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

B-130441

APR 12 1978

The Honorable James Abourezk
Chairman, Subcommittee on Administrative Practice and Procedure
Committee on the Judiciary
United States Senate

Dear Mr. Chairman:

This is in response to your letter, with enclosures, in which you ask that we determine "whether the Justice Department has any statutory authority under Attorney General's Order 683-77 (January 19, 1977) to retain private legal counsel who are not under the supervision of the Attorney General to represent Federal employees" in civil suits brought against them in their individual capacity. You also ask, if we determine that the Department is without such authority, that we "describe the liability, if any, of the Department under its existing contracts with private legal counsel," and that we discuss any modifications which may be necessary to three Comptroller General decisions dealing with retention of outside counsel.

You point out that the Department of Justice does not base its authority to retain private counsel under Attorney General's Order 683-77 on 28 U.S.C. § 515 (1970) and 28 U.S.C. § 543 (1970), under which private legal counsel retained by the Department must be under the supervision of the Attorney General. In answer to a number of specific questions submitted by your Committee to the Department, it appears that the Department relies instead on sections 516 and 517 of title 28 of the United States Code which, it feels, provide general broad authority to provide representation for Federal agencies or employees in all matters in which the United States is interested. (See Department answers to questions 5 and 6.)

You question whether authority to protect an interest of the United States in a law suit encompasses the authority to hire private legal counsel who are not under the supervision of the Department of Justice. A legal memorandum included with your letter argues that the legislative history as well as the judicial opinions interpreting 28 U.S.C. §§ 515 and 543 (and their predecessors) demonstrate that these sections are the sole and exclusive authority for the Attorney General to retain private legal counsel, and that the sections relied upon by the Department, dealing more generally with the powers of the Attorney General, give no additional authority to retain private legal counsel.

We have reviewed the arguments advanced by the Department that it has implied authority to do whatever is necessary and proper to carry out its responsibility to provide legal representation when it would advance the interests of the United States. We have also examined the opposing views, as expressed in the aforementioned legal memorandum, and an extensive report by the American Law Division (ALD), Congressional Research Service, Library of Congress. Finally, we have studied the various sections of the United States Code that comprise the specific statutory authority for providing legal advice and conducting litigation in which the United States is interested, as well as the legislative and litigative history of those provisions.

28 U.S.C. §§ 516 and 517, taken together, charge the Department of Justice, under the supervision of the Attorney General, with the conduct of all litigation in which the United States "is interested." These sections provide the authorization for the use of Department of Justice appropriations for the purpose of conducting litigation in the public interest.

Attorney General's Order 683-77, January 19, 1977, as revised, is the Department's statement of its policy that, subject to certain specified conditions, the Department will provide counsel to present or former Government employees who are being sued civilly or who are charged in a State criminal proceeding for acts performed within the scope of their employment. The Department of Justice feels that the United States "is interested" in such matters if the conduct in question was performed in connection with Federal employment. It may be important, it believes, from a governmental standpoint to establish its legality. Moreover, the act of providing representation at Federal expense to Federal employees is essential to the smooth functioning of the Government. Federal employees would, it is said, be less vigorous in upholding Federal law, in discharging their duties, and in exercising the discretionary functions of their positions, if they knew that when sued, even for conduct within their authority, they had to bear their own expenses of litigation.

To our knowledge, the Supreme Court has never ruled on the precise issue of the propriety of the Government's providing legal representation to its employees in the situations enumerated in the Attorney General's Order. However, in cases which presented issues of privilege of Government officials as a defense in civil damage suits for acts performed in the scope of their employment, the Court, based on considerations of policy, recognized that it is in the Government's interest that Federal employees be allowed to perform their jobs free from apprehension that they will suffer the burden of paying litigation expenses. Spalding v. Vilas, 161 U.S.

483 (1896), Barr v. Matteo, 360 U.S. 564 (1958). Our own decisions have consistently adopted this position. See, e.g., 56 Comp. Gen. 615 (1977).

Since providing counsel to employees in appropriate circumstances may be regarded as furthering the interests of the United States, the Department is authorized to use its appropriated funds for this purpose. We believe that this authority also extends to the use of Department funds to pay private counsel retained in accordance with the provisions of 28 U.S.C. §§ 515 and 543 to represent the United States when it is a party to a court case. However, nothing in the express language of either section indicates that these sections are the sole and exclusive authority for the Attorney General to retain private legal counsel.

The legislative history of the two sections indicates that they are part of a comprehensive statutory framework enacted by Congress for the purpose of providing for the conduct of the Government's legal business. The predecessors to these two sections were originally passed as part of the legislation which established the Department of Justice. 16 Stat. 162, et seq. (1870). They were enacted in part, in response to the practice of various executive departments of hiring private counsel to represent the Government. Congress saw in this practice an evil in need of correction because it provided no assurance that the United States would have competent legal representation when its interests were at issue at trial. Also, the practice resulted in excessive expense to the Government, and in a diversity and inconsistency of legal position expressed by United States representatives in litigation matters--i.e., inconsistent not only as between the several executive departments but perhaps with the overall interests of the United States. (See excerpts from the 1870 debate on a bill to create a Department of Justice, quoted at length in the aforementioned legal memorandum.)

Congress therefore enacted legislation which provided for the centralization within a single department, the Department of Justice, of the conduct of all litigation in which the Federal Government is interested. The Department was to be headed by the Attorney General, who would be accountable to Congress for the quality of legal representation. By so providing, it was Congress' hope that in cases where United States interests were at stake, the United States would be represented by attorneys who had no conflicts with those interests and who were of sufficient skill to protect them adequately.

Accordingly, a system was created which provided that any necessary Government hiring of private attorneys would have to be done under the Attorney General's supervision and responsibility. Thus, as indicated by the pertinent legislative history, a rationale throughout the statutory scheme which created and delineated the functions of the

Department of Justice, and of which the statutes at issue are a part, was a concern with the protection of interests of the United States in litigation in which its rights and/or obligations are directly affected. Therefore, the statutory scheme in general, and the mandates of sections 515 and 543, in particular, apply, in our view, to cases where an interest of the United States per se is involved.

We do not believe that suits against Government employees in their individual capacities, such as those covered by Attorney General's Order 683-77, can be so classified. Such cases are distinguishable from litigation in which the United States or one of its agencies is a party, or in which one of its employees or officers in his official capacity is a party, causing the interest of the United States with respect to its rights and duties to be directly affected by the outcome of the suit.

While there is sufficient United States interest to provide representation to its employees sued in their individual capacities under certain prescribed circumstances, that interest is of an administrative nature, rooted in the need to assist the employees whose individual interests are being served. In such cases, it is the employees' rights and duties, and not those of the United States, which are immediately affected by the outcome of the litigation. Thus, since the essential purpose in providing legal counsel is to protect the employees' interests, rather than the Government's, there is hardly the need to assure supervision by the Attorney General as there is in the case of actions directly affecting the Government. And since 28 U.S.C. §§ 515 and 543 merely prescribe the procedure for assuring such supervision, it cannot be said that they were meant to be applicable to the situations under consideration here.

The Attorney General's statement of policy provides that Justice Department attorneys will not represent an employee and that the Department will provide independent private counsel in the litigation of a civil matter for which the employee is also the target of a Federal criminal investigation, where there is a conflict between the legal or factual positions of various Federal employees in the same case, or where adequate representation requires the making of an argument which conflicts with a Government position.

These situations give rise to a conflict for a Justice Department attorney, who, by virtue of his oath of office, owes his allegiance to the United States and to the Attorney General. Any attorneys appointed in accordance with sections 515 and 543 of title 28 to represent employees would be subject to the same conflict as the Department of Justice attorneys, since, under section 515(b), they are also required to take an oath of office and also owe their primary allegiance to the United States and to the Attorney General.

The legislative history indicates that Congress did not contemplate the kind of situation here presented, where neither officers of the Justice Department nor private counsel retained pursuant to 28 U.S.C. §§ 515 and 543 can meet the Department's obligation to represent the interests of the United States. In 1870, when these provisions were first proposed, the doctrine of immunity for individual Government employees was well established in the law. Authority to hire outside counsel under 28 U.S.C. §§ 515 and 543 was meant to assist regular Department staff when, because of the press of business or other exigency a temporary augmentation of its usual complement of attorneys was deemed necessary. The conflict situation simply did not arise as a perceived need at that time.

We conclude that the Attorney General's policy of hiring private counsel not under his supervision in appropriate cases to represent employees or former employees charged as individuals with improper conduct while serving as employees of the United States is proper and within his authority to protect the interests of the United States.

We therefore have no reason to object to use of Department of Justice appropriations for the purpose of hiring attorneys who would be free of supervision by the Attorney General in the conduct of litigation, in accordance with the policy expressed in Attorney General's Order No. 683-77.

Sincerely yours,

R.F.KELLER

Deputy Comptroller General
of the United States