Released, 5-19-78.
See memo in file
— HJK

DIGEST

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

Subject Card

MAY 8 1978

B-130441

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 of April 27, 1978, in which you seek further clarification of our opinion, B-130441, April 12, 1978, concerning the authority of the Department of Justice to retain unsupervised private counsel to represent Government employees in civil suits brought against them in their individual capacities.

You state your view that the legislative history of 28 U.S.C. §§ 515(b) and 543 shows that whenever the Attorney General is protecting the interests of the United States within the meaning of 28 U.S.C. §§ 516-517, by hiring private counsel, Congress intended that such hiring must be in compliance with the requirements of sections 515(b) and 543. You then reason that because we hold that the requirements of sections 515(b) and 543 need not be followed in cases involving Government employees sued in their individual capacities, (arising out of conduct performed within the scope of their employment) that it is our position that no "516-517 interest" is involved in such cases. Based upon this belief, you raise several legal arguments and questions and ask that we "clarify" our position by responding to them.

Alternatively, in the event your understanding of our Opinion is not accurate (and we have found that the "interest" involved in these suits can be classified as a section 516-517 interest), you request that we explain the basis for the Attorney General's authority to retain independent private counsel in light of certain provisions of sections 516 and 517 and section 17 of the Judicial Department Act as you construe them, and in light of your view of an explanation by our Deputy General Counsel Mr. Milton Socolar "that GAO had found no such authority to exist."

We do not hold that the "interest" involved in the suits at issue cannot be classified as a "section 516-517 interest." It is our view, as stated on page 3 of our April 12 opinion, that the United States is interested within the meaning of 28 U.S.C. §§ 516 and 517 in suits brought against Government employees in their individual capacities resulting from conduct performed within the scope of their employment. (See also page 2 of our explanatory letter of April 24, 1978, to you.)

However, we do not agree with your interpretation of the legislative history of sections 515(b) and 543. Our interpretation, as explained at pages 3 and 4 of the Opinion, is that the mandates of sections 515(b) and 543 were not designed to apply in cases where a Federal employee is sued in his individual capacity under the circumstances described in the Attorney General's Order. Thus, those sections do not bar the Attorney General from hiring counsel without regard to procedures specified therein.

Because it is our view that the interest involved in the suits in question "can be 'classified' as a section 516-517 interest," it is unnecessary to answer questions two and four of your letter since they are predicated upon the understanding that we held to the contrary. In answer to questions one and three, there is no specific statutory authority to hire unsupervised outside counsel to represent employees under the circumstances described in the Attorney General's Order However, sections 516 and 517 do authorize use of Department appropriations to protect an interest of the United States. One such interest is the representation of Federal employees under these circumstances.

It is a settled rule that, where an appropriation is made for a particular object, it is also available for expenses which are necessary or incident to the proper execution of the object, unless there is another appropriation which makes more specific provision for such expenditures, or unless they are prohibited by law. 50 Comp. Gen. 534; 38 id. 782; 27 id. 419. Under the conflict of interest circumstances enumerated in the Attorney General's Order, the only means for him to fulfill his duty under sections 516 and 517 to protect the interests of the United States is to retain private counsel who are not under his supervision, since use of Department officers-specially retained or otherwise-would violate the judicial canon of ethics. Since in light of their underlying purpose we do not view sections 515(b) and 543 as prohibiting such expenditures, in the limited circumstances at issue, we see no basis upon which to object to the Attorney General's policy.

In the final analysis, the difference between us lies in the approach taken with regard to an apparent dilemma inherent in applying the statutes involved to the situations covered by the Attorney General's policy.

There is no question but that the Department of Justice is authorized to pursue the interests of the United States in matters of litigation. And, as the courts have stated, providing legal counsel for employees in the cases under consideration serves a

B-130441

legitimate United States interest. The apparent dilemma is caused by those statutes which by their terms provide for legal counsel to be under oath to the United States, while here the very reason for going to outside counsel is because of the conflict inherent in the assignment of counsel sworn to the United States to represent the individuals involved.

As we understand your position, you would conclude that the Department has only one option--that is, to forego pursuit of these legitimate interests of the United States. It is our opinion, however, that the statutes were not intended to make it inappropriate for the Department of Justice to pursue such interests. In other words, given the special circumstances of representing employees in conflict situations, we believe that the fundamental statutory authority of the Department to attend to the litigative interests of the United States is apart from the statutory provisions regarding use of Department attorneys which were enacted in the context of suits to which the United States is a party.

I hope this has accomplished the clarification which you seek.

Sincerely yours,

(Signed) Elmer B. Staats

Comptroller General
of the United States

ATTORNEYS
  Hire
    Justice Department
      Private counsel

JUSTICE DEPARTMENT
  Legal representation
    Government employees
      Retention of private counsel