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MEMORANDUM FOR OMB POLICY OFFICERS AND DADs

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SUBJECT: Agencies with Legislative and Budget "Bypass" Authorities – Information

Attached for your information is a periodic update of the Legislative Reference (LR) Division's list of Federal agencies with legislative and budget "bypass" authorities. "Bypass" authorities purport to restrict the President's review of the budgets and/or legislative recommendations of certain agencies.

The attached papers contain: (1) background information on the "bypass" authorities; (2) a list of "bypass" agencies; and (3) summary descriptions of agency-specific "bypass" authorities. This material is intended for OMB internal use only.

Forty-four Federal agencies currently have some form of legislative and/or budgetary "bypass". The attached compilation identifies agencies with: (1) budgetary and legislative "bypass" authority; (2) budgetary "bypass" authority only; (3) legislative "bypass" authority only; and (4) non-statutory (i.e., "informal") legislative "bypasses".

The principal additions to the 1999 version of this document are: (1) excerpts from the Justice Department's 2000 opinion on the constitutionality of legislative bypass provisions (page 2 of the background paper); and (2) updates to reflect statutory changes concerning the Federal Aviation Administration (pages 4 and 7), the District of Columbia courts (pages 4 and 7), and the Federal Housing Finance Board (pages 8 and 15).

LR Treatment of "Bypass" Agencies

LR's longstanding practice is to determine, on a case-by-case basis, whether or not to refer material for review to a "bypass" agency. Often, this decision is made in consultation with the "bypass" agency's legislative counsel. Depending on how the "bypass" agency interprets the applicable statute, it may have discretion regarding the treatment of OMB-referred material.

In general, an OMB referral is not made to a "bypass" agency unless the agency agrees to refrain from forwarding to Congress OMB-referred material or its response to an OMB referral. If a "bypass" agency cannot adhere to this guideline, but its views are important to the OMB clearance process or for preparation of an enrolled bill memorandum, the "bypass" agency's views are obtained informally.

Attachment

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BACKGROUND -- LEGISLATIVE AND/OR BUDGETARY "BYPASS" PROVISIONS

Introduction

Several statutory provisions purport to restrict the President's control over Government agencies' budgets and/or legislative recommendations. These "bypass" provisions, which are summarized in the attachments to this paper, erode Presidential control over Executive branch policies and operations.

Most of these "bypass" provisions apply to the so-called "independent" regulatory agencies, which have some degree of independence within the Executive branch. (The precise legal status of these agencies within the Executive branch is a question that is outside the scope of this paper.) Nevertheless, the statutory legislative and budgetary bypasses that have been enacted to date have established precedents for extension to other agencies, thereby further undermining the President's authority and control over the Executive branch.

In addition, several other agencies without statutory bypasses have historically or customarily not complied with OMB clearance requirements. Finally, the various Inspectors General within the agencies have asserted a limited statutory legislative bypass.

Statutory Legislative Bypass

OMB Circular No. A-19 requires that agency legislative proposals and views on legislation be submitted to OMB for coordination and clearance prior to their transmittal to Congress.¹ The agencies, in turn, are required to set forth in their communications (other than testimony) to Congress the advice received from OMB concerning the relationship of the proposal to the Administration's program.

¹ Circular No. A-19 states that it applies to all Executive branch agencies except those with a statutory bypass. Executive branch agencies are defined to include "any Executive department or independent commission, board, bureau, office, agency, Government-owned or controlled corporation, or other establishment of the Government, including any regulatory commission or board"

Legislative bypass provisions enacted into law usually:

(1) provide that legislative recommendations, testimony, or comments submitted to the President or OMB by the affected agency are to be transmitted simultaneously to Congress without prior Executive branch review; and/or (2) prohibit any Federal officer or agency from requiring the affected agency to submit legislative recommendations, testimony, or comments for approval or review prior to submission to Congress.²

These legislative bypass provisions undermine the President's role as Chief Executive and can deprive the President, Executive agencies, and Congress of the full benefits of OMB's central clearance process. In particular, OMB's coordination of legislative proposals, testimony, and the like on behalf of the Administration serves several important purposes. First, it provides a mechanism for development of a coherent legislative program for the President. Second, it encourages the various agencies to take the concerns and views of other agencies into account. Third, it facilitates the development of a consistent Administration position on legislation. Finally, it assures that Congress gets coordinated and informative agency views on legislation under consideration.

April 2000 Justice Department View on Constitutionality of Legislative Bypass. In an April 2000 letter to Senator Rockefeller, the Justice Department commented on legislation that would have: (1) required an agency component to submit legislative recommendations to the Congress; and (2) provided that "[n]o officer or agency of the United States may require the Director [of the agency component] to submit [the legislative recommendations] to any officer or agency of the United States for approval, comments, or review prior to [their submission] to Congress." The Department stated that "[w]e believe that this provision is invalid under the Recommendations Clause,³ which protects the President's constitutional prerogative to formulate his own recommendations and proposals, and to control the policy agenda of the Executive Branch. By requiring the President's subordinates to provide the Congress with legislative

² OMB will, however, as stated in Circular No. A-19, honor requests from such agencies for advice on the relationship of particular legislation, reports, or the testimony to the program of the President.

³ The Recommendations Clause of the Constitution (Art. II, sec. 3) provides that the President "shall from time to time . . . recommend to [Congress] . . . such measures as he shall judge necessary and expedient."

recommendations, the legislation infringes on the President's ability to decline to offer any legislative recommendation if, in the President's judgment, no such recommendation is necessary or expedient. The invalidity of such a congressionally-compelled legislative recommendation is heightened to the extent that the provision attempts to prohibit the President, or his subordinates, from reviewing, analyzing, or approving the legislative recommendation before it is sent to Congress." The Department added that "[e]ven if the terms 'officer' or 'agency' are construed so as not to include the President himself, . . . we do not believe the Congress can preclude the President from relying on subordinate officers in the discharge of his constitutional duty to supervise legislative recommendations."

Statutory Budget Bypass

In enacting the Budget and Accounting Act of 1921, Congress created a system that clearly defined the respective responsibilities of the Legislative and Executive branches in fiscal matters. That Act recognized the need for the Executive branch to speak with one voice in presenting the Federal Budget by replacing the previously followed practice of allowing each agency to decide for itself the amount of appropriations to request of Congress. An essential principle underlying the Act was -- and remains -- that the President's budget requests for individual agencies and programs should be developed within the larger context of Presidential policy formulation and the need for government-wide budget totals that are appropriate in terms of their effects on the economy and on public borrowing.

-- Concurrent Budget Submission Requirement

Most of the budget bypass provisions enacted to date require agencies to submit their budgets to OMB and Congress concurrently. Generally, these provisions do not require the President to include the agency's request in the Budget that he transmits to Congress (i.e., the President's Budget may propose appropriations for an agency that differ from the estimates that the agency has provided OMB and Congress).

One of the fundamental difficulties with these bypass provisions lies in the timing of the submission of budget information to Congress. The individual agencies' budgets -- including the independent regulatory commissions -- have important relationships to those of other Government agencies and programs. These budgets cannot be evaluated properly without an understanding of the President's overall fiscal policy as revealed in the entire budget. Premature disclosure of

individual agency budget requests can encourage a narrowly-focused, disjointed consideration of such requests by Congress -- precisely the problem that the Budget and Accounting Act, the Congressional Budget Act, and related legislation attempt to prevent.

Early disclosure may also affect the agencies' budget estimates. For example, an agency, knowing of a disposition by key members of Congress to view its budget proposals more favorably than the President, will likely increase its budget estimate. Transmitting their requests to Congress ahead of the President's Budget can enable agencies to try to build external pressures on the Appropriations Committees for more spending.

-- Requirement to Present Both an Agency's and President's Budget Requests

A variation of the budget bypass provision described above applies to the U.S. Postal Service, the Social Security Administration, the Internal Revenue Service Oversight Board, the District of Columbia Courts, and the Air Traffic Services Subcommittee of the Aviation Management Advisory Council (with respect to the Federal Aviation Administration). In these instances, the President is required to present the agency's budget request unchanged, but may make his own recommendations as well. These requirements are of less practical concern than the budget bypass requirements described above because the agency's budget is not submitted to Congress in advance of the President's Budget. These requirements are not construed to provide the concerned agencies with budget bypass authority.

Existing and longstanding OMB policies provide that after the President's Budget has been transmitted to Congress, the heads of agencies may provide information concerning the budget estimates they submitted to OMB when Congress asks for this information in connection with its consideration of the President's Budget. They are obliged, however, to support the President's Budget decisions, notwithstanding the latitude afforded them in communicating with Congress. (By contrast, the heads of the bypass agencies can be expected to, and do, testify before Congress in defense of their own budget requests, rather than the President's Budget recommendations.) Additionally, provisions of the Congressional Budget Act provide Congress with statutory authority to obtain appropriate data and information from Executive branch agencies that Congress may need to make and improve its own budgetary decisions.

-- Special Requirement for International Trade Commission

A 1975 law directs that the International Trade Commission's (ITC) proposed appropriations be included in the President's Budget "without revision". Since that time, the ITC's requests have been so included; the President has not proposed alternative appropriations, although there appears to be no express prohibition against so doing.

-- Other

Several other agencies -- mainly regulators of financial institutions, such as the Federal Reserve Board -- derive their funds from non-governmental sources; the budgets of these agencies are not subject to Executive review. This type of bypass is not examined in this paper. Similarly, under the Budget and Accounting Act, the budget requests of the Legislative and Judicial branches as received by OMB are simply included without change in the President's Budget.

Also, a number of corporations established by Federal law, but which are not owned or controlled by the Government, do not appear to be covered by A-19.

"Informal" or "Customary" (i.e., non-statutory) Bypasses

In addition to the statutory bypasses, there exists an "informal" or "customary" legislative bypass. This type of bypass is asserted by several "independent" agencies without any explicit authority, statutory or otherwise. OMB Circular No. A-19, by its terms, does cover the legislative activities of these agencies; however, the agencies generally do not comply with its provisions. In some cases, these de facto bypasses have been in effect for many years.

Inspectors General

Congress enacted the Inspector General (IG) Act of 1978, in part, because of concerns about the inability of Executive branch agencies to detect and prevent fraud, waste, and abuse in Federal programs.

Section 5(a) of the 1978 Act requires each IG to prepare a semi-annual report to the head of the agency in which he or she is located concerning a number of matters (e.g., recommendations for ways to correct significant problems). The agency head is, in turn, required to forward the report to Congress along with whatever comments he or she cares to make. In addition, section

4(a)(2) of the Act states that it is the responsibility of the IGs to "review existing and proposed legislation . . . and to make recommendations in the semi-annual reports concerning the impact of such legislation"

Many members of the IG community assert that these statutory IG reporting requirements provide the IGs with a limited legislative bypass. Some IGs have also argued that the reporting requirements in the Act provide a general legislative bypass. As a result, OMB does not routinely receive IG submissions for legislative clearance.

"BYPASS" AGENCIES

Agencies with Statutorily-Based Budgetary and Legislative
"Bypass" Provisions

1. Advisory Council on Historic Preservation
2. Chemical Safety and Hazard Investigation Board
3. Commodity Futures Trading Commission
4. Consumer Product Safety Commission
5. Federal Aviation Administration (Transportation)
6. Federal Election Commission
7. Federal Retirement Thrift Investment Board
8. Merit Systems Protection Board
9. National Transportation Safety Board
10. Railroad Retirement Board
11. Surface Transportation Board (Transportation)

Agencies with Statutorily-Based Budgetary
"Bypass" Provisions Only*

1. Court of Appeals for Veterans Claims
2. International Trade Commission
3. Legal Services Corporation
4. State Justice Institute
5. United States Institute of Peace

* Statutory provisions relating to the United States Postal Service (39 U.S.C. 2009), the Social Security Administration (42 U.S.C. 901), the Internal Revenue Service Oversight Board (26 U.S.C. 7802), the District of Columbia Courts (Pub.L. 105-33, secs. 11242-3), and the Air Traffic Services Subcommittee of the Aviation Management Advisory Council (with respect to the Federal Aviation Administration's air traffic control system budget -- 49 U.S.C. 106(p)(7)(C)(v)) require the President to submit these entities' budget requests to Congress without revision, together with the President's own budget proposals for the concerned entities. These provisions are not construed to provide the concerned agencies with budget bypass authority.

Agencies with Statutorily-Based Legislative "Bypass"
Provisions Only

1. Farm Credit Administration
2. Federal Deposit Insurance Corporation
3. Federal Housing Finance Board
4. Federal Reserve Board of Governors
5. National Credit Union Administration
6. Office of the Comptroller of the Currency (Treasury)
7. Office of Thrift Supervision (Treasury)
8. Securities and Exchange Commission
9. Federal Energy Regulatory Commission
10. Office of Federal Housing Enterprise Oversight (HUD)
11. Office of the National Taxpayer Advocate (Treasury -
Internal Revenue Service)
12. Office of Special Counsel
13. Small Business Administration (Chief Counsel for Advocacy)

Agencies with "Informal" (i.e., non-statutory)
Legislative Bypasses

1. Commission on Civil Rights
2. Corporation for Public Broadcasting
3. Court of Appeals for Veterans Claims
4. Federal Communications Commission
5. Federal Maritime Commission
6. Federal Trade Commission
7. International Trade Commission
8. Legal Services Corporation
9. Marine Mammal Commission
10. National Railroad Passenger Corporation (Amtrak)
11. Nuclear Regulatory Commission
12. State Justice Institute
13. Tennessee Valley Authority
14. United States Institute of Peace
15. United States Postal Service

Inspectors General

SUMMARY DESCRIPTION OF AGENCIES' STATUTORILY-BASED
BUDGETARY AND LEGISLATIVE "BYPASS" PROVISIONS

1. Advisory Council on Historic Preservation

P.L. 94-422, Sec. 201(9); 90 Stat. 1322, 1323; 16 USCA Sec. 470r, 470t(b), as amended by P.L. 96-515, Sec. 301(k); 94 Stat. 2999 provides that no Federal official or agency can require the Council to submit for review its legislative recommendations, testimony, or comments prior to the submission of such information to Congress. Where the Council voluntarily seeks other agency comments, such fact is to be noted in the transmittal. Any budget estimate or request that the Council submits to the President or OMB must concurrently be sent to the Appropriations Committees in both Houses and the House Interior and Senate Energy Committees.

2. Chemical Safety and Hazard Investigation Board

P.L. 101-549, Sec. 301 (amending Sec. 112(F)(6)(R) of the Clean Air Act; 104 Stat. 2569; 42 USCA Sec. 7412(r)(6)(R)) provides that any budget estimate, request, supplemental request, or information, any legislative recommendation, or prepared testimony submitted to the President or a Federal Agency shall be concurrently transmitted to Congress. No Federal official or agency can require prior review of the Board's budgetary or legislative communications to the Congress.

3. Commodity Futures Trading Commission

P.L. 93-463, Sec. 101(a)(3); 88 Stat. 1390; 7 USCA Sec. 4a (h)(1), (2) provides that all budget estimates or requests, or legislative recommendations, testimony, or comments submitted by the Commission to the President or OMB are to be transmitted concurrently to both the House and Senate Appropriations and Agriculture Committees. The Commission is expressly exempt from any requirement that legislative recommendations, testimony, or comments be submitted for Executive branch review prior to transmission to Congress. Where the Commission voluntarily seeks other agency comments, such fact is to be noted in the transmittal.

4. Consumer Product Safety Commission (CPSC)

P.L. 92-573, Sec. 27(k)(1), (2); 86 Stat. 1229; 15 USCA Sec. 2076(k)(1), (2) provides that any budget estimate or request, or legislative recommendations, testimony, or comments submitted to the President or OMB by CPSC be concurrently transmitted to the Congress. No Federal official or agency can require prior review of CPSC's legislative communications to the Congress.

5. Federal Aviation Administration (FAA) (Transportation)

P.L. 97-248, Sec. 506(f); 96 Stat. 679; 49 USCA Sec. 48109 provides that any budget estimate or request, supplemental budget estimate, other budget information, legislative recommendation, or comment on legislation that is sent to the Secretary of Transportation, the President, or OMB pertaining to funds authorized for air navigation facilities and equipment or for research, engineering and development must be concurrently transmitted to the Speaker of the House, the House Public Works and Appropriations Committees, the President of the Senate, and the Senate Commerce and Appropriations Committees. (The Justice Department has issued a legal opinion on this provision that asserts that Sec. 506(f) is constitutional only if interpreted to permit the Secretary and the President to review the FAA Administrator's reports prior to the time that they are submitted to Congress.) (Also see the footnote on page 7 concerning a separate requirement relating to the Air Traffic Services Subcommittee of the Aviation Management Advisory Council. This Subcommittee is required to review and approve the FAA's budget request related to the air traffic control system.)

6. Federal Election Commission (FEC)

P.L. 93-443, Sec. 208(a); 88 Stat. 1283; 2 USCA Sec. 437d(d)(1), (2) requires that any budget estimate or request, or legislative recommendation, testimony, or comments submitted to the President or OMB by the FEC be concurrently transmitted to the Congress. No Federal official or agency can require prior review of FEC's legislative communications to the Congress.

7. Federal Retirement Thrift Investment Board

P.L. 99-509, Sec. 6001(e); 100 Stat. 1931, amended 5 U.S.C. 8472 to add subsections (i) and (j) providing, respectively, that the Board shall submit its annual budget concurrently to the President and the appropriate committees of Congress, and that the Board may submit to the President, and, at the same time, shall submit to each House of Congress, any legislative recommendations of the board relating to any of its functions under any provision of law.

8. Merit Systems Protection Board

P.L. 95-454, Sec. 202(a); 92 Stat. 1125; 5 USCA Sec. 1205(j), (k) requires the Board to prepare and submit its annual budget concurrently to the President and to the appropriate committees of Congress. The Board's budget, "as revised," is required to be included as a separate item in the President's Budget. Any legislative recommendations of the Board relating to its functions are required to be submitted concurrently to the President and both Houses of Congress.

9. National Transportation Safety Board (NTSB)

P.L. 93-633, Sec. 304(b)(7); 88 Stat. 2170; 49 USCA App. Sec. 1903 (b)(7) provides that any budget estimate, request or supplemental estimate or legislative recommendation, prepared testimony, or comments submitted to the President or OMB shall be concurrently transmitted to the Congress. No Federal official or agency can require prior review of NTSB's budgetary or legislative communications to the Congress.

10. Railroad Retirement Board

P.L. 98-76, Sec. 416; 97 Stat. 436; 45 USCA Sec. 231f(f) provides that any budget estimate, request, or supplemental estimate, or legislative recommendation, prepared testimony, or comment or legislation submitted to the President or OMB shall be concurrently transmitted to the Congress. No Federal official or agency can require prior review of the Board's budgetary or legislative communications to the Congress.

11. Surface Transportation Board (STB)

P.L. 104-88 abolished the Interstate Commerce Commission (ICC) and transferred some of its functions to the Surface Transportation Board (STB), a new entity within the Department of Transportation. Bypass provisions similar to those that applied to the ICC apply to the STB. Specifically, P.L. 104-88, sec. 201, 109 Stat. 934, 49 U.S.C. 703(g) provides that any budget estimate, request, or budget information (including personnel needs), or legislative comment, recommendation, or prepared testimony for congressional hearings submitted to the Secretary of Transportation shall be concurrently transmitted to the Congress. No officer of an agency may impair communications between the STB and the Congress concerning budget estimates or requests.

SUMMARY DESCRIPTION OF AGENCIES' STATUTORILY-BASED
BUDGETARY "BYPASS" PROVISIONS ONLY

1. Court of Appeals for Veterans Claims

The United States Court of Appeals for Veterans Claims was established by the Veterans Judicial Review Act, 38 U.S.C. Sections 7251-7292, under Article I of the Constitution. Section 7282 of the Act authorizes the Court to submit its budget for inclusion in the President's budget without review within the Executive branch.

2. International Trade Commission

P.L. 93-618, Sec. 175(a)(1); 88 Stat. 2011; 19 USCA Sec. 2232 specifically excludes the Commission from the provisions of the Budget and Accounting Act of 1921 and directs that the Commission's estimated expenditures and proposed appropriations be included without revision in the President's Budget.

3. Legal Services Corporation (LSC)

The LSC is a private nonprofit corporation largely funded through Federal appropriations. Its Board Members are appointed by the President subject to Senate confirmation. P.L. 93-355, Sec. 1005(e)(1); 88 Stat. 380; 42 USCA Sec. 2996d(e) provides that the LSC is generally not to be considered a department, agency or instrumentality of the Federal Government. [There is no explicit statement in P.L. 93-355 that the LSC is outside the regular budget process, but the Corporation has so interpreted Sec. 1005(e)(2) of the Act (88 Stat. 380, 42 USCA Sec. 2996d(e)(2)), which states that "nothing in this title shall be construed as limiting the authority of the Office of Management and Budget to review and submit comments upon the Corporation's annual budget request at the time it is transmitted to the Congress."] LSC has been submitting its budget requests concurrently to OMB and the Congress.

4. State Justice Institute

The State Justice Institute is a private nonprofit corporation established to further the development and adoption of improved judicial administration in State courts. Its Board of Directors is appointed by the President with the advice and consent of the Senate.

P.L. 98-620, Sec. 203; 98 Stat. 3336; 42 USC 10704(c) states that OMB may "review and submit comments" on the State Justice Institute's budget request when it is transmitted to Congress, implying a budgetary bypass. The same provision also states that otherwise the Institute "shall not be considered a department, agency, or instrumentality of the Federal Government."

5. United States Institute of Peace (USIP)

P.L. 98-525; 98 Stat. 2651; 22 USCA Sec. 4601, et seq., established the USIP as an independent, nonprofit corporation and generally provides that officers and employees of the USIP are not to be considered officers or employees of the United States Government. (There is no explicit provision contained in P.L. 98-525 stating the USIP is outside the regular budget process; however, USIP has so interpreted Sec. 1709(a) of P.L. 98-525, 22 USCA Sec. 4608(a), which states that "[n]othing in this title may be construed as limiting the authority of the Office of Management and Budget to review and submit comments on the Institute's budget request at the time it is transmitted to the Congress. ")

SUMMARY DESCRIPTION OF AGENCIES' STATUTORILY-BASED
LEGISLATIVE "BYPASS" PROVISIONS ONLY

1. Farm Credit Administration (FCA)

P.L. 92-181, Sec. 5.18(3); 85 Stat. 622; 12 USCA Sec. 2252(a)(3) provides that from "time to time" the FCA may recommend legislative changes directly to Congress.

2. Federal Deposit Insurance Corporation (FDIC)

3. Federal Housing Finance Board

4. Federal Reserve Board of Governors

5. National Credit Union Administration

6. Office of the Comptroller of the Currency (Treasury)

7. Office of Thrift Supervision (Treasury)

8. Securities and Exchange Commission (SEC)

P.L. 93-495, Sec. 111; 88 Stat. 1506; 12 USCA Sec. 250 prohibits any Federal officer or agency from requiring the SEC or the preceding five (item nos. 2-6 above) agencies to submit legislative recommendations, testimony, or comments for approval or review prior to their submission to Congress, provided that such communications include a statement to the effect that the views expressed therein do not necessarily represent the views of the President.

9. Federal Energy Regulatory Commission

P.L. 95-91, Sec. 401(j); 91 Stat. 583; 42 USCA Sec. 7171(j) provides that whenever the Federal Energy Regulatory Commission submits to the Secretary of Energy, the President, or the Office of Management and Budget, any legislative recommendation or testimony, or comments on legislation, prepared for submission to Congress, the Commission shall concurrently transmit a copy thereof to the appropriate committees of Congress.

10. Office of Federal Housing Enterprise Oversight (HUD)

P.L. 102-550, Sec. 1313 allows the Office of Federal Housing Enterprise Oversight in HUD to provide Congress with recommendations and reports without "the prior approval, comment, or review of any officer or agency of the United States." The Office must include a statement indicating that the views expressed do not necessarily represent the views of the HUD Secretary or the President.

11. Office of the National Taxpayer Advocate (Treasury - Internal Revenue Service)

The Office of the National Taxpayer Advocate was established by the Internal Revenue Service Reform and Restructuring Act, P.L. 105-206, sec. 1102(a), 112 Stat. 697 et. seq., 26 U.S.C. 7803(c). Among other things, section 1102 requires the Office of the Taxpayer Advocate to submit certain annual reports directly to the House Ways and Means Committee and the Senate Finance Committee, without any prior review or comments by the IRS Commissioner, the Secretary of the Treasury, the IRS Oversight Board, any other Treasury Department officer or employee, or the Office of Management and Budget. The reports are to contain, among other things, such legislative recommendations as may be appropriate to resolve problems encountered by taxpayers.

12. Office of Special Counsel (OSC)

P.L. 101-12, Sec. 3 (5 U.S.C. Sec. 1217) pertains to OSC's transmittal of information to the Congress. This section states: "The Special Counsel or any employee of the Special Counsel designated by the Special Counsel, shall transmit to the Congress on the request of any committee or subcommittee thereof, by report, testimony, or otherwise, information and the Special Counsel's views of functions, responsibilities, or other matters relating to the Office. Such information shall be transmitted concurrently to the President and any other appropriate agency in the executive branch."

13. Small Business Administration (Chief Counsel for Advocacy)

P.L. 94-305, Sec. 201; 90 Stat. 668; 15 USCA Sec. 634a requires the President to appoint, subject to Senate confirmation, a Chief Counsel for Advocacy. 15 USCA 634f provides, in pertinent part, that

The Chief Counsel may from time to time prepare and publish such reports as he deems appropriate. Not later than one year after June 4, 1976, he shall transmit to the Congress, the President, and the [Small Business] Administration, a full report containing . . . specific recommendations . . . including specific legislative proposals and recommendations Not later than 6 months after June 4, 1976, he shall prepare and transmit a preliminary report on his activities. The reports shall not be submitted to [OMB] . . . for any purpose prior to transmittal to the Congress and the President.

SBA's Advocacy Office has contended that these reporting provisions provide it with a permanent and general legislative bypass. OMB has not insisted on compliance by the Advocacy Office with legislative clearance requirements.

SUMMARY DESCRIPTION OF AGENCIES' "INFORMAL"
(I.E., NON-STATUTORY) LEGISLATIVE BYPASSES

1. Commission on Civil Rights

The Commission was created by the Civil Rights Act of 1957, P.L. 85-315, which was later amended by P.L. 103-419. Although the Act has never provided statutory bypass authority, the Commission asserts that it has implied legislative bypass authority since four of its eight Commissioners are appointed by Congress.

2. Corporation for Public Broadcasting (CPB)

P.L. 90-129, Section 201(9), 81 Stat. 368; 47 USC 396 establishes the CPB as a nonprofit corporation not to "be an agency or establishment of the United States Government." The President appoints the Board of Directors of the CPB with the advice and consent of the Senate. The CPB generally does not submit legislative materials for clearance.

The CPB submits its budget request directly to the Congress. However, this request is first sent to OMB and OMB provides recommended changes. CPB can ignore these recommendations in its request to Congress but the President's budget includes OMB's recommended CPB funding.

3. Court of Appeals for Veterans Claims

In addition to the statutory budget bypass previously noted, the Court views itself as an independent judicial body and does not submit legislation or testimony to OMB for clearance. This view is not based on statutory authority.

4. Federal Communications Commission (FCC)

Section 154(k) of the Communications Act of 1934, 47 USCA Sec. 154(k), requires the FCC to submit an annual report to Congress addressing several matters, including "specific recommendations to Congress as to additional legislation which the Commission deems necessary or desirable, including all legislative proposals submitted for approval to the Director of the Office of Management and Budget." (Absent specific bypass language, OMB does not interpret reporting requirements of this nature as authorizing a bypass.)

The Commission acts as if it has a bypass and does not ordinarily submit legislation or reports or testimony on legislation in advance to OMB for clearance. Moreover, OMB has made no effort in recent memory to subject the FCC to the requirements of Circular A-19.

5. Federal Maritime Commission (FMC)

Reorganization Plan No. 7 of 1961, 75 Stat. 840; 26 F.R. 7315 established the FMC and stated that it "shall not be a part of any executive department or under the authority of the head of any executive department." The FMC generally does not submit legislative materials for clearance.

6. Federal Trade Commission (FTC)

The FTC has no statutory legislative bypass but acts as if it does: it does not ordinarily submit legislation or reports or testimony on legislation to OMB for clearance. OMB has made no effort in recent memory to subject the FTC to the requirements of Circular A-19.

OMB does refer legislative materials to the FTC on a case-by-case basis, however, particularly with respect to matters likely to have a direct impact on that agency (e.g., concerning revisions of the laws governing unfair trade practices).

7. International Trade Commission (ITC)

In addition to the formal budgetary bypass enacted on behalf of the ITC, noted previously, the ITC asserts an informal legislative bypass and does not clear legislative materials through OMB. This assertion could be based on 19 USCA 2232, which, besides providing ITC with a budgetary bypass, states that the ITC "shall not be considered to be a department or establishment for purposes of the [Budget and Accounting Act of 1921]."

8. Legal Services Corporation (LSC)

In addition to the budget bypass for LSC, previously described, LSC has never participated in OMB's Circular No. A-19 legislative clearance process.

9. Marine Mammal Commission

P.L. 92-522, Sec. 204; 86 Stat. 1045; 16 USCA Sec. 1404, requires the Commission to transmit an annual report to Congress, which must include, among other things, various recommendations made to the Secretary of the Interior and other Federal officials with respect to matters concerning marine mammals. Under section 202, the report must be furnished "for comment" to the Interior Secretary before it is transmitted to Congress.

The Commission has no statutory legislative bypass but behaves as if it does. It generally does not submit legislative materials to OMB for review and clearance in accordance with OMB Circular A-19.

10. National Railroad Passenger Corporation (Amtrak)

Amtrak is a for-profit corporation that is largely owned by the Federal Government. P.L. 95-421, Sec. 3; 92 Stat. 923, repealed the budgetary and legislative bypass provisions previously applicable to Amtrak (contained in P.L. 93-146, Sec. 12; 87 Stat. 553). Notwithstanding that repeal, however, Amtrak does not currently submit budget information or legislative proposals and comments to OMB for clearance. Consequently, Amtrak's informal bypass is both budgetary and legislative in nature.

11. Nuclear Regulatory Commission (NRC)

NRC has no statutory legislative bypass but asserts one nonetheless. NRC does submit its appropriation authorization legislative materials for clearance under Circular A-19. In virtually all other cases, however, including testimony and legislative reports, it does not acknowledge OMB's central clearance authority.

12. State Justice Institute

In addition to the budget bypass noted previously, the Institute generally does not submit legislative materials for clearance.

13. Tennessee Valley Authority (TVA)

TVA has no statutory legislative bypass but frequently acts as if it does.

14. United States Institute of Peace (USIP)

In addition to the budget bypass enacted for the USIP, noted previously, the USIP has asserted an informal legislative bypass, for which there is no statutory or other authority.

15. United States Postal Service (USPS)

In addition to the USPS budget provisions described in the footnote on page 7, the Postal Service has generally not submitted legislative items for clearance.

THE INSPECTORS GENERAL (IGs)

Section 5(a) of the Inspector General Act of 1978; P.L. 95-452; 5 USCA App. 3, Sec. 5(a), requires each IG to prepare a semi-annual report to the head of the agency in which he or she is located concerning a number of matters (e.g., a description of the recommendations made by the IGs to their agencies for corrective action with respect to significant problems, abuses, or deficiencies). Section 4(a)(2) of the Act expressly states that it is the responsibility of the IGs "to review existing and proposed legislation . . . and to make recommendations in the semi-annual reports concerning the impact of such legislation"

In addition, Section 5(d) of the Act requires the IGs to report to their agency heads "immediately" when the IGs become aware of especially serious abuses, problems, or deficiencies. In both cases, the agency heads are, in turn, required to forward these reports -- semi-annual or otherwise -- to Congress, along with whatever comments they care to make. These requirements constitute a legislative bypass for the IGs with respect to the specified reports. (The agency head comments on the IG reports are, however, subject to the requirements of OMB Circular A-19.)

Some of the IGs have argued that, taken together, the IG reporting requirements provide the IGs with a general legislative bypass, applicable to all legislative recommendations and materials. As a result, OMB rarely receives any IG submissions for legislative clearance.