



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

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B-219310

October 22, 1985

The Honorable John Heinz
Chairman
Subcommittee on International Finance
and Monetary Policy
Committee on Banking, Housing and Urban Affairs
United States Senate

Dear Mr. Chairman:

By letter dated June 24, 1985, you asked our opinion concerning the amendments made by section 614 of the Export-Import Bank Act Amendments of 1983 (1983 Amendments or Pub. L. No. 98-181), Pub. L. No. 98-181, 97 Stat. 1255 (1983) to section 3(c) of the Export-Import Bank Act of 1945 (1945 Act), 12 U.S.C. § 635a(c) adding, among other things, a 4-year term of office for Directors of the Export-Import Bank (Bank), including the Bank President and First Vice President. As we understand your question, you ask whether the current Bank President's term of office is limited by application of section 614 of Public Law 98-181 to 4 years. The current Bank President, Mr. William H. Draper III, took office July 13, 1981. For the reasons discussed below, we conclude that section 614 does not apply to the current President.

I.

As originally enacted, section 3(c) of the Export-Import Bank Act of 1945, 12 U.S.C. § 635a did not provide a prescribed term of office for the Bank President. Rather, the term of office of the Bank President, like the other Bank Directors, was "at the pleasure of the President of the United States." 12 U.S.C. 635a(c) (1976). To increase the independence of the Board of Directors of the Bank, including the Bank President, and to provide continuity in the Board of Directors, section 614 of Public Law 98-181 deleted the foregoing provision of section 3(c) of the 1945 Act and added a new paragraph 8 to section 3(c) that reads as follows:

"(8)(A) The terms of the directors, including the President and the First Vice President of the Bank, appointed under

this section shall be four years, except that--

"(i) during their terms of office, the directors shall serve at the pleasure of the President of the United States;

"(ii) the term of any director appointed after the date of enactment of this paragraph to serve before January 20, 1985, shall expire on January 20, 1985;

"(iii) of the directors first appointed to serve beginning on or after January 21, 1985, two directors (other than the President and First Vice President of the Bank) shall be appointed for terms of two years, as designated by the President of the United States at the time of their appointment; and

"(iv) any director first appointed to serve for a term beginning on any date after January 21, 1985, shall serve only for the remainder of the period for which such director would have been appointed if such director's term had begun on January 21, 1985. If such term would have expired before the date on which such director's term actually begins, the term of such director shall be the four-year period, or remainder thereof, as if such director had been preceded by a director whose term had begun on January 21, 1985.

"(B) Of the five members of the Board appointed by the President, not less than one such member shall be selected from among the small business community and shall represent the interests of small business.

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"(C) Any person chosen to fill a vacancy shall be appointed only for the unexpired term of the director whom such person succeeds.

"(D) Any director whose term has expired may be reappointed."

II.

We observe that courts will construe a statute, if fairly possible, so as to avoid constitutional questions. United States v. Security Industrial Bank, 459 U.S. 70, 78 (1982); Lorillard v. Pons, 434 U.S. 575, 577 (1978), quoting from Crowell v. Benson, 285 U.S. 22, 62 (1932). It could be argued that if the provisions of section 614 are interpreted to apply to the current Bank President, Congress would be unconstitutionally infringing upon authority vested exclusively in the executive branch. Since the statute established a fixed term of office for the Bank President, Congress could be charged with having removed a current executive officer other than through impeachment. A court could view such an attempt as an unconstitutional transgression on the appointment and removal power granted to the Chief Executive by Article II of the United States Constitution.

In 1973 Congress passed a bill (S. 518) that would have abolished the existing office of the Director of the Office of Management and Budget, and created a new office in its place. The result was that the Director would have been removed from office and forced to be reappointed and confirmed by the Senate. An influential argument against the statute was that this would be an unconstitutional removal of an executive officer. See generally Myers v. United States, 272 U.S. 52 (1926). President Nixon used this argument in his veto of the bill, and Congress was sufficiently persuaded that an attempt to override the veto was defeated. 119 Cong. Rec. 16764-73 (1973). When the bill was modified and re-introduced 1 year later, the report of the House Government Operations Committee explicitly noted that the new statute did not apply to the current Director. H.R. Rep. No. 93-697, 93rd Cong., 2d Sess. reprinted in 1974 U.S. Code Cong. & Ad. News, 2778, 2780.

Although there are differences between the 1983 Amendments and S. 518, a comparison of the two illustrates the

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controversial issues raised by a retroactive application of the 1983 Amendments. Applying the amending provisions of section 614 retrospectively could be viewed as an attempt to remove an executive officer by a congressional action other than impeachment. Many observers would hold that a prospective application of the amendment would be more consistent with traditional notions of the separation of powers as defined by Article II, and would avoid a possibly substantial constitutional issue.

III.

We have examined the language of paragraph (8)(A) as added by section 614 and its legislative history to determine whether Congress intended the 4-year term of office to apply to the current Bank President. The thrust of paragraph (8)(A) is directed at future appointments. Thus, Congress' scheme to stagger membership in the Bank's Board of Directors was designed for implementation with directors "first appointed to serve for a term beginning on or after January 21, 1985." 12 U.S.C. § 835a(c)(8)(A)(iii) and (iv). Similarly, the new requirement added by section 614 of Public Law 98-181 that not less than one Bank director be selected from, and represent the interest of, the small business community was to be applied to the first member, other than a member who will serve as President and First Vice President, selected after date of enactment of section 614. Pub. L. No. 98-181, § 614(b), 97 Stat. 1256 (1983). A prospective application of the 4-year term to a Bank President first appointed after enactment of Public Law 98-181, therefore, would appear more consistent with section 614's scheme.

A well-developed principle of statutory construction is that statutes should not be applied retroactively unless their legislative history indicates a contrary congressional intent. Retroactivity, even where permissible, is not favored by the courts except under the clearest mandate. United States v. Security National Bank, 459 U.S. 70, 79-80 (1982); Claridge Apartments Co. v. Commissioner, 323 U.S. 141, 164 (1944); Union Pacific R. Co. v. Laramie Stock Yards, 231 U.S. 190, 199 (1913). Hence, provisions added by an amendment generally operate prospectively, absent a strong indication of legislative intent to the contrary. Hospital Employees Labor Program v. Ridgeway Hosp., 570 F.2d 167, 169-170 (7th Cir. 1978); In re Reilly, 442 F.2d 26 (7th Cir. 1971).

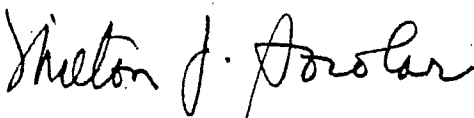
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Here, if Congress were deemed to have intended the statutory 4-year term to commence, either from the date the incumbent took office or from the date of enactment of the 1983 Amendment, section 614 would be retrospectively applied. The difference between the two dates is one of degree, not character, since, in either event, the application of section 614 affects the incumbent's term of office acquired prior to the enactment of the 1983 Amendments. Thus, in the absence of any clear indication that Congress intended a retrospective application of paragraph (8)(A), and we have found none, we do not think that paragraph (8)(A) should be applied retrospectively.

IV.

We conclude that the current Bank President is not subject to the provisions of paragraph (8)(A) as added by section 614. We hope the foregoing discussion is useful to you. Unless you release it earlier, this opinion will be made available to the public 30 days from today.

Sincerely yours,

for 
Comptroller General
of the United States