a notification of those restrictions so as to help filers comply with them. We also note that both OGE forms require that the source of any income over $200 be indicated. Thus, if a foreign government or other foreign entity were reported as an income source on one of the forms, State could follow up as appropriate with the particular filer involved.

The remaining suggestions in your May 18 letter concern just the SF 278.[1] First, you recommend that the instructions to the

[1] As announced in DAEOgram # DO-99-011, we will soon issue a first round Federal Register notice of a proposed updated and revised SF 278 report form.

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report form include a statement regarding the general requirement to report assets (and transactions) of trusts as to which a filer serves as trustee. OGE will include such a statement in the forthcoming proposed modified SF 278. Likewise, as you suggest, we will include proposed references in Block A of Schedule A to reporting of the spouse's earned income in addition to that of the filer and of any income of sold assets prior to sale.

However, we do not intend to propose the last three suggestions you make for the SF 278: to split the Ethics Act statutory asset reporting category of $1,001-$15,000 into two so as to match one of the 18 U.S.C. § 208(b)(2) de minimis regulatory exemptions;[2] to require reporting of the subject of a speech or article giving rise to an honorarium; or to include a block on Part I of Schedule B to indicate whether a sale is full or partial. The Ethics Act and OGE's implementing regulation do not authorize these additional items, and we do not believe they are needed. See 5 U.S.C. appendix, § 102(a)(1)(A), (a)(3), (a)(5) & (d)(1)(A), and 5 C.F.R. §§ 2634.301(d)(1), 2634.302(a)(1)(iii) & 2634.303(a). Of course, the reviewing ethics officials can inquire further with particular filers as to any of these matters which may appear to be of interest on specific reports.

In closing, we note that we are in the middle of our review and revision of OGE financial disclosure forms. Our initial focus has been on the OGE Form 450 Confidential Financial Disclosure Report. After two rounds of Federal Register paperwork notices (with the last public comment period closing April 1, 1999), the updated and revised OGE Form 450 received three-year approval over a month ago from the Office of Management and Budget under the Paperwork Reduction Act. See Office of Government Ethics (OGE) DAEOgram # DO-99-011 of March 18, 1999; another DAEOgram distributing the new 4/99 edition of the OGE Form 450 will soon be issued. Thank you again for your letter of suggestions. If you or your staff have any questions about this response, you can contact William E. Gressman of my legal office at 202-208-8000, ext. 1110.

Sincerely,

Stephen D. Potts
Director

(b) (5) [redacted]

United States
Office of Government Ethics
1201 New York Avenue, NW , Suite 500
Washington, DC 20005-3917

February 17, 2000

Andy Caplan
Ethics Counsel
Office of the General Counsel
Department of Health and Human Services
Washington, DC 20201

Dear Mr. Caplan:

This is in response to your memorandum of February 1, 2000, to G. Sid Smith of my general counsel staff, requesting approval from the Office of Government Ethics (OGE) for a modification to FDA Form 3410, the confidential financial disclosure format that the Food and Drug Administration (FDA) uses for advisory committee special Government employees (SGE) as an alternative to OGE Form 450. The FDA proposal would require filers to identify any current or anticipated affiliations with a foreign government (including its subdivisions and entities owned or operated by it), such as employment, positions, payments, or any other ties, whether or not related to their FDA duties. We cannot approve that type of inquiry as part of the confidential financial disclosure system that OGE administers under 5 C.F.R part 2634, for the reasons indicated below.

We understand that FDA Form 3410, which OGE approved for temporary use by the FDA in 1994, must be completed by SGEs on FDA advisory committees prior to each meeting. It requires extensive disclosures about financial interests related to each meeting's agenda, including investments, employment, positions (consultant, advisor, or expert witness), contracts, grants, CRADAs, patents, royalties, trademarks, speaking/writing, and any relationships that would create an appearance of a conflict. That format was provisionally approved by OGE, based on extensive justification from then-Commissioner of Food and Drugs, Dr. David Kessler. His memorandum of September 1, 1994, offered assurances that the form would be used to "collect only the essential data associated with the issues, products, and manufacturers related to a specific meeting or task in which an SGE is serving." Further, Dr Kessler stated that the form would "collect only that level of financial data essential to satisfy conflict of interest concerns and maintain the integrity of the review process without being intrusive."

The additional disclosure question now proposed by the FDA about foreign government affiliations is not consistent with the purposes outlined in Dr. Kessler's memorandum for this confidential financial disclosure form. Nor is it consistent with the purpose generally of the overall confidential financial disclosure system that we manage, which is to aid employees and reviewers in testing for potential conflicts with assigned duties, so that prospective preventive measures can be taken The proposed amendment to FDA Form 3410 would specifically ask filers to disclose information that constitutes illegal activity, which would appear to require immediate referral to the Department of Justice. Any affirmative response by a filer would likely place him in violation of the criminal statute at 18 U.S.C. § 219, as well as the Emoluments Clause of the U.S. Constitution (article I, section 9, clause 8). In general, those two provisions effectively prohibit a person from serving as a U.S Government employee, including an SGE, if he is an agent of a foreign government or receives any payment from a foreign government. See 15 Op. O.L.C. 65 (April 29, 1991)

We understand the concerns that you and the FDA have about enforcing the standards of ethical conduct rule at 5 C.F.R. § 2635 807, which your memorandum cited. However, because foreign government affiliations present a fundamental impediment to U.S Government employment, it would be more appropriate to focus on this as part of the screening process for Government appointment as an SGE, which might include collecting a new entrant financial disclosure report prior to appointment. For that purpose, the FDA could, under its authority at 5 C.F R § 2634.905(a) and (b), use part or all of OGE Form 450 as a new entrant report, to obtain disclosures from prospective SGEs about outside activities and employment generally, before deciding to appoint them. This could be followed by advisories to SGEs before each meeting or throughout their service, reminding them of the criminal statute at 18 U.S.C. § 219, the Emoluments Clause, and the standards of ethical conduct rules on outside activities.

Please let us know if we can offer further advice on this matter.

Sincerely,

Marilyn L. Glynn
General Counsel

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United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

March 23, 2000

MEMORANDUM

TO: Constance J. Bowers (for)
Assistant Director for Legislative Reference
Office of Management and Budget

FROM: Jane S. Ley
Deputy Director for
Government Relations & Special Projects

SUBJECT Office of Personnel Management Draft Bill on Federal Human Resources Management Innovation Act, LRM ID: KCT 70

This is in response to your request for views on the above-referenced subject. Our concerns relate to the provision of the draft bill which would create a new 5 U.S.C. § 4712 setting forth authority for the establishment of alternative personnel systems.

New section 4711, in part, defines an alternative personnel system as one which "requires a waiver (except as prohibited under section 4712(c) of one or more of the provisions of this title or any rule or regulation prescribed under this title." Section 4712(c) in turn lists certain sections of title 5 which may not be waived under an alternative personnel system.

Our concern is that (b) (5) [redacted] "

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(b) (5)

[redacted]

Some consideration might also be given to protecting the Foreign Gifts Act (5 U S.C § 7342) from being waived This statute permits acceptance of certain gifts that would otherwise be barred by the Emoluments Clause of the Constitution This Office does not administer Foreign Gifts Act - Nevertheless, there is no reason given for allowing this statute to be waived.

Finally, (b) (5)

[redacted]

United States
Office of Government Ethics
1201 New York Avenue, NW, Suite 500
Washington, DC 20005-3917

March 27, 2003

(b)(6)
[redacted]

This letter is to confirm our conversation of March 25, 2003, concerning the applicability of the Emoluments Clause of the Constitution of the United States to honoraria you received in connection with your service on (b)(5) [redacted] As we discussed, the Emoluments Clause generally bars the receipt of honoraria from a foreign university that is an instrumentality of a foreign State

There are circumstances, however, where the acceptance of honoraria from a foreign public university may be permissible The Department of Justice has found the Emoluments Clause did not apply when a showing was made that a public university acted independently of a foreign government with respect to decisions regarding the terms and conditions of faculty employment Under those circumstances, the university was not considered to be a foreign State under the Emoluments Clause when acting in the context of faculty employment.

Based on the facts available to us, it is not entirely clear whether the Emoluments Clause would apply in your particular situation In an abundance of caution, however, you have volunteered to return the honoraria to avoid any question of impropriety We agree with your decision and believe that return of the honoraria is an appropriate way to address the issue.

Please do not hesitate to contact us if you would like additional assistance

Sincerely,

Marilyn L. Glynn
General Counsel

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United States
Office of Government Ethics
1201 New York Avenue, NW, Suite 500
Washington, DC 20005-3917

April 26, 2007

Steven G Bradbury
Acting Assistant Attorney General
Office of Legal Counsel
Department of Justice
Washington, DC 20530

Dear Mr. Bradbury

We are writing to request the opinion of your office regarding whether the Smithsonian Institution and its personnel, as described at 20 U S C. § 41 et seq., are subject to the oversight and authority of the Office of Government Ethics (OGE) with respect to the executive branch ethics program

(b) (5) [redacted] OGE recently has received inquiries pertaining to the status of the Smithsonian and its personnel for purposes of the executive branch ethics program, including OGE oversight and regulations. These inquiries have arisen in the context of current efforts by various sources to evaluate the need for possible administrative changes to the Smithsonian Therefore, we are seeking your views (b) (5) [redacted]

OGE's Authority

A brief overview of OGE's statutory and other authorities makes clear that OGE's authority generally is limited to

agencies or other units in the executive branch of the Federal Government, and the officers and employees thereof.[1]

Title IV of the Ethics in Government Act of 1978 (EIGA) is OGE's organic law See 5 U S C app § 401 et seq. Probably the most fundamental statement of OGE's responsibility is found in section 402(a): "The Director shall provide . overall direction of executive branch policies related to preventing conflicts of interest on the part of officers and employees of any executive agency, as defined in section 105 of title 5, United States Code."[2] Among other things, OGE is responsible for· developing "rules and regulations pertaining to conflicts of interest and ethics in the executive branch," § 402(b)(1), monitoring and investigating compliance with the financial disclosure requirements of the EIGA "by officers and employees of the executive branch and executive agency officials responsible for receiving, reviewing and making available financial statements" under the EIGA, § 402(b)(3); and "monitoring and investigating individual and agency compliance with any additional financial reporting and internal review requirements established by law for the executive branch," § 402(b)(5)

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[1]One specific exception is OGE's authority to issue regulations exempting "all or a portion of all officers and employees covered by" 18 U.S C. § 208 from the coverage of that provision under certain circumstances 18 U.S.C § 208(b)(2); see also 18 U S.C § 208(d)(2) Section 208, by its terms, covers officers and employees of the District of Columbia and possibly other individuals who might not be in the executive branch of the Federal Government See OGE Informal Advisory Letter 00 x 5

[2]Based on this language, for example, OGE generally declines to "provide advice to, or concerning, current or former employees of the legislative or judicial branches of the Federal Government or current or former employees of the District of Columbia, absent unusual circumstances " OGE Informal Advisory Letter 97 x 9.

There is no definition of "executive branch" in Title IV [3] However, the main regulations implementing OGE's Title IV oversight authorities define "executive branch" as follows. "Executive branch includes each executive agency as defined in 5 U S.C 105 and any other entity or administrative unit in the executive branch However, it does not include any agency, entity, office or commission that is defined by or referred to in 5 U S C app. 109(8)-(11) of the Act [EIGA] as within the judicial or legislative branch." 5 C F R. § 2638.104 Although this definition is somewhat tautological--it defines executive branch, in part, by reference to "any other entity or administrative unit in the executive branch"--it does clearly indicate OGE's intent to exclude agencies and other entities in the other two branches of Government. This definition delineates the scope of OGE's "executive branch regulations," 5 C F.R § 2638.101(b), pertaining to supervision of the executive branch ethics program See, e g , 5 C F.R part 2638, subpart D ("Correction of Executive Branch Agency Ethics Programs"); id , subpart F ("Executive Branch Agency Reports")

Titles I and V of the EIGA also give OGE executive branch authorities Under Title I of the EIGA, OGE is the "supervising ethics office . for all executive branch officers and employees," for purposes of the public and confidential financial disclosure systems. 5 U S C. app § 109(18)(D) [4] Under Title V, OGE is charged with implementation of various provisions governing outside earned income and other activities,

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[3]As discussed at footnote 4 below, however, there is a definition in Title I of the EIGA, which pertains to financial disclosure

[4]For purposes of Title I of the EIGA, "'executive branch' includes each Executive agency (as defined in section 105 of title 5, United States Code), other than the Government Accountability Office, and any other entity or administrative unit in the executive branch " 5 U.S C app § 109(4) A similar definition (except for the express GAO exclusion) appears in 18 U S C § 202(e)(1), which pertains to the criminal conflict of interest statutes in chapter 11 of Title 18, U S. Code Both definitions are accompanied by definitions of "legislative branch," which likewise include residual phrases covering "any other agency, entity, office, or commission established in the legislative branch " See 5 U S C. app § 109(11), 18 U S C § 202(e)(3)

"with respect to officers and employees of the executive branch." 5 U.S C app § 503(2)

Other miscellaneous authorities give OGE executive branch-wide responsibilities and powers. Under 5 U.S C. §§ 7353 and 7351, which prohibit certain gifts to Federal employees, OGE is the "supervising ethics office" for "all executive branch officers and employees " 5 U.S.C. §§ 7353(d)(1)(D); 7351(c). Moreover, by Executive Order, the President has delegated to OGE some of his authority under 5 U S C § 7301 to "prescribe regulations for the conduct of employees in the executive branch " See Executive Order 12731, § 403. Part II of that Executive Order specifically directs OGE to issue various regulations governing executive branch employees, including "a single, comprehensive, and clear set of executive-branch standards of conduct," id. at § 201(a). See also id , Preamble ("in order to establish fair and exacting standards of ethical conduct for all executive branch employees, it is hereby ordered").

Status of the Smithsonian

We understand that the status of the Smithsonian under various authorities has been a notoriously difficult subject Certainly, the Smithsonian has been considered part of the "United States" for many purposes, e.g., O'Rourke v Smithsonian Institution Press, 399 F 3d 113 (2d Cir. 2005)(28 U S.C § 1498), and its employees, a majority of whom are in the Federal civil service, are considered to be public officials for certain purposes, e.g , Memorandum of Daniel Koffsky, Acting Assistant Attorney General, OLC, for the General Counsel, Smithsonian Institution, May 24, 2001, n 1 (Emoluments Clause)

Nevertheless, for many purposes, the Smithsonian has not been considered to be an agency or unit of the executive branch of the Federal Government. Indeed, one court has stated that the Smithsonian could not be part of the executive branch for constitutional purposes because "the method by which its regents are appointed would appear to violate the Constitution's separation of powers principles " Dong v. Smithsonian Institution, 125 F.3d 877 (D.C Cir 1997) Similar observations were made earlier by OLC: "It is readily apparent that the Smithsonian, under no executive control or appointment whatever, is not within the Executive branch " Memorandum of Leon Ulman, Deputy Assistant Attorney General,

OLC, for Peter Powers, General Counsel, Smithsonian Institution, February 19, 1976 (Ulman opinion), at 5 Moreover, certain OLC opinions refer to the Smithsonian as a "Congressional agency" for constitutional purposes See Memorandum of Walter Dellinger, Assistant Attorney General, OLC, to General Counsels of the Federal Government, May 7, 1996, at 56; Memorandum of Randolph D Moss, Deputy Assistant Attorney General, OLC, for Assistant General Counsel, Smithsonian Institution, April 25, 1997.

Similarly, the Smithsonian has not been deemed an agency for various statutory purposes These include the Privacy Act, the Freedom of Information Act, the Federal Advisory Committee Act, and the Administrative Procedure Act. See Dong, 125 F 3d at 879ff; Cotton v Heyman, 63 F.3d 1115 (D.C Cir. 1995); Ulman Opinion at 10 OLC has reasoned that the "strength and thrust of those . . statutes is their concept of public accountability and public responsibility in the operation of federal agencies," purposes that OLC found inapposite in the case of entities such as the Smithsonian "which do not fill an administrative, operational, regulatory, or executive role within the government " Ulman Opinion at 10 [5]

However, underscoring the need to examine each statutory scheme on its own terms, OLC has concluded that the Smithsonian actually is an "executive agency" under the Federal Property and Administrative Services Act (Property Act). See 12 Op O L C. 152 (1988) Although the statutory definition of "executive agency" at issue in that opinion was similar to definitions in other laws, including 5 U S C § 105, OLC's conclusion in that opinion was predicated largely on legislative history peculiar to the Property Act In any event, the opinion "counsels reluctance toward a sweeping declaration of the Smithsonian's status within the federal government" and "counsels in favor of

(b) (5)
[redacted]

determining the status of the Smithsonian on a statute-by-statute basis " Id

As we mentioned at the outset, (b) (5) [redacted]

(b) (5) [redacted]

(b) (5)

[redacted]

[redacted]

8 (b) (5)

[redacted]

(b) (5)

[redacted]

We realize that the question we have posed could involve complicated statutory and even constitutional issues However, to the extent it is feasible, we would like to receive your views, even informally, in the near term, as we are being asked to respond to potential proposals involving OGE oversight of the Smithsonian Please contact Marilyn Glynn, General Counsel, at 202-482-9292, or Rick Thomas, Associate General Counsel, at 202-482-9278, if you have any questions or require further information.

As always, we appreciate your assistance

Sincerely,

Robert I Cusick
Director

Enclosure

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