United States Department of State

The Legal Adviser

Washington, D.C. 20520

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MEMORANDUM

TO: Timothy E. Flanagan, Acting Assistant Attorney General
Office of Legal Counsel, Department of Justice

FROM: Jamison M. Selby, Deputy Legal Adviser JS

SUBJECT: Constitutionality of Legislation Prohibiting Multiple Official or Diplomatic Passports

INTRODUCTION

Sections 129(e) of the State Department's current authorization act and 503 of the Department's current appropriations act would, among other things, prohibit the issuance of multiple diplomatic or official passports for the purpose of complying with the Arab League boycott of Israel. As set forth in greater detail below, it appears to us that these provisions are unconstitutional to the extent that they would intrude upon the President's ability to conduct diplomacy on behalf of the United States. We would appreciate your views and guidance on this issue.

Preliminarily, we note that the Department of State is sympathetic to the goals of this legislation; we strongly object to the policy of some Arab nations of denying admission to persons whose passports reflect travel to Israel. It has been a goal of this administration's diplomacy in the Middle East to persuade those nations to abandon that policy. Thus, there is no conflict between the legislative and executive branches concerning the underlying issue: both agree that a goal of U.S. foreign policy is to bring about the end of the Arab League passport policy. The conflict arises because 1) Congress has attempted to direct the precise means by which the President is to carry out this foreign policy; and 2) the means chosen by Congress would itself interfere with the conduct of diplomacy and perhaps prevent the accomplishment of the desired goal.

RELEVANT STATUTORY PROVISIONS

Section 129(e) of P.L. 102-138, the Foreign Relations Authorization Act, Fiscal Years 1992 and 1993, provides that "[t]he Secretary of State shall not issue more than one official or diplomatic passport to any official of the United

States Government for the purpose of enabling that official to acquiesce in or comply with the policy of the majority of Arab League nations of rejecting passports of, or denying entrance visas to, persons whose passports or other documents reflect that the person has visited Israel." It further provides that the Secretary "shall promulgate such rules and regulations as are necessary to ensure that officials of the United States Government do not comply with, or acquiesce in" the Arab League passport policy.

Section 503 of P.L. 102-140, the Department of State and Related Agencies Appropriations Act, 1992, similarly provides that "[n]one of the funds provided in this Act shall be used by the Department of State to issue more than one official or diplomatic passport to any United States Government employee for the purpose of enabling that employee to acquiesce in or comply with the policy of the majority of Arab League nations of rejecting passports of, or denying entrance visas to, persons whose passports or other documents reflect that person has visited Israel."

The provisions quoted above are part of a comprehensive legislative plan that would require the executive branch vigorously to encourage the Arab League nations that maintain the passport and visa policy described in these provisions to reverse that policy, and would also prohibit U.S. Government acquiescence in the policy, "especially with respect to travel by officials of the United States." See P.L. 102-138, section 129(a); H.R. Rep. 102-238, Conference Report accompanying H.R. 1415, at 107-08. In addition to the ban on issuing multiple diplomatic or official passports for the purpose of complying with the Arab League passport policy and the requirement that the Secretary promulgate regulations to ensure that U.S. government officials do not comply with that policy, the legislation also directs the Secretary of State immediately to undertake negotiations to seek an end to the policy, and directs the Secretary to cease issuing passports designated for travel only to Israel. See section 129 (b), (d).

The effect of these provisions, thus, is that the Secretary may still issue multiple passports to enable private travellers to comply with the Arab League passport policy, so long as no passport is stamped "Israel only." The legislation permits no such flexibility with respect to U.S. government officials. Instead, it directs that, without exception, they may not "comply with, or acquiesce in" that policy. (The U.S. policy of issuing two passports to accommodate travel to the Middle East region is not, in our view, acquiescence to the restrictive policy of the Arab States but rather a challenge to it, because the rules of the boycott forbid the use of second passports to evade the policy. However, the legislative history of the provision in question explicitly states that Congress considers the issuance of second passports as compliance with the Arab League policy. See H.R. Rep. 102-138,

Conference Report Accompanying H.R. 1415, at 107.)

BACKGROUND

The Arab League boycott of Israel. The Arab League boycott of Israel is designed to prevent commerce between Arabs and Israel and to prevent firms that do business with Arabs from contributing to the economic development or military strength of Israel. The Arab League boycott extends back to 1945 when the Arab League Council passed a resolution urging member states and other Arab territories to prohibit the distribution and use of products from Jewish industries in Palestine. Following Israel's independence in 1948, the League formally banned all commercial and financial transactions between Israel and Arab states. Subsequently, the ban has included a secondary boycott directed at non-Israeli firms or persons who trade or otherwise deal with Israel. The boycott of travel documents is an element of that policy as it seeks to discourage travel to Israel by third country nationals.

Individual countries have enacted their own legislation to implement the Arab League's boycott resolutions. The Damascus-based Arab League Central Boycott Office (CBO), which is responsible for monitoring boycott enforcement throughout the Arab League, promulgated a uniform Boycott Law which all Arab League members have adopted with minor variations. The CBO also promulgates "General Principles" or regulations to guide and assist member states' implementation of the uniform law. One of these "general principles" requires member states to prohibit entry into their countries by foreign nationals with passports bearing Israeli visas or with a second passport designed to evade this restriction.1/

1/ The Principles state that the following persons are exempt from this prohibition:

1. Members of the diplomatic corps
2. Officials of the United Nations and International agencies who are not Israelis by nationality.
3. Official persons who are nationals of foreign states and members of the foreign press whose being permitted to enter the Arab countries is considered by the Arab authorities to be called for by the higher interests of the Arabs.
4. Foreign tourists and pilgrims coming on group tours to the Arab countries and Israel.

In practice, these exemptions are not recognized by Arab League nations in a number of cases, but they provide scope for our quietly encouraging individual Arab states to erode objectionable visa practices by exception, a process already under way.

U.S. practice in response to the prohibition. The U.S. has long recognized that the boycott-related entry practices within the Arab League are inconvenient and inappropriate to our travellers. Over the last few decades, the State Department has responded to accommodate the official and private travel needs of U.S. citizens by issuing second passports to permit them to have one travel document for travel to Israel, leaving a second general passport free of any evidence of travel there. The State Department issues second official or diplomatic passports not only to U.S. Executive branch employees, but also to members of Congress and their staff and members of the federal judiciary, whose travel to the Middle East may include both Israel and Arab League member states that enforce the travel boycott. This practice has been successful in keeping the Arab travel boycott from interfering with the conduct of U.S. diplomacy in the region and from raising bilateral tensions.

Past U.S. practice has been to restrict one of the two passports for travel only to Israel. This was an internal control mechanism, which also provided a clear indication to the traveler as to which passport should be used on which occasions. This technical limitation was clearly consistent with U.S. recognition of Israel and has been accepted as such by Israel, which has been issuing visas in these documents for many decades.

Impact of the legislation on the Arab League boycott. In order to determine the extent to which this legislation would interfere with the President's ability to conduct diplomacy, the Department has recently reviewed the current status of the travel boycott and the likely impact this legislation would have on it. Because the legislation permits issuance of a second regular passport for non-official travel, there is likely to be little, if any, impact from the statute's prohibition on the issuance of "Israel-only" passports for such travel. With respect to diplomatic or official passports, however, we believe that the effect of this legislation might well be the opposite of what Congress intends. Arab League states that might have been willing quietly and without publicity to modify their policy as part of an overall diplomatic process may feel compelled to stand up to what they perceive as threatening, coercive U.S. legislation. It is also very likely that U.S. implementation of this legislation would be viewed by the Arab League nations as giving a concession to Israel without exacting anything in return.

A recent State Department survey of the governments of the Arab League countries with which the U.S, currently has relations supports this prognosis. No country indicated that it would change its policy in response to this legislation. The survey revealed that the prohibition is not enforced in several countries, enforcement in some others is haphazard, and enforcement in others is strict. Recent changes, prior to passage of the legislation, were gradually improving Arab practices. The countries where enforcement is haphazard or nonexistent are generally unwilling publicly to so state, and if we were to force them to state an official position, they would probably toughen their stance.

As the survey referred to above establishes, U.S. officials travelling to the Middle East could be expected to face obstacles to their entry to many Arab League countries[2/] if their passports reflect travel to Israel. Even those countries that do not enforce the prohibition, or enforce it haphazardly, could change their stand at any time without notice. Quite apart from the question of entry, difficulties might also arise when an individual bearing evidence of prior or future travel to Israel is stopped at one of the many internal checkpoints in Lebanon and other Arab countries, and asked to produce a passport. At this juncture, evidence of travel to Israel might spark other, more serious, problems than denial of an entry visa. Thus, we believe that the inability to issue more than one official or diplomatic passport would, in some cases, interfere with the ability of United States officials to engage in diplomacy and could upset delicate and complex negotiations. In addition, in some cases, travelling with a diplomatic passport bearing evidence of travel to Israel would place our officials at personal risk.

Other options. The legislation in question has not yet had any adverse impact because it has not yet become effective. However, in anticipation of its potential impact, we examined a variety of possibilities for carrying out diplomatic functions without the issuance of more than one official or diplomatic passport and were unable to identify a satisfactory alternative in a significant number of cases that would be affected by this legislation.

One of the options considered was the possibility of travelling to either Israel or Arab League nations without

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2/ We understand that, on occasion, certain non-Arab League countries with large Muslim populations, such as Senegal, have also refused to honor travel documents reflecting travel to Israel.

presenting a passport. Assuming that such a practice would be consistent with U.S. law, this option was rejected because such travel would probably not be permitted by receiving states, would adversely impact U.S. bilateral relations in the region, and, if permitted, would expose U.S. officials to unacceptable personal risk, since the passport serves as a statement of official U.S. government concern and is used by many countries to establish privileges and immunitities.

Another option -- to ask Israel not to stamp the passports of U.S. officials -- was rejected on policy grounds because even to propose it could adversely affect our relations with Israel, and, in any event, any such request would likely be rejected by Israel (although Israel does accomodate private travellers in this way).

Another option considered was to seek advance permission from the receiving Arab country every time a U.S. official would be entering that country with a passport reflecting travel to Israel. While some Arab countries indicate they might accomodate such requests, others would not; the procedure at best would put our diplomatic travel at the pleasure of Arab governments.

We also considered the option of cancelling a diplomatic or official passport that reflected travel to Israel whenever the holder needed to travel to an Arab League nation, and reissuing a new passport. Aside from the logistical problems this option would create, we concluded that Congress would probably view it as violating the spirit, if not the letter, of the legislation. A similar option, of arranging negotiations so that travel to Israel followed travel to the Arab countries, was rejected as unacceptable to Israel, and, in any event, unworkable because the Israeli visa in the passport would show intent to travel to Israel in the future, and thus would invoke the Arab League boycott. Moreover, it would be impossible in complex negotiations involving rapid, repeated travel between Israel and Arab countries. Travelling to an intervening third country to get the Israeli visa would be impractical, and at best would only resolve the problem for a single trip, because after the first trip to the Arab countries and Israel, the passport would reflect travel to Israel.

Thus, in order to carry out this provision in all cases, the President would have to make the abolition of the Arab League passport policy the first item on his negotiating agenda and succeed in having that policy abolished before proceeding with substantive negotiations of great importance to all parties concerned. As indicated earlier, we believe that such an effort would not succeed at this time.

DISCUSSION

There appears to be very strong support for the proposition that the prohibition on the issuance of multiple diplomatic or official passports is unconstitutional because it impermissibly interferes with the President's authority to conduct diplomatic relations with foreign governments. "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." 10 Annals of Cong. 613 (1800), quoted in E. Corwin, The President: Office and Powers 216 (1948). This statement by John Marshall, made in 1799 when he was a Member of Congress, summarizes the view -- widely accepted from the founding of the Nation until the present -- that the Constitution confers on the President a predominant, extensive power with respect to foreign affairs. Further, the President's authority is especially clear when, as is the case here, the challenged legislation would directly interfere with the President's ability to send his diplomats abroad to negotiate with foreign governments. The ability of the President to determine "how, where, when and by whom the United States" negotiates is a core executive function, and "there is nothing to suggest that he is limited as to time, place, form, or forum." L. Henkin, Foreign Affairs and the Constitution 47 (1972).

A. The Constitution Vests In the President the Preeminent Authority to Conduct Diplomatic Relations.

The source of the President's foreign affairs power is Article II of the Constitution which vests the executive power of the United States in the President and requires the chief executive to "preserve, protect and defend the Constitution." Article II, Section 1. The Constitution also designates the president as Commander in Chief of the armed forces, gives him the power, by and with the advice and consent of the Senate, to make treaties and appoint ambassadors and other consular officials, and the power to receive ambassadors from foreign countries. Article II, Sections 2 and 3. There is no dispute among the drafters of the Constitution, other early statesmen, the courts and scholars that these provisions give the President the preeminent role in conducting the nation's diplomacy.[3/]

3/ "No one believes that the President's powers are only what, on their face, these clauses say," and "all will agree that ... Presidents have achieved and legitimated an undisputed, extensive, predominant, sometimes exclusive 'foreign affairs power.'" Henkin, at 41, 44.

The constitutional primacy of the executive in the conduct of negotiations was clearly the intention of the founders. In The Federalist Papers John Jay and Alexander Hamilton refer to the "constitutional agency of the President in the conduct of foreign negotiations," note that "perfect secrecy and immediate dispatch" are "indispensable in the management of foreign negotiations" and point out that the executive is "the most fit agent in those transactions." The Federalist No. 64, at 330-31 (J. Jay), No. 70, at 359 (A. Hamilton), and No. 75, at 383-84 (A. Hamilton) (M. Beloff ed. 1948). It is instructive that, while the precise constitutional provision Jay and Hamilton were discussing was the treaty power, which does not explicitly confer on the President the power to conduct foreign negotiations outside of the treaty context, it is evident from the discussion that they understood this provision to encompass a broad executive power to negotiate with foreign governments.

In 1793, shortly after the adoption of the Constitution, Hamilton elaborated on the President's broad role in foreign affairs. While Article I, he noted, gives to Congress "all legislative powers herein granted" (emphasis supplied), Article II has no such restriction, but rather simply begins by saying that "the executive power shall be vested" in the president. The President then is not limited to powers that are expressly enumerated. These powers are merely illustrative. Hamilton continued:

> The enumeration ought therefore to be considered, as intended merely to specify the principal articles implied in the definition of executive power; leaving the rest to flow from the general grant of that power, interpreted in conformity with other parts of the Constitution, and with the principles of free government.
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> The general doctrine of our Constitution then is, that the executive power of the nation is vested in the President; subject only to the exceptions and qualifications, which are expressed in the instrument.

7 A. Hamilton, Works 76, 81, quoted in Henkin, at 298, n. 11 (emphasis in original).[4/]

4/ The issue of the presidential foreign affairs power was the subject of a famous debate between Hamilton and James Madison 6 J. Madison, Writings 138, 147-50 (Hunt ed. 1910), cited in Henkin, at 298, n. 12. While Madison did not agree that Congress was excluded from any foreign affairs role that was not explicitly enumerated in the Constitution, he did not dispute Hamilton's view that the "executive power" clause vests broad power over foreign affairs in the President. Id.

Other statements similarly illustrate the common understanding, from the beginning of the Republic, that the executive power vested by the Constitution in the President includes the preeminent authority to conduct diplomacy with foreign governments. In 1790, Secretary of State Thomas Jefferson wrote:

> The transaction of business with foreign nations is Executive altogether. It belongs then to the head of that department, except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly.

5 T. Jefferson, Writings 162 (Ford ed. 1892) (quoted in Henkin, at 297-298, n. 10 (emphasis in original).

The Senate Committee on Foreign Relations similarly reported in 1816:

> The President is the constitutional representative of the United States with regard to foreign nations. He...must necessarily be most competent to determine when, how, and upon what subjects negotiations may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution.

Reports of the Committee on Foreign Relations, vol. 8, p. 24 (1816), quoted in United States v. Curtiss-Wright Corp., 299 U.S. 304, 319 (1936).

The courts have concurred with the view that, under the Constitution, the President has the preeminent role in the conduct of foreign diplomacy.[5/] As the Supreme Court stated in Curtiss-Wright, in speaking of the "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations":

> In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and

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5/ There are very few cases dealing with the President's power to conduct diplomacy, probably because such cases are often regarded as nonjusticiable, i.e., involving political questions not admitting of judicial review. See Haig v. Agee, 453 U.S. 280, 292 (1980) ("[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention").

> consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.

299 U.S. at 319-320 (emphasis omitted). In more recent times, Curtiss-Wright was relied on in Goldwater v. Carter, 617 F. 2d 697 (D.C. Cir.), rev'd on other grounds, 444 U.S. 996 (1979) where the court said that "[t]he subtleties involved in maintaining amorphous relationships are often the very stuff of diplomacy -- a field in which the President, not the Congress, has responsibility under our Constitution." 617 F.2d at 708. See also, Haig v. Agee, 453 U.S. 280 (1980); Zemel v. Rusk, 381 U.S. 1 (1965).

In modern times, Presidents have frequently asserted in signing statements that particular provisions of bills would be treated as non-binding because they impermissibly intruded on their constitutional foreign affairs power. For example, with respect to the very provisions at issue here, President Bush explained in his signing statement that the prohibition could interfere with his ability to conduct diplomacy and that he, therefore, was directing the Secretary of State to ensure that the provision does not interfere with his constitutional prerogatives and responsibilities. President Bush's Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1992 and 1993, 27 Weekly Comp. Pres. Doc. 1527, 1529. In addition, President Bush previously stated that he would treat as a non-binding sense of the Congress a section of the 1990-1991 Foreign Relations Authorization Act that purported to prohibit use of certain appropriated funds for attendance at any meeting within the framework of the Conference on Security and Cooperation in Europe unless the U.S. delegation contained members of a Congressionally controlled group. President Bush's Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, 26 Weekly Comp. Pres. Doc. 266-67 (February 16, 1990). See also President Reagan's Statement on Signing H.R. 1777 into law, 23 Weekly Comp. Pres. Doc. 1547, 1548 (Dec. 22, 1987) (invoking the President's "exclusive authority to determine the time, scope, and objectives" of any international negotiations); President Carter's Statement on Signing H.R. 3363 into law, 15 Weekly Comp. Pres. Doc. 1434 (Aug. 15, 1979) ("decisions associated with the appointment of Ambassadors are acknowledged to be a constitutional prerogative of the President"). 6/

6/ On some occasions Presidents have, instead of issuing signing statements declining to enforce unconstitutional provisions, vetoed bills because of such provisions. For example, President Bush vetoed the first version of the Foreign Relations Authorization Bill, Fiscal Years 1990 and 1991, because of the so-called Moynihan provision, which would have prohibited members of the executive branch from using U.S.

B. The President's Power to Conduct Diplomacy Encompasses the Authority to Issue Multiple Diplomatic or Official Passports Where Necessary To Carry Out Diplomatic Relations.

The issuance of travel documents to enable U.S. officials to carry out diplomacy with foreign countries is part and parcel of the exclusively executive power to conduct diplomacy on behalf of the United States. From The Federalist Papers (the executive is the "most fit agent" to conduct foreign negotiations) to Curtiss-Wright ("[the President] alone negotiates .... [and] [i]nto [that] field the Senate cannot intrude; and Congress itself is powerless to invade it"), it has been well established that the Constitution gives the President the exclusive authority to conduct diplomacy on behalf of the United States. As noted above, Article II's power to make treaties includes the power to negotiate. Similarly, Article II's power to appoint ambassadors and other diplomatic officials includes the power to supervise them and to determine when, where, how, and by whom the United States will conduct diplomatic relations abroad. See Henkin, at 47; 7 Op. of Atty Gen. 186, 197 (1855) (considerations of public policy require these powers to be lodged with the Executive).

The Executive accordingly has historically taken the position that the Senate cannot use its "Advice and Consent" function under Article II of the Constitution to restrict the President's exclusive authority in this area. See 7 Op. of Atty. Gen. at 217 (Congress cannot constitutionally require the

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funds or facilities to assist certain diplomatic enterprises if the purpose of any such assistance were the furthering of certain activities which the U.S. was prohibited by law from carrying out itself. This provision was directed at Iran-Contra type activities, such as soliciting funds from third parties to fund activities that the USG was prohibited from funding. The President vetoed the bill because, among other things, it could have been construed as prohibiting consultation on certain subjects between U.S. officials and foreign governments. President Bush's Message to the House of Representatives Returning Without Approval the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, 25 Weekly Comp. Pres. Doc. 1806 (November 21, 1989). See also President Bush's Message to the House of Representatives Returning Without Approval the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1990, 25 Weekly Comp. Pres. Doc. 1783 (November 19, 1989) (vetoed because of, among other reasons, a provision similar to the one discussed above).

President to appoint or not appoint consular officials to a particular place); Meyers v. United States, 272 U.S. 52, 163-64 (1926) (Congress may not limit President's executive power of appointment by seeking to control removal of appointees from office).

The intent of this legislation is that either the Arab League drops its passport boycott, or the President may not send diplomats who travel to Israel to carry out diplomacy in Arab League nations. Based on prior experience and recent efforts to have the boycott repealed, we believe that at least in some instances the passport boycott will be enforced against U.S. officials. Therefore, the effect of the legislation would be to restrict the President's ability to determine where and by whom he will negotiate. Such restrictions would interfere with the discretion and flexibility needed by the President to carry out the exclusively executive function of foreign diplomacy.1/

1/ In addition to the President's authority to issue all necessary travel documents to his diplomats, the President has broad constitutional authority in the area of passports generally. Until 1856 there was no statutory authority for the issuance of passports in the United States. As the Supreme Court said in 1835: "There is no law of the United States, in any manner regulating the issuing of passports, or directing upon what evidence it may be done, or declaring their legal effect...." Urtegui v. D'Arbel, 34 U.S. (9 Pet) 692, 699 (1835). The Passport Act of 1856 merely confirmed the authority of the Secretary of State to issue passports under the guidance of the President:

> [The statute] worked no change in the power of the Executive to issue passports; nor was it intended to do so. The Act was passed to centralize passport authority in the Federal Government ....In all other respects the 1856 Act 'merely confirmed an authority already possessed and exercised by the Secretary of State.' This authority was ... necessarily incident to the [Secretary's] general authority to conduct the foreign affairs of the United States under the Chief Executive.

Haig v. Agee, 453 U.S. 280, at 294-95, quoting from the Senate Committee on Government Operations, Reorganization of the Passport Functions of the Department of State, 86th Cong., 2d Session., 13 (Comm. Print 1960).

C. If Congress Cannot Directly Prohibit the Issuance of Multiple Diplomatic Passports, It Cannot Do So Indirectly Through Its Appropriations Power.

Article 1, Section 9, Clause 7 of the Constitution provides that "No money shall be drawn from the Treasury, but in consequence of appropriations made by law; ..." While section 129 of the authorization act directly prohibits the issuance of multiple diplomatic or official passports for the purpose of complying with the Arab League boycott, section 503, the analogous provision in the appropriations act, prohibits the use of appropriated funds for this purpose. Section 503 can no more constitutionally restrict the President's conduct of diplomacy than section 129.

While Congress has its own constitutional power over appropriations, it appears to us that it may not, in the exercise of this power, circumvent constitutional limitations on congressional power or undercut other constitutional powers vested elsewhere. The Supreme Court most recently reaffirmed this principle in Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise (MWAA v. CAAN), 501 U.S. ___, 114 L.Ed. 2d 236 (1991). In that case, Congress authorized the transfer of Washington National Airport and Dulles International Airport from federal control to MWAA (a local governmental body created by a compact between Virginia and the District of Columbia). Because of congressional concern that surrender of federal control of the airports might result in the transfer of a significant amount of traffic from National to Dulles, the relevant statute conditioned the transfer on the creation of a Board of Review, composed of congressmen who would have the authority to veto any decision of MWAA. 114 L.Ed. at 247. The Court held that Congress' conditioning the airports' transfer upon the creation of such a Board violates the doctrine of separation of powers. (The Board's power was either executive, which a legislative body cannot exercise, or legislative, which can only be exercised by both Houses of Congress in accordance with the Constitution.) 114 L.Ed. at 258-259.

One of petitioners' arguments was that the Board was constitutionally valid because it was created pursuant to Congress' exercise of its power to dispose of federal property. See U.S. Constitution, Art. IV, section 3, clause 2. Petitioners pointed to South Dakota v. Dole, 483 U.S. 203 (1987), where the Court held that a grant of highway funds to a State conditioned on the State's prohibition of the possession of alcoholic beverages by persons under the age of 21 was a lawful exercise of Congress' spending powers. The MWAA Court rejected this argument, noting that in Dole there was no conflict between the spending power and any other constitutional provision, whereas in the case of the Review Board, Congress' exercise of its power to dispose of federal property violated the constitutional principle of separation of powers. 114 L.Ed.2d at 256. See also Buckley v. Valeo, 424

U.S. 1, 132 (1976) (per curiam) (even though the Constitution gives Congress explicit authority to regulate congressional elections, Congress may not appoint the members of the Federal Election Commission, because the Constitution vests the appointment power in the President; "Congress has plenary authority in all areas in which it has substantive legislative jurisdiction, so long as the exercise of that authority does not offend some other constitutional restriction").

This same analysis is applicable to Congress' appropriations' power: Congress cannot regulate Presidential action by conditions on the appropriation of funds to carry it out, if it could not regulate the action directly. See United States v. Lovett, 328 U.S. 303 (1946) (despite Congress' constitutional power over appropriations, it cannot attach a condition to an appropriations bill forbidding the payment of any funds in that bill to three named individuals because this constitutes an unconstitutional bill of attainder by imposing punishment without a judicial trial). See also, Henkin, at 113 ("should Congress provide that appropriated funds shall not be used to pay the salaries of State Department officials who promote a particular policy or treaty, the President would no doubt feel free to disregard the limitation"); Letter from Attorney General William P. Rogers to the President, 41 Op. A.G. 507, 526 (December 19, 1960) (with regard to Congress' attempt to cut off Mutual Security Act funds from Office of Inspector General and Comptroller, "Congress may not use its powers over appropriations to attain indirectly an object which it could not have accomplished directly"); Memorandum from the Office of Legal Counsel to the Attorney General, 4B Op. O.L.C. 731, 733 (August 13, 1980) (with respect to proposed legislation that would prevent the use of funds appropriated under that legislation to administer any regulation which Congress disapproved by legislative veto, "[i]t is well-established that Congress cannot use its power to appropriate money to circumvent general constitutional limitations on congressional power").

CONCLUSION

For the reasons given above, it appears to us that, to the extent that they purport to prohibit the issuance of multiple diplomatic passports for the purpose of complying with the Arab League's passport policy, even when the issuance of such passports is necessary in order for the President to conduct negotiations with foreign governments, sections 129 and 503 are unconstitutional. (We also believe that a court would probably find this issue to be a non-justiciable political question.) We request your views and guidance on this issue, as well as on the issue of the constitutionality of these provisions as applied to non-Executive branch officials, such as members of Congress and the federal judiciary, who often carry diplomatic passports, and Congressional staff, who frequently travel on official passports.