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The Honorable Howard L. Berman
Chairman, Committee on Foreign Affairs
House of Representatives

The Honorable Robert Menendez
Chairman, Subcommittee on International
Development and Foreign Economic Affairs,
and International Environmental Protection
Committee on Foreign Relations
United States Senate

The Honorable Daniel K. Akaka
Chairman, Subcommittee on Oversight of Government
Management, the Federal Workforce, and
the District of Columbia
Committee on Homeland Security and Governmental Affairs
United States Senate

Subject: *Delegation of Authorities to the Director of Foreign Assistance*

This opinion responds to your letter of September 10, 2007, in which you asked us, as part of a larger overall review of the Office of the Director of Foreign Assistance's activities, to review the legality of the delegation of authorities of the Secretary of State and the President to the Director of Foreign Assistance (DFA). The creation of the DFA represented a significant structural change to the organization of U.S. foreign assistance.¹ As a result, some Members of Congress questioned the propriety of the delegation of certain functions Congress had previously conferred by statute upon the President and the Secretary to the DFA, a position that does not receive Senate confirmation.²

Our practice when rendering legal opinions includes obtaining the views of the relevant agency to establish a factual record and to elicit the agency's legal position

¹ *Nomination of Ambassador Randall Tobias: Hearing Before the Committee on Foreign Relations, 109th Congress, 2nd Session (2006)* (questions for the record submitted to Ambassador Randall Tobias by Senator Joseph Biden).

² *Id.*

on the subject matter of the request.³ In accordance with this practice, we sent a development letter to the State Department to solicit its views of the facts and law in question. We received a timely response from State and followed up with informal discussions.

Based on information and documentation we received from State, as well as our independent research and analysis, we conclude for the reasons discussed below that, with respect to functions originally conferred by statute either upon the Secretary or the President, the subsequent redelegation by the Secretary of these functions to the DFA was authorized by law.

BACKGROUND

The Secretary announced the creation of the position of the Director of Foreign Assistance in 2006. According to the Secretary, she created the position to better align foreign assistance programs with foreign policy goals by having the DFA provide guidance within State and to other agencies to develop and implement a coherent foreign assistance strategy for the United States government.⁴ According to State's fact sheet entitled, "New Direction for U.S. Foreign Assistance" and the State Department Foreign Affairs Manual, the DFA:

- develops a coordinated U. S. Government foreign assistance strategy, including developing country specific assistance strategies and annual country-specific assistance operational plans as well as the Director of Foreign Assistance goals and priorities;
- creates and directs consolidated policy, strategic and program plans, the operational budget, implementation mechanisms, and staff functions required to provide umbrella leadership to foreign assistance;
- has authority over all Department of State and USAID foreign assistance funding and programs, with continued participation in program planning, implementation, budget, oversight, and program results reporting from the various bureaus and offices within State and USAID, as part of the integrated interagency planning, coordination and implementation mechanisms;
- provides coordination, guidance, and assistance to all development assistance delivered through the Millennium Challenge Corporation and the Office of the Global AIDS Coordinator as well as implement a mechanism to effectively facilitate interagency collaboration of foreign assistance programs and policies of other agencies and entities of the U.S. Government; and

³ GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006) available at www.gao.gov/congress.html (last visited Oct. 16, 2008).

⁴ Remarks on Foreign Assistance by Secretary of State Condoleezza Rice, Washington, D.C., January 19, 2006, available at <http://www.state.gov/secretary/rm/2006/59408.htm> (last visited Oct. 16, 2008).

- directs the required transformation of the U. S. Government approach to foreign assistance in order to achieve the President’s Transformational Development Goals, and provides high-level comprehensive framework for reporting on achievements and summary of performance results that support the organization’s strategic objectives.⁵

The Secretary subsequently delegated specific functions to the DFA related to overseeing and administering various aspects of U.S. foreign assistance programs.

DISCUSSION

As the head of a department, the Secretary has broad authority to create positions within the agency and to employ and appoint officials in such positions. 5 U.S.C. §§ 301, 3101. In addition, the State Department Basic Authorities Act gives the Secretary broad authority to administer, coordinate, and direct the personnel of the Department. 22 U.S.C. § 2651a. Utilizing these authorities, the Secretary created the position of the DFA within the Department. According to the State Department Foreign Affairs Manual, the DFA serves concurrently as the USAID Administrator, reports directly to the Secretary, and holds the rank at the level of the Deputy Secretary of State.”⁶

The State Department Basic Authorities Act also authorizes the Secretary to promulgate such rules and regulations as may be necessary to carry out the functions of the Secretary and delegate “authority to perform any of the functions of the Secretary or the Department to officers and employees under the direction and supervision of the Secretary.” 22 U.S.C. § 2651a. Exercising this authority, the Secretary delegated numerous functions to the DFA in section 1 of the Department of State Delegation of Authority 293 (hereinafter Delegation 293).⁷ The functions delegated to the DFA in Delegation 293 fall into two broad categories: (1) functions conferred upon the Secretary of State by statute, and (2) functions originally conferred upon the President by statute and subsequently delegated to the Secretary of State.⁸ These two categories are covered by subsections (a) and (b), respectively, of section 1 of the delegation, which provide:

⁵ U.S. Department of State Foreign Affairs Manual Volume 1, section 033.1.

⁶ *Id.*

⁷ *Delegation of Authority by the Secretary of State to Officers of the Department of State and the Administrator of the U.S. Agency for International Development of Authorities Under the Foreign Assistance Act of 1961 and Other Related Acts*, 71 Fed. Reg. 38202 (July 5, 2006).

⁸ The July 5, 2006, authority delegation specified that certain functions conferred upon the Secretary by Exec. Order No. 11077, *Administration of the Migration and Refugee Assistance Act of 1962*, 28 Fed. Reg. 629 (Jan. 22, 1963), *reprinted as amended in* 22 U.S.C. § 2603 (delegating certain functions from the President to the Secretary of State) and Exec. Order No. 12163, *Administration of foreign assistance and related functions*, 44 Fed. Reg. 56673 (Sept. 29, 1979), *reprinted as amended in*

“(a) The functions conferred upon the Secretary of State by sections 101(b), 531(b) and 622(c) of the Act [Foreign Assistance Act of 1961 (FAA), as amended], section 2(b) of the Arms Export Control Act, and section 1523 of the Foreign Affairs Reform and Restructuring Act of 1998 (22 U.S.C. 6593), including the authority to provide for continuous supervision and general direction of development and other economic assistance, military assistance, military education and training, and foreign military financing, designing a U.S. foreign assistance strategy and budgetary approach, determining whether there shall be a program for a country and the amount thereof, and approving the programming of foreign assistance.

“(b) The functions conferred upon the Secretary by section 1-100 of the Order [Executive Order 12163, Sept. 29, 1979] and section 1 of Executive Order 11077 of January 22, 1963 (28 FR 629) insofar as such functions are necessary to approve assistance and programs under chapters 3 and 8 of Part I of the Act [FAA], Part II of the Act [FAA] (including chapters 4, 6 and 8 thereof), and the Migration and Refugee Assistance Act of 1962 (22 U.S.C 2601) [sic] as part of a coordinated U.S. foreign assistance strategy.”

We discuss each of these categories of functions in turn below.

Delegation of Functions Originally Conferred upon the Secretary

With respect to those functions statutorily conferred directly upon the Secretary, which are delineated in section 1, paragraph (a) of Delegation 293, *supra*, the State Department Basic Authorities Act states that “[u]nless otherwise specified in law, the Secretary may delegate authority to perform any of the functions of the Secretary or the Department to officers and employees under the direction and supervision of the Secretary.” 22 U.S.C. § 2651a (emphasis added). Under Delegation 293, functions statutorily conferred upon the Secretary were delegated to the DFA.⁹

22 U.S.C. § 2381 (delegating certain functions from the President to the Secretary of State) were redelegated to the DFA.

⁹ The functions that were delegated to the DFA originate from the following statutory provisions: (1) § 101(b) of the Foreign Assistance Act of 1961 (FAA), Pub. L. No. 87-195, § 101(b), 75 Stat. 424 (Sept. 4, 1961) (*codified as amended at 22 U.S.C. § 2151*) (establishing State’s policy guidance authority); § 531(b) of the FAA (*codified as amended at 22 U.S.C. § 2346*) (establishing the State Department’s responsibility for the programming of the economic support fund); § 622(c) of the FAA (*codified as amended at 22 U.S.C. § 2382*) (establishing the State Department’s responsibility for the supervision and general direction of assistance programs, except for the transfer

To determine if the Secretary's authority to delegate these functions to the DFA was otherwise specifically prohibited by law, we researched and analyzed the statutory provisions that conferred these functions upon the Secretary, as well as other relevant statutes including public laws amending the FAA. We found no specific prohibition in law on the Secretary's authority to delegate the functions named in paragraph (a) of Delegation 293 and described above. Based on this analysis, we conclude that it was lawful for the Secretary to delegate these functions to the DFA pursuant to the general delegation authority provided to the Secretary in the State Department Basic Authorities Act.¹⁰

Delegation of Functions Originally Conferred upon the President

In addition to the delegation of functions that had been directly conferred upon the Secretary by statute, the Secretary also delegated certain functions to the DFA, which are delineated in section 1, paragraph (b) of Delegation 293, *supra*, that Congress had originally granted to the President. These functions were conferred upon the President by the Migration and Refugee Assistance Act of 1962¹¹ (MRAA) and the Foreign Assistance Act of 1961¹² (FAA). The President subsequently delegated these functions, and many others, to the Secretary of State in Executive Order No. 11077 and Executive Order No. 12163.

In order to determine whether redelegation of these functions to the DFA was authorized, we reviewed the relevant provisions of the MRAA and the FAA to determine (1) whether they authorized the President to delegate the functions to the Secretary, and (2) whether they provided authority for the Secretary to redelegate the same functions to a subordinate, such as the DFA. With respect to the MRAA, section 4(a)(1) states:

“The President is authorized to designate the head of any department or agency of the United States Government, or any official thereof who is required to be appointed by the President by and with the advice and consent of the Senate, to perform any functions conferred upon the President by

of excess defense articles under section 622(c)); § 2(b) of the Arms Export Control Act, (Foreign Military Sales Act), Pub. L. No. 90-629, § 2(b), 82 Stat. 1320, 1322 (Oct. 22, 1968) (*codified as amended at 22 U.S.C. § 2752*) (establishing the State Department's role in foreign military financing); and § 1523 of the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, Div. G, § 1523, 112 Stat. 2681, 2681-794 (Oct. 21, 1998) (*codified as amended at 22 U.S.C. § 6593*) (establishing the Secretary's U.S. assistance coordination activities).

¹⁰ 22 U.S.C. § 2651a.

¹¹ Migration and Refugee Assistance Act of 1962, Pub. L. No. 87-510, 76 Stat. 121 (June 28, 1962) (*codified as amended at 22 U.S.C. §§ 2601-2606*).

¹² Pub. L. No. 87-195, 75 Stat. 424 (*codified as amended at 22 U.S.C. §§ 2151-2431k*).

this Act. If the President shall so specify, any individual so designated under this subsection is authorized to redelegate to any of his subordinates any functions authorized to be performed by him under this subsection, except the function of exercising the waiver authority specified in section 3(b) of this Act.”¹³

In authorizing the President to designate the head of an agency to perform the functions conferred on the President by the MRAA, the Act provides explicit authority for the President to delegate such functions to the Secretary of State. The Act also explicitly provides that the President may specify that his designee, in this case the Secretary of State, may redelegate the same functions to any subordinate.¹⁴ Consistent with the authority granted to him in section 4(a)(1) of the MRAA, the President, by Executive Order No. 11077, properly delegated certain functions to the head of the Department of State, namely the Secretary. In addition, and also consistent with section 4(a)(1), the President specified that the Secretary of State could “redelegate any of his functions under [the] order to any of his subordinates.”¹⁵ By specifying in the original delegation to the Secretary that the Secretary had the authority to redelegate such functions, the President granted the Secretary the necessary authority to subsequently redelegate functions to her subordinate that had been delegated to her. Therefore, the Secretary’s delegation of these functions to the DFA, a subordinate who reports directly to the Secretary, was proper.¹⁶

In addition to the MRAA functions, the President also delegated certain functions to the Secretary that were originally granted to the President by the FAA.¹⁷ With respect to this delegation, the relevant provision of the FAA is section 621(a). Section 621(a) states:

“The President may exercise any functions conferred upon him by this Act through such agency or officer of the United States Government as he shall direct. The head of any such agency or such officer may from time to time promulgate such rules and regulations as may be necessary to carry out such functions, and may delegate authority to perform any such functions, including, if he shall so specify, the authority

¹³ Pub. L. No. 87-510, § 4(a)(1) (*codified as amended at 22 U.S.C. § 2603*).

¹⁴ *Id.*

¹⁵ Exec. Order No. 11077, 28 Fed. Reg. 629.

¹⁶ Neither the MRAA nor Executive Order No. 11077 requires a “subordinate” who is the recipient of the delegation to meet any additional criteria. For example, there is no requirement that the subordinate to whom the Secretary redelegates functions be a Senate-confirmed official.

¹⁷ Exec. Order No. 12163, *reprinted as amended in 22 U.S.C. § 2381*.

successively to redelegate any of such functions to any of his subordinates.”¹⁸

Similar to the authority provided by the MRAA for the President to designate an agency head to carry out the functions included in that Act, section 621(a) of the FAA authorizes the President to direct an agency or officer of the United States to exercise the functions conferred upon him on his behalf. The President utilized this authority in issuing Executive Order No. 12163 to delegate certain FAA functions to the Secretary of State.¹⁹ With respect to the re delegation of such functions to a subordinate of the Secretary, section 621(a) provides that “[t]he head of any such agency . . . may from time to time promulgate such rules . . . as may be necessary to carry out such functions” The provision further authorizes the head of any such agency, here the Secretary, to, among other things, delegate authority to perform such functions and, as she may see fit and so specify, to include in such delegation the authority to further redelegate such functions to any of her subordinates. Given this statutory construct, the authority of the Secretary to redelegate to the DFA the functions delegated to her by the President becomes operative under section 621(a) once the President directs the Secretary to exercise said functions. Additionally, in Executive Order No. 12163, the President authorized the Secretary to “redelegate to any other officer or agency of the Executive branch functions delegated to the Secretary by [the] order to the extent such delegation is not otherwise prohibited by law.”²⁰ Because both section 621(a) and the terms of Executive Order No. 12163 provide that the Secretary may redelegate to subordinates those functions delegated to her by the President, the Secretary had the authority to redelegate those functions to the DFA.²¹ Therefore, we conclude that in Delegation 293 the Secretary properly re delegated to the DFA functions previously delegated to her in section 1-100 of the Executive Order No. 12163 “insofar as such functions are necessary to approve

¹⁸ Pub. L. No. 87-195, § 621(a), 75 Stat. 424, 445 (*codified as amended at 22 U.S.C. § 2381*).

¹⁹ The President also delegated a number of other functions to the Secretary relying on additional statutory authorities in Executive Order No. 12163. However, none of these other functions were subsequently re delegated to the DFA.

²⁰ Exec. Order No. 12163, *reprinted as amended in 22 U.S.C. § 2381*.

We note that, in the absence of specific delegation authorization, the general delegation statute, sections 301 and 302 of title 3 of the United States Code, explicitly authorize delegation to Senate confirmed positions except where precluded by statute. *See, e.g.*, 5 U.S. Op. Off. Legal Counsel 91 (1981). As we have discussed, with respect to the functions that the Secretary delegated to the DFA in section 1 of Delegation 293, both the MRAA and the FAA provide specific re delegation authority of such functions to “any of [the Secretary’s] subordinates” and the President authorized such re delegation in Executive Order No. 11077 and 12163 in his delegation of those functions to the Secretary.

²¹ As with the MRAA, neither the FAA nor Executive Order No. 12163 requires a “subordinate” who is the recipient of the delegation to meet any additional criteria. For example, there is no requirement that the subordinate to whom the Secretary re delegates functions be a Senate-confirmed official.

assistance and programs under chapters 3 and 8 of Part I of the [FAA], Part II of the [FAA] (including chapters 4, 6, and 8 thereof), . . . as part of a coordinated U.S. foreign assistance strategy.”

CONCLUSION

Section 1 of the State Department Basic Authorities Act²² provides the Secretary with general authority to delegate performance of any of the statutory functions originally conferred upon the Secretary to those under her direction and authority, such as the DFA. Therefore, with respect to the functions which were originally conferred by statute directly upon the Secretary, we conclude that the Secretary lawfully delegated those functions to the DFA. The MRAA²³ authorized the President to delegate to the Secretary both the authority to perform certain of those functions conferred upon him therein, and the authority for the Secretary to redelegate those functions to a subordinate, such as the DFA. The FAA²⁴ authorized the President to delegate certain functions conferred upon him therein to the Secretary. Once the President made such a delegation, the Secretary had authority under the FAA to further delegate those functions to a subordinate, such as the DFA. Therefore, with respect to the functions which were originally conferred by the Congress directly upon the President and subsequently delegated by the President to the Secretary, we conclude that the Secretary lawfully delegated those functions to the DFA.



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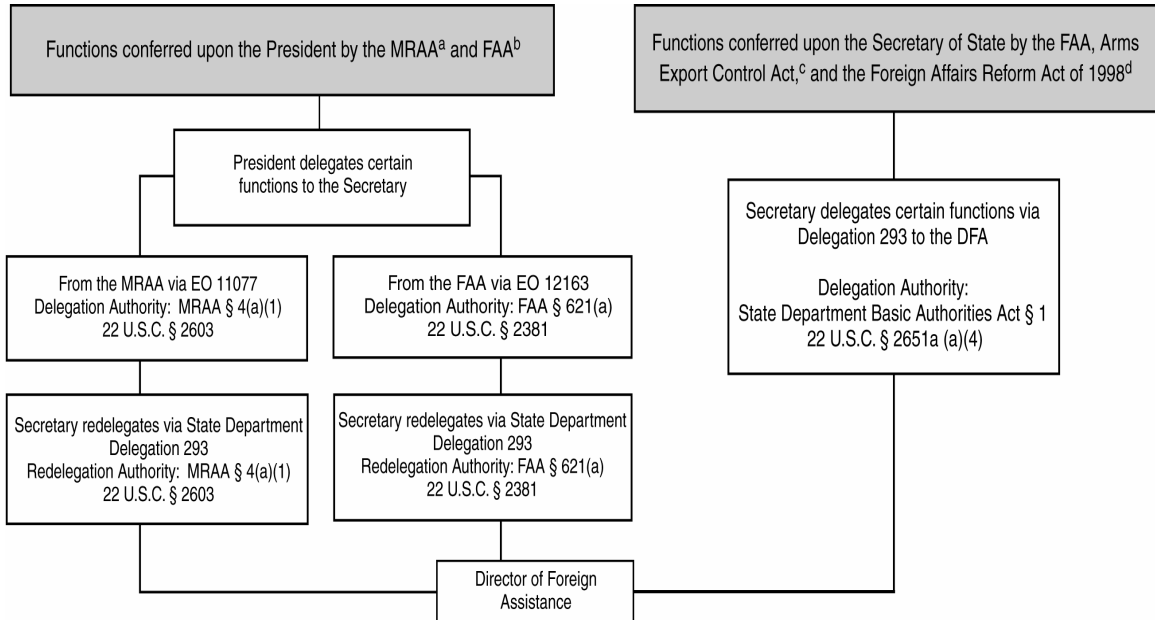
Enclosure

²² 22 U.S.C. § 2651a.

²³ 22 U.S.C. § 2603.

²⁴ 22 U.S.C. § 2381.

Delegation of Functions Pursuant to State Department Delegation of Authority 293 to the Director of Foreign Assistance



Source: GAO analysis of State Department Delegation 293

^aMigration and Refugee Assistance Act of 1962, Pub. L. No. 87-510, 76 Stat. 121 (codified as amended at 22 U.S.C. §§ 2601-2606).

^bThe Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 434 (codified as amended at 22 U.S.C. §§ 2151-2431k).

^cArms Export Control Act (Foreign Military Sales Act), Pub. L. No. 90-629, 82 Stat. 1320 (1968) (codified as amended at 22 U.S.C. §§ 2751-2799aa-2).

^dForeign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, Div. G, 112 Stat. 2681-761 (codified as amended at various sections of title 22 of the United States Code, 8 U.S.C. § 1182d, and 42 U.S.C. § 11611).