



Comptroller General
of the United States

Washington, D.C. 20548

B-243175

August 2, 1991

The Honorable Al McCandless
Ranking Minority Member
Subcommittee on Government Information,
Justice and Agriculture
Committee on Government Operations
House of Representatives

Dear Mr. McCandless:

This responds to your letter of February 25, 1991, requesting our opinion on the legality of Attorney General Order No. 1473-91, dated February 19, 1991. In that order, the Attorney General delegated to the Assistant Attorney General for the Office of Justice Programs (OJP) a number of functions with respect to OJP's five component agencies. These agencies, hereafter referred to collectively as the OJP agencies, are: the Bureau of Justice Assistance (BJA), National Institute of Justice (NIJ), Bureau of Justice Statistics (BJS), Office of Juvenile Justice and Delinquency Prevention (OJJDP), and the Office for Victims of Crime (OVC).

Prompted by Justice Department reports referring to management problems within OJP,^{1/} the Attorney General order assigns the Assistant Attorney General for OJP broad policy-making authority over the contract and grant programs of the OJP agencies. It provides in part:

"The Assistant Attorney General shall, under the general guidance and direction of the Attorney General, establish binding policies and priorities for the heads of the OJP agencies with respect to the award and administration of grants, contracts and cooperative agreements. . . . The Assistant Attorney General is authorized to make final determinations concerning whether such grants, contracts and cooperative agreements are consistent with the established policies and priorities. If the Assistant Attorney General concludes that any such grant, contract or cooperative agreement is not

^{1/} See e.g., Department of Justice, Justice Management Division, A Management Review of the Office of Justice Programs (Nov. 1990).

consistent with such policies and priorities, the Assistant Attorney General may modify such action or direct compliance with the established policies and priorities."

As discussed in detail below, the statutes governing OJP programs vest their contracting and grant-making functions directly in the OJP agency heads, not the Attorney General or the Assistant Attorney General, and explicitly provide that the agency heads shall have "final authority" with respect to grants and contracts. These statutory provisions, as they have evolved over the years, evidence a clear intent on the part of Congress to insulate the OJP agencies' grant and contract programs from policy control by the Attorney General and the Assistant Attorney General.

In our opinion, the provision of the Attorney General order authorizing the Assistant Attorney General to countermand or direct the award of contracts and grants violates the plain terms of the statutes, which explicitly reserve to the OJP agency directors final authority over such contracts and grants. Further, this provision and the provisions of the order authorizing the Assistant Attorney General to set policies and priorities for the OJP agency heads in essence shift policy control over the OJP programs from the agency heads to the Assistant Attorney General, contrary to the statutory scheme.

I. Legislative Background

Statutory framework governing OJP. OJP consists of five program agencies as well as an administrative component headed by the Assistant Attorney General for OJP.^{2/} Each of the five program agencies is established within the Department of Justice "under the general authority of the Attorney General." Each of the agencies is headed by a director who "shall report to the Attorney General through the Assistant Attorney General," but who also is appointed by the President with the advice and consent of the Senate.

Unlike other components of the Justice Department, the substantive functions of the five OJP agencies are vested by law in their directors rather than the Attorney General. The directors have independent authority to promulgate rules and

^{2/} The statutory provisions governing OJP and its component agencies are: the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 42 U.S.C. §§ 3711 et seq.; the Juvenile Justice and Delinquency Prevention Act, as amended, 42 U.S.C. §§ 5601 et seq.; and the Victims of Crime Act of 1984, as amended, 42 U.S.C. §§ 10601 et seq.

regulations and to enter into contracts, grants and cooperative agreements. The statutes provide that directors "shall have final authority over all grants, cooperative agreements, and contracts awarded by" their respective agencies.3/

The statutory provisions dealing with denial of grant applications and termination of grants likewise provide that the relevant determinations will be made by the agency directors. Each of the five directors is authorized to suspend and terminate grants and to hold hearings on these and other actions. See 42 U.S.C. §§ 3783-3787 (NIJ, BJS and BJA); 42 U.S.C. § 5673(d) (OJJDP); and 42 U.S.C. § 10604(f) (OVC). Detailed statutory procedures applicable to grants terminated or denied by NIJ, BJS and BJA authorize the agencies to hold hearings (42 U.S.C. § 3783); provide that the agencies' findings in these matters shall be "final and conclusive upon all applications" (42 U.S.C. § 3784); and provide that the agency directors' decisions are reviewable directly by the federal courts (42 U.S.C. § 3785).

In contrast to the broad statutory authorities over contracting and grant-making conferred on the agency directors, nothing in the statutes assigns the Attorney General or the Assistant Attorney General any specific role with respect to the formulation or award of OJP grants and contracts. The Attorney General is provided only "general authority" over each of the agencies, and, as noted previously, is not statutorily vested with any functions of the agencies. In view of these statutory limitations, the Justice Department's Office of Legal Counsel (OLC) has held that the Attorney General lacks authority to approve a program agency's grants. See 2 Op. Off. Legal Counsel 72, 74-75 (1978). The Assistant Attorney General's statutory functions are even more limited, and primarily involve information dissemination and inter-governmental liaison activities. The Assistant Attorney General's principal function with respect to the OJP agencies is to "provide staff support to coordinate the activities of" the agencies.4/

3/ See 42 U.S.C. § 3722(b) (NIJ); 42 U.S.C. § 3732(b) (BJS); 42 U.S.C. § 3741(b) (BJA); and 42 U.S.C. § 10605(b) (OVC). The OJJDP head, while not expressly provided such final authority, is given broad authority to "award, administer, modify, extend, terminate, monitor, evaluate, reject, or deny all grants and contracts." See 42 U.S.C. § 5611(b).

4/ See generally 42 U.S.C. § 3712. Section 3712 provides that, in addition to specifically enumerated functions, the Assistant Attorney General may exercise functions delegated by the Attorney General.

Evolution of OJP statutes. The statutory framework for OJP reflects a long history of controversy between the Justice Department and the Congress regarding who should exercise policy control over the OJP programs. The current provisions have their antecedent in the Omnibus Crime Control and Safe Streets Act of 1968, which assigned grant-making functions directly to the Law Enforcement Assistance Administration (LEAA) and established LEAA "within the Department of Justice, under the general authority of the Attorney General." Pub. L. No. 90-351, § 101(c), 82 Stat. 197, 198. This provision was a compromise between the House version of the 1968 legislation, which gave the Attorney General responsibility for making grants to the States, and a Senate version which established LEAA in the Justice Department but provided that it would be wholly independent of the Attorney General and other Department offices. The legislative history indicates that the "general authority" language was intended to give LEAA a large measure of independence from the Attorney General while still allowing the Attorney General to coordinate LEAA's programs with other crime programs in the Department. See 114 Cong. Rec. 14,777 (1968) (remarks of Sens. McClellan and Tydings). The 1968 Act did not contain language giving LEAA final authority over grant and contract matters.

In a September 19, 1973 memorandum, OLC concluded that the Attorney General's "general authority" would not allow him to be involved in LEAA's "day-to-day" operations, but would allow him to set "major policy guidelines" for LEAA. The OLC memorandum interpreted this authority, at its outer boundaries, as permitting the Attorney General to apply Department-wide policies to LEAA and to reverse any grant, contract, or other action that was "plainly inconsistent with some previously expressed Department-wide policy."

While Congress initially accepted the outcome reached in OLC's 1973 memorandum--that the Attorney General should have some policy control over LEAA's programs--it regarded the "general authority" language as insufficient to accomplish this purpose. Thus, Congress amended the statute in 1976 to place LEAA "under the general authority, policy direction, and general control" of the Attorney General. Pub. L. No. 94-503, § 102, 90 Stat. 2407. (Emphasis supplied.) The House Judiciary Committee characterized this amendment as an augmentation of the Attorney General's authority over LEAA, and explained:

"This section [places] the Law Enforcement Assistance Administration under the general authority, policy direction and general control of the Attorney General of the United States. In the present Act, the Administration exists only under the general authority of the Attorney General. This

would allow the Attorney General to assure the development of policies and priorities of the Administration in a way that he has not heretofore done."

H.R. Rep. No. 1155, 94th Cong., 2d Sess. 19 (1976). See also S. Rep. No. 847, 94th Cong., 2d Sess. 35 (1976), noting that the amendment makes "it clear that the Attorney General not only has general authority over LEAA but also is responsible for the general policy direction and control of the Administration"

In the Justice System Improvement Act of 1979, Pub. L. No. 96-157, 93 Stat. 167, Congress established the underpinnings for the current OJP structure, and in the process significantly contracted the scope of the Attorney General's authority. The 1979 Act created an administrative office, the Office of Justice Assistance, Research, and Statistics (OJARS), and provided that this office and the program agencies--at that time LEAA, NIJ and BJS--would be subject only to the "general authority" of the Attorney General. The Act omitted the broader 1976 language which had assigned the Attorney General policy direction and general control over these programs, while adding the language giving the agency directors "final authority" over their grants and contracts.

The legislative history of the 1979 Act confirms that the effect of these provisions was to scale back the Attorney General's policy authority while enhancing the authority of the agency directors. During consideration of the conference report, Senator Thurmond, one of the cosponsors, stated:

"[The legislation] now establishes OJARS, LEAA, NIJ, and BJS, all under the general authority of the Attorney General. This is different than the 'general authority, policy direction, and general control of the Attorney General,' where LEAA has previously been placed. It is also different than the 'direct authority of the Attorney General' proposed by the original [Senate bill]. Of course, the Attorney General retains ultimate authority over and responsibility for these functions, as he does for all activities of the Justice Department; but it would be highly inappropriate for the Attorney General to get involved in the day-to-day operations and funding decisions of these grant-making agencies. This not only insulates the granting agencies but it also insulates the Attorney General from the political pressures that sometimes are attached to Federal aid programs." 125 Cong. Rec. 35,410 (1979).

With respect to the "final authority" language, Senator Thurmond observed:

"LEAA, NIJ, and BJS are given final sign-off authority over the award of grants. Action taken by the heads of LEAA, NIJ and BJS may not be altered or undone by the OJARS Director or Attorney General except on such extraordinary grounds as illegality. There is no authority for outside control of the day-to-day operations of LEAA, NIJ, and BJS." Id.

Senator Thurmond emphasized that OJARS would serve only as a "management tool" with respect to the agencies and would not be able to set policy for them or to become involved in their programs. Id. In this vein, the conference report stated that OJARS would provide "support and coordination functions, and not policy direction and control," and that:

"It is the intention of the conferees that, under this structure, policy setting for the LEAA, NIJ, and BJS will be the responsibility of the appropriate Director or Administrator of the program in question." H. R. Rep. No. 695, 96th Cong., 1st Sess. 77 (1979).

The basic structure and authorities formulated in 1979 for OJARS and the program agencies were carried forward in the Justice Assistance Act of 1984, Pub. L. No. 98-473, § 601, 98 Stat. 2077, which established OJP and the program agencies. The 1984 Act also created the position of Assistant Attorney General for OJP. In explaining this legislation, one of the conference managers indicated that the Attorney General's relationship with the OJP agency heads would be much the same as his relationship with their predecessors:

"BJS, NIJ, and OJJDP are reauthorized as independent agencies within the Department of Justice, operating under the general authority of the Attorney General. This act does not change the structure or the independence of these agencies. Thus, BJS and NIJ and OJJDP continue to be headed by Directors who are Presidential appointees. The Directors will continue to have final and exclusive authority to set policy for their agencies by awarding contracts, cooperative agreements, and grants" 130 Cong. Rec. 31,671 (1984) (remarks of Rep. Hughes).

In creating OJP as an administrative office with fundamentally the same authority as OJARS, placing the agencies under the "general authority" of the Attorney General, and preserving the final grant and contracting authority of the agencies, Congress rejected a Justice Department proposal to vest the

Department with greater control over the agencies. The Justice Department proposal would have required the appointment of OJP agency heads by the Attorney General rather than the President, and would have transferred final grant and contracting authority from the agency heads to the Assistant Attorney General. See H.R. Rep. No. 68, 98th Cong., 1st Sess. 10 (1983). A similar Justice Department proposal was rejected when Congress reauthorized OJP in the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181.5/ The Congress again declined to dilute the authority of the agencies, and in fact provided that OVC and BJA--in addition to the three other agencies-- would be headed by presidential appointees.

II. Analysis and Conclusions

Nothing in OJP's statutory framework expressly confers authority on the Attorney General or the Assistant Attorney General to set policy for the program agencies or to countermand their grant and contracting decisions. Nevertheless, the Justice Department asserts that the Assistant Attorney General's policy-setting and countermand authorities delegated by the February 1991 Attorney General order are within the scope of the Attorney General's "general oversight authority" over the OJP agencies.^{6/} Apparently, this assertion relies on the statutory language establishing the OJP agencies under the "general authority" of the Attorney General.

In our opinion, such authority cannot reasonably be implied from the "general authority" language. Even before the statutes were amended to give OJP agency heads final authority over their contracts and grants, Congress viewed the "general authority" language as insufficient to support the exercise of policy control and countermand authority by the Attorney General. Moreover, such an expansive interpretation of the "general authority" language clearly conflicts with and would effectively nullify the current statutory provisions which

^{5/} Justice Department officials described this proposal in House hearings on the reauthorization. See Reauthorization of the Justice Assistance Act: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary, 100th Cong., 1st Sess. 163-166 (1987).

^{6/} The Department's legal position was presented by its Office of Legislative Affairs in a letter to you dated May 1, 1991, and a similar letter dated March 12, 1991, to the Chairman of the House Judiciary Committee's Subcommittee on Crime and Criminal Justice.

specifically accord the agency heads "final authority" over contracts and grants.^{7/}

Finally, the entire statutory structure reflects Congress' unequivocal intent to vest policy control over the OJP grant and contract programs in the agency heads. As discussed previously, Congress initially assigned these program functions directly to the agency heads, and it has consistently strengthened their authority while rebuffing the Justice Department's repeated efforts to transfer policy control away from the agency heads.

In sum, therefore, we conclude that the February 1991 order, by assigning the Assistant Attorney General policy-setting and countermand authority over the OJP programs, exceeds the Attorney General's "general authority" over the agency heads; is contrary to their statutory "final authority" over grant and contract matters; and conflicts with the overall statutory scheme.

Sincerely yours,

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Comptroller General
of the United States

^{7/} The Attorney General's general authority over the OJP agencies does extend to a number of management and administrative matters. For example, the OLC held in a 1981 opinion that the Attorney General can mandate review of OJP contracts for compliance with Government-wide and Department-wide procurement requirements, so long as such reviews do not impinge upon the agencies' final authority over the substantive content of their contracts. See Management Review of the Office of Justice Programs, note 1 supra, at App. B, 16-17, containing excerpts from the OLC opinion. The Justice Department informed us that it could not locate the full text of the opinion.