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ANNUAL REPORT

AND

OFFICIAL OPINIONS

OF THE

ATTORNEY GENERAL

OF

MARYLAND

1985

STEPHEN H. SACHS

ATTORNEY GENERAL

CONTENTS

ATTORNEYS GENERAL OF MARYLAND

This office was permanently separated from that of Secretary in 1657. Under royal government (1690–1715) there were two Attorneys General, one for the Proprietary and one for the King. The office was continued under the Constitution of 1776. Other places held by any Attorney General during his incumbency are indicated in each case.

Lt. Richard Smith, Sr., of Calvert County (Prot.), appointed by the Provincial Court, 28 Sept. 1657.

Capt. Thomas Manning of Calvert County (Prot.), com. by the Lt. Gen., 20 Feb. 1660/1.

Col. William Calvert of St. Mary's City (Cath.), sworn 12 June 1666.

Col. Vincent Lowe of Talbot County (Cath.), sworn 13 Dec. 1670. Resigned after appointed Sheriff of Talbot County.

Kenelm Cheseldyne of St. Mary's City (Prot.), sworn 6 April 1676.

Thomas Burford of Charles County (Prot.), appointed by His Lordship and sworn 4 Oct. 1681; died in office in March, 1686/7.

Robert Carvile of St. Mary's City (Cath.), com. by Chancellor Henry Darnall, pursuant to Lord Baltimore's instructions, 3 April 1688. Superseded by Carroll.

Charles Carroll of St. Mary's City and of Anne Arundel County (Cath.), formerly of the Inner Temple, London; com. by the Proprietary, to hold office during good behavior, 18 July 1688; arrived in Maryland 1 Oct. and was confirmed in office by the Deputy Governors, 13 Oct. 1688. After 1 Aug. 1689 he continued as Lord Baltimore's Attorney General until the restoration of Proprietary government. On the death 17 June 1711, of Col. Henry Darnall I, his father-in-law, he succeeded to the offices of Agent and Receiver General and Keeper of His Lordship's Great Seal.

Col George Plater I of St. Mary's County (Prot.), appears as acting Attorney General, for the crown, as early as 23 April 1691; superseded by Wynne.

Edward Wynne of St. Mary's County (Prot.), sworn crown Attorney General, 5 April 1692; died in office shortly before 8 Sept. 1692.

Col. George Plater I, sworn 8 Sept. 1692; resigned to be Naval Officer of Patuxent shortly before 21 Oct. 1698. He was Receiver of Patuxent and, until Nov. 1696, Collector of the Same. He married, about 1694, Anne, dau. of Thomas Burford above.

Maj. William Dent of Charles County (Prot.), com. by Gov. Nicholson, 22 Oct. 1698, resigned 8 May 1702. He was again commissioned by Gov. Seymour, 16 May 1704, and continued to serve until his death in Nov. 1704. He was also Naval Officer of North Potomac, and in May, 1704, he became joint Commissary General.

Col. William Bladen of Annapolis (Prot.), wife (Cath.), com. by Gov. Seymour as Her Majesty's Attorney General, succeeding Dent, 4 Dec. 1704; sworn His Lordship's Attorney General, succeeding Carroll, 1 May 1716; died in office 1 Aug. 1718. He was Naval Officer of Annapolis, and in Aug., 1708, he became sole Commissary General.

Thomas Bordley of Annapolis (Prot.), sworn 6 Sept. 1718; dismissed in September, 1721. He was sole Commissary General. He died 11 Oct. 1726.

Daniel Dulany, Sr., of Annapolis (Prot. protege and former clerk of George Plater above), succeeded Bordley, 10 Oct. 1721. Until July, 1724, he was joint Commissary General. He resigned in 1725.

Michael Howard of Talbot County (Prot.), sworn 19 Oct. 1725. He was appointed Surveyor General of the Eastern Shore in June, 1726, and Naval Officer of Oxford about 1727. He resigned in 1734.

Daniel Dulany, Sr., succeeded Howard in Oct. 1734, and was also sole Commissary General; resigned in 1744.

Henry Darnall III of Prince George's County (Prot. convert, wife and children Cath.), com. and sworn 19 April 1744; appointed Naval Officer of Patuxent, 24 May 1755; persuaded to resign early in 1756.

Stephen Bordley of Annapolis (Prot. son of Thomas Bordley above), com. 26 March and sworn 26 May 1756; suffered a paralytic stroke and resigned in Dec. 1763; died 6 Dec. 1764. He was Naval Officer of Annapolis until March, 1762, when he became sole Commissary General.

Edmund Key of Annapolis (Prot., mother Cath.), com. 26 Dec. 1763 and sworn 10 April 1764; resigned shortly before his death on 4 May 1766.

Robert Goldsborough II of Dorchester County (Prot.), sworn 8 April and com. 4 June 1766. Resigned in 1768; died 30 April 1777.

Thomas Jennings of Annapolis (Prot.), sworn 18 Oct. and com. 27 Oct. 1768; recom. 29 April 1773. He was appointed State Attorney General in April 1777, but was succeeded, on 6 Jan. 1778, by Benjamin Galloway. He was a relative of former Deputy Secretary Edmund Jennings.

(Reprinted from "His Lordship's Patronage", pages 132–34, by permission of the author, Professor Donnell M. Owings, Department of History, University of Oklahoma.)

Luther Martin	1778
William Pinkney	1805
John Thomas Mason	1806
John Johnson	1806
John Montgomery	1811
Luther Martin	1818
[1]Nathanial Williams, Assistant Attorney General	1820
Thomas B. Dorsey	1822
Thomas Kell	1824
Roger B. Taney	1827
Josiah Bayley	1831
George R. Richardson	1845
Robert J. Brent	1851
[2]Alexander Randall	1864
Issac D. Jones	1867
Andrew K. Syester	1871
Charles J. M. Gwynn	1875
Charles B. Roberts	1883
William Pinkney Whyte	1887
John P. Poe	1891
Harry M. Clabaugh	1896
George R. Gaither, Jr.	1899
Isidor Rayner	1900
William S. Bryan, Jr.	1904
Isaac Lobe Straus	1908
Edgar Allan Poe	1912
Albert C. Ritchie	1916
[3]Ogle Marbury	1918
Alexander Armstrong	1920
Thomas H. Robinson	1924
William Preston Lane, Jr.	1930
Herbert R. O'Conor	1934
William C. Walsh	1938
William Curran	1945
[4]Hall Hammond	1946
[5]J. Edgar Harvey	1952
[6]Edward D. E. Rollins	1952
[7]C. Ferdinand Sybert	1954
[8,9,10]Thomas B. Finan	1961
[11]Robert C. Murphy	1966
[12]Francis B. Burch	1966
Stephen H. Sachs	1979

[1]During the physical incapacity of Luther Martin, 1820–1822, the Governor appointed Nathanial Williams, Assistant Attorney General, to act as Attorney General.

[2]The office of Attorney General was abolished by the Constitution of 1851, but was re-established by the Constitution of 1864 (Art. V. Sec. 1).

[3]During Mr. Ritchie's absence, June 1918–January 1919, while serving as General Counsel of the United States War Industries Board, Ogle Marbury became Acting Attorney General.

[4,5]On September 30, 1952, Mr. Hammond resigned as Attorney General to accept an appointment to the Court of Appeals of Maryland. Mr. Harvey was designated by Governor McKeldin to be Acting Attorney General until the new Attorney General qualified.

[6]Mr. Edward D. E. Rollins qualified as Attorney General on the 14th of November, 1952.

[7]Resigned January 12, 1961, to accept an appointment to the Court of Appeals of Maryland.

[8]Appointed January 13, 1961, to serve unexpired term of former Attorney General.

[9]Elected at election of November, 1962.

[10]On October 13, 1966, Mr. Finan resigned as Attorney General to accept an appointment as an Associate Judge of the Court of Appeals of Maryland.

[11]October 13, 1966, Mr. Robert C. Murphy was sworn in as Attorney General to serve for Mr. Finan's unexpired term.

[12]Mr. Francis B. Burch was elected Attorney General in the November, 1966 election and was sworn in on December 16, 1966.

OFFICE OF THE ATTORNEY GENERAL

STEPHEN H. SACHS..........	Attorney General
ELEANOR M. CAREY.........	Deputy Attorney General
CHARLES O. MONK, II.......	Deputy Attorney General
DENNIS M. SWEENEY........	Deputy Attorney General
*AVERY AISENSTARK........	Chief Counsel, Opinions and Advice
JACK SCHWARTZ.............	Chief Counsel, Opinions and Advice
ELLEN A. CALLEGARY	Special Assistant to the Attorney General
JEANNE D. HITCHCOCK......	Special Assistant to the Attorney General
JAMES G. KLAIR.............	Chief Counsel, Administration; Counsel to the Courts
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SUSAN K. GAUVEY..........	Principal Counsel, Trial Litigation
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* Resigned

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Jeanne D. Hitchcock
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Diana G. Motz
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CRIMINAL APPEALS AND CORRECTIONAL LITIGATION DIVISION -

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Steven J. Cole.......... Chief of Division

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*Jeffrey S. Chernow
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Peter W. Taliaferro

Mass Transit Administration—
William B. Tittsworth, Jr.

Motor Vehicle Administration—
Edward R.K. Hargadon
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Port Administration—
*Thomas K. Farley
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Robert L. Gray
Lloyd J. Hammond
Andrea D. Johnson
Henry F. Leonnig
Daniel F. McMullen, Jr.
Thomas E. Marshall
Emil A. Nichols
Peyton Paul Phillips
*Clater W. Smith, Jr.
George H. White
Frank W. Wilson

Uninsured Employers Fund—
Charles R. Goldsborough, Jr.

Exceptional Service Awards

In 1981, Attorney General Stephen H. Sachs inaugurated a special awards program to recognize unique achievements on behalf of the State. Each year, Exceptional Service Awards are presented to Assistant Attorneys General who have demonstrated special "ability, dedication, leadership and imagination" in carrying out their work for the State. The recipients of these awards are:

1981

Ellen A. Callegary	Department of Health and Mental Hygiene
Louis J. Kozlakowski, Jr.	Department of Transportation
Cheri Wyron Levin	Consumer Protection Division
James J. Mingle	Educational Affairs Division
Peter W. Taliaferro	Department of Assessments and Taxation
Charles R. Taylor	Department of Personnel

1982

Philip M. Andrews	Criminal Appeals Division
Robert deV. Frierson	Department of Licensing and Regulation
Paul W. Grimm	Department of Licensing and Regulation
Linda H. Lamone	Maryland General Assembly
Thomas M. Meachum	Central Collection Unit, Dept. of Budget and Fiscal Planning
James L. Shea	Civil Division
Alexander Wright, Jr.	Department of Personnel

1983

Alma L. Borenstein	Department of Licensing and Regulation
Michael F. Brockmeyer	Antitrust Division
Brian Cohen	Mass Transit Administration, Dept. of Transportation
Susan K. Gauvey	Civil Division
Diane G. Goldsmith	Criminal Appeals and Correctional Litigation Division
Nancy Knisley	Department of Personnel
Daniel J. O'Brien, Jr.	Department of Health and Mental Hygiene
Jennifer Lauterback Robbins	Department of Health and Mental Hygiene

1984

Gertrude Bartel	Criminal Appeals and Correctional Litigation Division
Stefan D. Cassella	Medicaid Fraud Control Unit
Bruce P. Martin	Department of Personnel
Kathleen Howard Meredith	Civil Division
Frederick G. Savage	Educational Affairs Division

Michael J. Scibinico	Department of Natural Resources
Catherine M. Schultz	Civil Division
Ralph S. Taylor	Department of Human Resources

1985

Jane F. Barrett	Hazardous Waste Unit, Dept. of Health and Mental Hygiene
Ben C. Clyburn	Department of Transportation
Louisa H. Goldstein	State Highway Administration, Dept. of Transportation
Illona Sheffey Rawlings	Department of Personnel
Richard B. Rosenblatt	Criminal Appeals and Correctional Litigation Division
David M. Sheehan	Civil Division
Marlene Trestman	Civil Division
Susan Zimmerman Whitman	Maryland Industrial Development Financing Authority, Dept. of Economic and Community Development

ANNUAL REPORT FOR 1985

December 31, 1985

The Honorable Harry Hughes
Governor of Maryland
State House
Annapolis, MD 21401

Dear Governor Hughes:

In accordance with Section 6-108(b) of the State Government Article, I am submitting this report of the business and proceedings of the Office of the Attorney General for the calendar year 1985. A detailed financial statement of the Office, as well as caseload statistics and the official Opinions of the Attorney General, follow this report.

Annapolis Office

Scarcely more than two months before the start of the 1986 Session of the General Assembly, the Legislature finally concluded the last of its 1985 sessions. With its close came the end of the Attorney General's 1985 bill review and a hectic period of advising legislators.

Maryland's savings and loan crisis forced the General Assembly into overtime not once but twice: first for 11 days in May and then for 19 days in the fall. During the May special session, State legislators passed bills giving the Governor broad emergency powers to regulate State-insured savings and loans; creating a new State agency to insure savings and loan accounts; authorizing a savings and loan to issue certificates of deposit in exchange for State financial support in order to qualify for federal insurance; establishing an Office of Special Counsel to review and report on the savings and loan crisis, and providing authority to prosecutors to compel testimony during criminal investigations involving savings and loan associations. The October-November session of the General Assembly saw the enactment of legislation sanctioning the acquisition of Merritt Savings and Loan and two other savings and loans by Chase Manhattan Bank.

Among the legal questions considered and resolved by the Attorney General's Office during these special sessions were:

— the State could not contract away its right to pursue a criminal prosecution against officers of Merritt or obtain an order of restitution;

— any civil action brought by the Maryland Deposit Insurance Fund Corporation against officers, directors or employees of Merritt would not be barred by the statute of limitations;

— the State could distribute to Chase Manhattan that portion of the Central Reserve Fund contributed by savings and loans acquired by the bank without making similar distributions to other savings and loans;

— the Governor should sign only one of the two differing bills dealing with the grant of immunity to witnesses in State savings and loan investigations.

In addition, the Office considered the constitutionality of the May savings and loan package in a lengthy opinion issued in October.

During the regular 1985 session, the General Assembly passed and the Attorney General's Office reviewed nearly 900 bills, of which 789 were signed by the Governor on May 28th. Among the significant bills signed were those bringing interstate and regional banking to Maryland; punishing child pornography; providing additional protections for victims of crime and abused children; sanctioning "living wills"; banning phosphate detergents; and conferring upon environmental, civic and consumer organizations a "right to know" about hazardous substances information. Among the legal questions considered and resolved by the Attorney General's Office during the April-May bill review were the following:

— a bill authorizing the State to invest and guarantee investments in franchises of socially and economically disadvantaged persons does not impermissibly pledge the State's credit in violation of Article III, §34 of the Constitution;

— a legislative ban on the location of mobile seafood vendors within 50 yards of a place of worship, unless the person responsible for the grounds consents, violates the First Amendment;

— on its face, legislation permitting the AELR Committee of the General Assembly to delay the adoption of executive regulations for protracted periods of time (5 months or more) does not excessively burden the executive function in violation of the Separation of Powers doctrine; however, if the bill were administered in such a way as to seriously damage the executive rulemaking function, a substantial constitutional issue would be presented;

— a bill intended to shift large numbers of prisoners from State facilities to local detention centers would have allowed Baltimore City, as of July 1, 1985, to refuse to accept State prisoners until a new detention facility was built in the City; as a result of this interpretation of the legislation, the Governor vetoed the bill;

— the creation of a new three-member liquor board in Frederick County with the retaining of the former members at a higher pay violates Article III, §35's ban against in-term increases in the compensation of a public officer.

Human Resources

"Reaganomics" continues to have a substantial impact on the State's programs of benefits and services for low-income people. As a consequence, the Assistant Attorneys General assigned to the Department of Human Resources (DHR) have maintained their efforts to ensure that those served by DHR have use of the maximum amount of federal funds allotted to the agency for various welfare programs. For example, in *Maryland Department of Human Resources v. United States Department of Agriculture*, the United States District Court granted our request for a preliminary injunction that prevented USDA from calculating a State-enacted energy grant as income when determining the benefit level for welfare recipients in the Food Stamp Program. This ruling has assured 180,000 recipients continued payment of $425,000 in monthly food stamp benefits. In another federal case related to the treatment of energy payments for food stamp purposes, USDA agreed to settle an action brought by Maryland to contest the federal agency's refusal to permit a deduction from income for heating costs of households which received energy grants under the federal Low Income Energy Assistance Act.

Similar success has resulted from vigorous representation of DHR in administrative proceedings initiated by the federal government to contest the proper expenditure of federal monies in State-operated programs. For instance, DHR won a remand from the Grant Appeals Board of the federal Department of Health and Human Services (HHS) when the State challenged HHS's attempt to recover $3.2 million in funds that Maryland receives under §427 of the Child Welfare and Adoption Assistance Act of 1980. The Board's opinion signified its agreement that Maryland had reasonably interpreted the periodic review requirement of the Act when in finding that it did not apply to children in permanent placements. This decision marked the first time ever that a State has won a §427 case before the Board. DHR also obtained a comparable victory for its Aid to Families with Dependent Children (AFDC) Program. Maryland challenged HHS's decision to disallow $1.3 million for the State's alleged failure to meet federally established "quality control" error rates for the AFDC program. With the aid of the Attorney General's Office, DHR persuaded HHS that mitigating circumstances caused Maryland to exceed the allowable error rate. As a result, HHS waived the proposed sanction in full, and the State saved more than a million dollars in general funds it would have had to contribute to offset the loss of federal money.

The Attorney General's Office also continued to assist DHR in several of its priority efforts, such as the enforcement of Maryland's child support laws; the prevention, investigation and punishment of child abuse; and the implementation of its Minority Business Enterprise program.

Office on Aging

In 1985, legislation significantly expanded the role of the Office on Aging in regulating the practices of the continuing care industry in Maryland. As our population ages, new housing and health options have become increasingly popular, and approximately 4,250 Marylanders are now residents of 22 continuing care facilities, with eight additional facilities in planning stages. Residents in continuing care facilities generally pay substantial entrance fees plus monthly rent, in return for a guarantee of some health services as they age and become frail.

To prevent the financial failures of these communities that have occurred in other states, the Legislature in 1985 amended The Continuing Care Act to give the Office on Aging a solid base from which to regulate the industry and protect the residents. The Assistant Attorney General assigned to the Office played a major role in implementing the new statute and developing regulations, with the cooperation of the industry, to administer the Act.

Also in 1985, the Director of the Office on Aging was the court-appointed guardian "of last resort" for approximately 200 disabled aged residents of Maryland, empowered by the court to make health, residence, and other personal decisions for the care of these persons. The Assistant Attorney General assigned to the Office conducted a review of the guardianship program and assisted the Director in developing procedures which assure a high level of care and responsiveness to each client, in line with the responsibility assigned by the court in each case.

Antitrust

In 1985, the Antitrust Division reaffirmed its important role in providing preventive law advice to State regulatory and licensing boards, local subdivisions, and members of the business community. The Division published reviews of the practices of the Maryland State Board of Morticians and the Maryland State Board of Examiners in Optometry, recommending important changes in the boards' regulations. These antitrust reviews of Maryland's professional licensing boards were initiated by the Attorney General to ensure that the boards do not limit competition in Maryland any more than the General Assembly has expressly empowered them to do.

In response to a request by Maryland Delegate Helen L. Koss, Chairman of the Constitutional and Administrative Law Committee, Division attorneys wrote a thirty-eight page *Guide to State and Local Government Cable Regulation Under the Cable Communications Policy Act in 1984*, focusing on the regulatory authority of State and local governments over cable television. The report summarizes the role of local government contemplated by the Cable Communications Policy Act of 1984 and identifies the limitations placed on franchising authorities. Copies of the guide were forwarded to State and local officials throughout Maryland.

A detailed business review letter was sent to the Medical and Chirurgical Faculty of Maryland stating the Attorney General's enforcement intentions under the antitrust laws for this local AMA affiliate's *Compendium of Laws, Regulations, Opinions and Policies Governing the Practice of Medicine in Maryland.* As a result of this review, the Faculty deleted provisions that raised antitrust concerns; reduced certain conduct from violations of the Faculty's ethical rulings to an ethical consideration to be included in a new "Policy Statements" section of the Compendium; and amended a host of ethical rulings to eliminate their competitive aspects.

In all these instances of "preventative antitrust law," both businesses and consumers benefit. Costly and protracted litigation is avoided and the benefits of competition in the marketplace are promoted.

On the litigation side, the Division settled a case involving alleged price-fixing and territorial allocation by two manufacturers of gabions, which are wire-mesh configurations, usually filled with stones, used for river training and erosion and flood control. The settlement recovered $132,500 on behalf of the Maryland subdivisions that purchased the products at anticompetitive price levels due to the violations of the law. This amount is approximately ten percent of the State's purchases during the period of the alleged conspiracy and constitutes full restitution for overcharges made to the State and its subdivisions during that time.

A suit seeking more that $1 million in compensatory and punitive damages was filed in federal court against Trans Eastern Inspection Services, Inc., its president and former vice-president, and a former supervisor of the State Highway Administration. The suit alleges a conspiracy to defraud the State by submitting invoices seeking payment for excessive and unnecessary overtime during the construction of the Ft. McHenry Tunnel. One count of the six-count complaint is based on the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), another weapon in the Antitrust Division's battle against business misconduct.

Consumer and Investor Affairs

The work of the Consumer Protection Division in 1985 was imaginative, aggressive and precedent-setting, with important lawsuits being instituted and resolved in cases involving housing, retailing, automotive repairs, career counseling and charities. Special attention also has been given to health care matters of particular concern to the elderly, as well as of concern to the public at large, and the adoption of new rules governing our unique arbitration program has enabled its continued expansion.

In the area of housing, the Division initiated the first legal action of its kind in Maryland by joining forces with the Baltimore Legal Aid Bureau to file suit in Baltimore City Circuit Court on July 25 against Robert William Connolly, Jr., one of the largest owners of rental housing in Baltimore. The suit accused Connolly of violating the Consumer Protection Act by failing to make promised repairs in his properties and otherwise deliberately avoiding his legal responsibility to maintain them in a habitable condition. We charged that he thereby subjected hundreds of tenants to a "substantial risk to life, health and safety . . . ."

Specifically, the suit charged that Connolly, who operates some 700 rental units in Baltimore under the name of B & M Associates, failed to make promised or legally required repairs to apartments; failed to warn tenants about potentially hazardous conditions in their units, including the presence of lead-based paint; and failed to return security deposits to tenants who were entitled to them.

Today—on New Year's Eve—the Circuit Court approved a precedent-setting agreement in which Connolly promises to make prompt repairs on the units he owns in the city and to establish a contingency fund of up to $250,000 for an independent monitor to tap if Connolly fails to make the repairs. Connolly also agrees to pay five Legal clients a total of $23,000 in compensation for losses they suffered due to the substandard living conditions in his properties. This comprehensive settlement also establishes strict guidelines for Connolly to follow in responding to future complaints, and creates a procedure by which the court-appointed monitor can keep track of Connolly's compliance with the settlement and all existing housing laws. This is an innovative agreement that forcefully reaffirms the right of all renters to live in a safe and decent home. It shows that the State's consumer protection law is a powerful addition to the arsenal of local codes that strives to ensure decent housing for all Marylanders.

Another significant development on the housing front was the first criminal case prosecuted under the State's Consumer Protection Act. A 90-day jail sentence and restitution of $79,199 was imposed earlier this month on Richard T. Lebling, owner of Northern Modular Homes, Inc., who was convicted by a Howard County jury of stealing the money eight couples had given to him as down payments for prefabricated homes or as payments to subcontractors. Lebling used the money to buy himself a condominium in Ocean City and subsidize another business he owned. He stole sums ranging from $4,495 to $20,141 from couples in Howard, Anne Arundel and Baltimore Counties, wrecking the hopes they had of owning a home.

In the field of retailing, the Division concluded one massive, four-year-old case with a record-setting settlement and launched another case with the potential for significantly affecting advertising practices by one of the State's largest retailers.

On October 3, the Howard County Circuit Court formally approved a settlement under which Luskin's, Inc. agreed not to use deceptive advertising and sales tactics it was alleged to have employed; pledged to pay $250,000 to the State for a consumer education program concentrating on customer rights in the sale of appliances and electronic goods; and promised to settle more than 1,000 unresolved consumer complaints through binding arbitration, as well as submit all future complaints to arbitration for the next two years. The $250,000 the State will receive is the largest settlement ever obtained in a Maryland consumer protection case. Luskin's also will pay the State another $40,000 to cover the costs of its investigation.

As was the case with the settlement of the Connolly case, this agreement with Luskin's is innovative and comprehensive. It creates a quarter-million-dollar fund for consumer education; it provides relief for those alleged to have been injured by Luskin's in the past; and it goes a long way toward ensuring that Luskin's customers will receive a fair deal in the future. We also believe that the guidelines now established for Luskin's will help make the marketplace for appliances in Maryland fairer and more open in general.

Similar industry-wide guidelines may result from another suit we filed on December 4 against The Hecht Company, charging that it is using fictitious "regular" prices in its advertisements for mattresses. We allege that a lengthy investigation has shown that the company, which sells $11 million worth of mattresses a year, is falsely promoting dramatic savings and significant bargains which in fact do not exist. We charge that since at least April, 1984, Hecht's has virtually never sold mattresses at the prices it cites as "regular" in its ads. We contend that the claimed "regular" price has been set only for the purpose of establishing a fictitious price upon which deceptive price comparisons might later be based. We also allege that these misleading and deceptive price comparisons have been used with respect to other consumer goods and are continuing. We are seeking an injunction against such practices, as well as an undetermined amount in civil penalties and restitution to consumers.

In the area of auto repair fraud, we obtained an agreement in July from Master Auto Service, a Virginia-based firm that once had six tire and auto service outlets in the Baltimore area and one in Rockville, to pay $100,000 in civil penalties to settle a three-year-old lawsuit accusing it and company officials of violating the Consumer Protection Act. The company and its president, Samuel Archer Green, will also pay and additional $10,000 to provide restitution to former customers and to fund further investigations of auto repair fraud, as well as to provide for consumer education. Another $5,000 in civil penalties was assessed on Douglas Solomon Wade, who once worked for Master Auto in Maryland. The suit had accused the company of refusing to perform free front end alignments as advertised unless consumers bought unnecessary parts and other repairs; of advertising particular tires for sale that were not available; of charging consumers for repairs that were not performed; of not giving customers written warranties; and of not honoring the guarantees they did give.

Earlier this year, the Division also issued a cease and desist notice to Sherwood Ford, Inc., a Baltimore auto dealership we alleged was telling customers they needed parts, services and repairs for the braking systems in their vehicles when they did not. In March, a consent order was signed in which Sherwood Ford acknowledged that it tried to sell a $160 brake master cylinder to a customer whose car later was repaired elsewhere without replacing the cylinder. The company agreed to pay $1,106 to the Division to cover the costs of its investigation and to follow all inspection and diagnostic procedures set forth in the manufacturer's shop and/or service manual. The consumer who complained also received reimbursement for the $25 towing charge that was incurred when the car was towed from Sherwood Ford to the other repair facility.

A similarly satisfactory result was obtained in a case that could have had tragic consequences. In October, the Garrett County Circuit Court approved a consent order requiring Ralph Pritts & Sons, Inc., a defunct car dealership, and Christopher Karl David Pritts, a one-time salesman for the firm, to pay $1,500 in fines and costs for selling a structurally defective used car that actually broke in half while the buyer was driving it on a highway. The respondents admitted that they disguised the defect in the car with tin-plating and undercoating before selling it for $900 to a Deer Park couple in December, 1983. After the Division notified the dealership that a suit would be filed against it, full restitution was paid to the couple, who were lucky to have escaped unharmed.

Fortunately, most consumer frauds are not life-threatening, but that does not diminish the Division's diligence in pursuing them. This year, we obtained an order from the Baltimore City Circuit Court requiring Design & Funding, a now-defunct invention marketing firm, and its president, Alden L. Coke, to pay restitution that could total as much as $2 million to at least 477 consumers who were deceived into thinking the company could help them profit from their ideas for inventions. Some consumers had paid the firm as much as $30,000 for a single "Development Contract" to evaluate and market an invention. The Division had filed suit against Design

& Funding in March, 1983, alleging that it failed to comply with State regulations that require invention marketing firms to give prospective customers disclosure statements advising them of the risky nature of the investment marketing business. Design & Funding's disclosure statements understated the number of customers with which it had dealt and grossly overstated the number of people whose ideas earned more money for them than they had paid the company, giving the consumers a deceptive picture of their prospects for success that was twelve times more positive than actually was the case. A court-appointed master will determine how much restitution is owed to the consumers.

Lawsuits also were filed in 1985 against other alleged frauds, one a phony charity, the other a defunct trade school. In June, the Division filed suit in Frederick County Circuit Court against National Police Journal, Inc. and its president, Ronald Rubenzer, seeking the return of an estimated $10,000 to Frederick-area residents who gave money to the firm after it allegedly implied it is a charitable organization affiliated with police groups, which it is not. The company, which is a privately owned firm that operates locally as the *Maryland Police Journal*, allegedly conducted a misleading telephone solicitation campaign in the summer of 1984, offering a subscription to its publication and a canister of chemical defense spray in return for $28 "contributions" that went right into the company's coffers, not to any police group.

In July, the Division filed suit in Baltimore against the Global Career Academy, which once operated a training school for would-be travel agents and airline workers, alleging that it misled students by using extraordinarily inflated figures to measure the success of its graduates. The school is also charged with falsely claiming that it could extend federal aid to students and representing that it was authorized to conduct a full training program at its Silver Spring headquarters, which it was not. The school went out of business in July, 1984, leaving at least 80 active students and 13 who had paid in advance but received no training. The State Board for Higher Education and Commissioner Knorr also are plaintiffs in the suit. The Board has paid more than $13,000 in refunds to former students of Global Career Academy out of the State's Guaranty Student Tuition Fund but has never been reimbursed by the defendants.

The significant initiatives launched by the Division in 1984 in the field of health care cost containment have continued during 1985. Late last year we received a massive amount of information on Maryland doctors' fees as a result of our unprecedented Freedom of Information Act request for the statistical material the federal government compiles on the fees charged by Maryland doctors who treat Medicare patients. We still are in the process of compiling and analyzing that data, and we hope to be able to publish what we believe will be the nation's first comprehensive, statistical directory of physicians' fees by early spring. This project, which has the backing and assistance of the Medical and Chirurgical Faculty of Maryland, the State hospital association, the Union-Management Health Care Cost Containment Committee, and other groups, is designed to encourage consumers to comparison shop for health care services. We believe that the competition that inevitably accompanies comparison shopping will help contain costs in the medical field, as it does in others. The directory will list the customary fees charged by physicians for commonly performed procedures. The fees cited will be based on Part B Medicare claims in 1983, with annual inflation rates for subsequent years provided to estimate the 1984 and 1985 fees. Physicians will also be listed by location and specialty. We believe this directory will be especially helpful to elderly consumers, who spend more for medical care than anything else and are increasingly being held responsible for their own health care decisions. But as Assistant Attorney General Steven J. Cole, the Chief of the Consumer Protection Division, has said, we hope that by removing the barrier of almost total secrecy regarding this information, all consumers who want to compare physicians' fees will be able to do so, and more and more Marylanders will become smarter shoppers for health care services.

Elderly consumers also are particularly vulnerable to health care scams, and last January 3 the Division filed suit in Montgomery County Circuit Court seeking a permanent injunction against Burt Miller, Jr., a Virginian who has worked as a door-to-door salesman of hearing aids and allegedly engages in misrepresentations, false promises and other illegal acts to sell unneeded hearing aids and repair services to elderly Marylanders in Prince George's, Montgomery and Frederick counties.

In other health-related cases, the Court of Appeals overturned a Baltimore Circuit Court ruling and upheld a Division order directing the Consumer Publishing Company of Canton, Ohio, to pay refunds to dissatisfied consumers who purchased mail-order diet pills the company deceptively advertised in Maryland. The appellate court found that the lower court judge "exceeded (his) statutory authority and usurped administrative functions" when he substituted his judgment for that of a Division hearing officer, who had found the company's newspaper advertisements misleading. The company had claimed it was selling the "best diet pill ever" featuring "a recent medical innovation." In fact, the active ingredient in the pills is a chemical that has been on the market for at least 20 years and is used primarily as a nasal decongestant. The company's claims that consumers could lose weight without dieting were untrue, and the effect its pills had on weight loss is "trivial," the Division found.

During 1985, the Division also continued its aggressive enforcement of the Maryland Health Club Services Law. In April, administrative cease and desist proceedings were brought against another eight health clubs, bringing to 27 the number of clubs that have been charged with violating the registration and bonding requirements of the health club law since the Division's enforcement program was instituted in July, 1983. In June, the Division filed suit in Baltimore County Circuit Court against the owner of the now-defunct Grecian Lady Spas, seeking $50,000 in restitution for approximately 1,000 consumers who were members of the club at the time it closed, as well as substantial civil penalties. Finally, the Division has, for the first time, cashed in on bonds and letters of credit posted under the health club law and begun the process of distributing more than $250,000 to thousands of consumers who have refund claims against clubs that have closed.

On July 15, new rules we devised for our arbitration program went into effect, for the first time permitting non-lawyers to serve as arbitrators to resolve consumer grievances through binding arbitration. The new rules also clarify the type of relief an arbitrator can grant a party in a dispute; formalize the use of expert advisors when the issue in a complaint requires special knowledge of a product or service; put into regulatory form certain informal practices that have been followed in the past; and improve the organization of the rules of the program, which is the only one of its kind in the country.

In our all-volunteer Consumer Assistance Unit, we've found that non-lawyers—especially senior citizens—are very good at settling disputes. We're convinced that average citizens under professional supervision can do an effective job resolving consumer complaints. Lawyers still will be eligible to serve as arbitrators—and we expect that they still will hear a substantial number of arbitration cases. But being a lawyer will no longer be a requirement to serve as an arbitrator. So far, we have recruited approximately 30 lay arbitrators for the program, and we anticipate persuading between 10 to 15 attorneys to volunteer to arbitrate cases this coming year.

Our arbitration activities continue to grow. We now have more than 800 businesses signed up to precommit themselves to resolve consumer disputes through arbitration. In April, we were especially pleased to announce that most of the members of the Appliance Technicians of Maryland (ATOM) had agreed to join the members of 20 other merchants' groups who have joined our arbitration program. In all, we added between 200 to 250 businesses to the program in 1985, and we performed some 275 to 300 arbitrations. We also hope to have a new Question-and-Answer booklet available early in the new year, describing the arbitration program and serving as a tool for recruiting more businesses to participate in it.

The new regulations adopted this year—and the new arbitrators we've recruited—enhance our commitment to the five basic principles governing our arbitration program: fairness, simplicity, convenience, speed and economy. Arbitration doesn't cost the consumer or the business anything, and it is much quicker and simpler than going to court.

In consumer education, the Division launched a new publication in 1985, the *Maryland Consumer Courier*, a quarterly newspaper containing considerable consumer advice and information, as well as updates on the consumer protection cases brought by the Attorney General's Office and the consumer affairs offices in Howard, Montgomery and Prince George's Counties. The first issue, released in July, had a press run of 25,000 copies and was distributed for free to an initial 10,000 community groups and consumer organizations, in addition to all of Maryland's public libraries and the American Automobile Association offices in the State. The second issue, released this month, had a press run of 100,000 copies, and its distribution has been expanded significantly. Copies were placed in all 83 Giant Food Stores and all 83 Safeway Food Stores in Maryland, as well as the 12 Motor Vehicle Administration offices in the State and in nine Baltimore subway stations. We are extremely grateful to all these businesses and agencies for permitting us to use their stores and offices to perform this educational service.

We also continue to distribute the pamphlets, books, slide show and videotape consumer education program we developed in previous years, as well as our consumer-oriented newspaper column and our consumer radio alerts. In all, 32 newspaper columns were mailed to weekly papers throughout the State and 59 taped radio reports were sent to radio stations.

Securities Division

The explosive rate of growth that has characterized the securities industry continued in 1985. There were approximately 3,400 securities filings and renewals in 1985 and nearly 2,000 exemption filings producing revenue for the State in the amount of about $1.4 million. The rate of filing for securities registration and exemptions was up 17% over the 1984 totals, although the fees generated were less, indicating that while the number of offerings continues to rise, the size of the offerings is diminishing.

In the franchise area the registrations, renewals, and amendments totalled approximately 687 for revenues of $92,955. This is about a 7% increase over the numbers of filings last year and in excess of a 12% growth in the amount of fees paid to the State. Business opportunities, the smallest area of regulation by the Division, amounted to only 13 filings for revenues of $2,450.

The only area of the Division's regulatory responsibility which did not demonstrate the usual pattern of expansion was broker/dealer and agent registrations and renewals. This year only 272 firms filed an initial broker/dealer registration, compared to 305 last year. The Division also received approximately 9,000 new agent registration applications, compared to 11,000 new ones received last year.

The Division has handed over to the State $1,073,325, representing the fees generated by broker/dealer registration and renewals and agent registration and renewals. Of this amount, $688,325 were agent renewal fees, and the majority of these funds will have to be returned by the State to the largest broker/dealers. This also is the last year the State will have to refund the majority of funds taken in through agent registration.

During 1985, the Attorney General approved the issuance of a regulation exempting the securities of NASDAQ National Market System companies from registration requirements under the law for the sale of the quoted company's securities in Maryland. Maryland thus became the second state in the nation to grant NASDAQ National Market System parity with the New York and American Stock Exchanges.

The agent surveillance program initiated by the Division last year was in full use again in 1985. Based on applications received, 54 challenge letters were sent by the Division, and of these, one went to a full hearing; four applications were approved on a conditional basis providing special supervisory terms, and the remainder withdrew from the registration application procedure in Maryland.

Enforcement investigations by the Division in 1985 covered a wide spectrum. The Division obtained $20,000 on behalf of Maryland investors from Acacia Mutual Life Insurance Company, which marketed securities in the form of John Nuveen & Co. bond products. Investor losses resulted because a former agent of Acacia who had obtained money from Maryland investors to purchase Nuveen products securities failed to forward the funds to Nuveen Company.

Kobrin Securities, Inc. agreed to offer rescission in the amount of $20,000 to Maryland purchasers of unregistered securities in settlement of an administrative proceeding brought against it by the Division. In addition to agreeing to offer rescission to Maryland investors, Korbrin was prohibited from becoming registered as a broker/dealer in Maryland for one year. It also paid the costs of the Division's investigation.

In a cooperative enforcement action with the North American Securities Administrators Association, the Division issued administrative orders against four broker/dealers allegedly operating illegally in Maryland by trading securities on behalf of Maryland customers without registering with the State as required by law.

A joint inquiry by the Securities Division and Criminal Investigation resulted in the indictment and conviction of Martin Baum, president of Fabulous Fakes of America, Inc. and Fantastic Jewels, Inc., on charges that he fraudulently sold franchises in the amount of $40,500 to Marylanders by promising large profits on their investments.

A Cease and Desist Order was issued against the operators of Westlake Dynamics International, a pyramid-type investment scheme. The Order charged that the investment scheme was offered in violation of Maryland securities law. It alleged that a local representative of the company was operating an illegal pyramid scheme promising "investors" more than $300,000 in monthly returns for an initial $770 in investments.

Overall, the Division was able to obtain offers of rescission in excess of $607,000 for aggrieved investors. In addition, fines and costs of investigation were recovered in the amount of $2,725 by the Division. Approximately 35 enforcement investigations were concluded in 1985 with sanctions ranging from rescission offers to fines, consent orders, cease and desist orders, and criminal referrals.

The Division has a right to be proud of its record in 1985, because for a substantial period of time only two attorneys were assigned to it because of unexpected resignations, and for a while only one lawyer was handling Division matters and enforcement activities had to be suspended temporarily. Yet, despite operating with a skeleton staff, significant accomplishments were achieved in every area of the Division's responsibilities.

Educational Affairs Division

During calendar year 1985, the Educational Affairs Division handled 92 court cases for all client institutions. This total excludes numerous "administrative cases," such as adversarial proceedings before an assortment of State and federal agencies dealing with medical malpractice claims; personnel grievances; procurement protests; discrimination complaints; audit disputes, etc. Of the 92 cases, 45 were pending as of January 1, 1985, and 47 new lawsuits were filed during the year. Thirty-two cases were closed during the year, all except one (an employee grievance appeal) favorably to Division clients. This continues a "favorable resolution" rate that has exceeded 96% over the past four years. Similarly characteristic of the Division's 1985 caseload was the remarkable variety of litigation issues we encountered:

— Wrongful Discharge

— Employment discrimination

— Academic dismissal

— Will contest

— Special education

— First Amendment

— Plagiarism

— Defamation

— Aid to religious institutions

— Construction litigation

— Medical malpractice

— Comparable worth

— Retrenchment

— Sovereign immunity

— Due process and equal protection

— Copyright and trademark

— Licensing of academic institution

— Assortment of civil rights claims

— Procurement and contract disputes

Court litigation involving the University of Maryland accounted for 53% of the Division's total caseload during 1985. This compares with 23% for the State Department of Education, 15% for the eight

State universities and colleges, and 9% for remaining client boards and commissions.

As in past years, employment cases dominated, comprising close to 30% of the court cases handled on behalf of the Division's clientele. Other major categories included medical malpractice claims, student and special education lawsuits, and commercial contract disputes.

As in past years, the Educational Affairs Division devoted substantial attention to day-to-day counseling of client administrators on a spectrum of educational policy issues, numerous personnel and other disputes, and an assortment of business transactions. There were several special developments and initiatives that animated our work on behalf of our educational clientele during 1985. These are highlighted below.

One of the most significant developments in 1985—significant in terms of educational policy, political, fiscal and legal considerations—was the State's resourceful resolution of a desegregation dispute with the federal government. Following virtually four years of "negotiations" in various venues (including a federal classroom), the parties came to terms on a comprehensive plan and companion settlement agreement that will carry through until the end of the decade.

For some time we also have been urging chief administrators to impanel working groups to evaluate "early retirement incentive" programs. Several institutions have taken the initiative on this critical policy and legal planning issue. Towson State University has a limited program in place, Morgan State University has one in the works, and the State Board for Higher Education in studying various alternatives that may lead to enabling legislation benefiting all the various institutions.

In another noteworthy planning initiative, our Division has been the catalyst in efforts to streamline the cumbersome, time-consuming employee grievance process. Following a series of meetings involving University of Maryland and Department of Personnel management and MCEA and AFSCME leaders, a bill has been prepared and submitted to the General Assembly to reduce hearing steps for general grievances from five to three, and, correspondingly, to reduce steps for removals from three to two. The bill proposes to make these and other more minor changes in the classified employee grievance statutes that govern both the University of Maryland and the DOP grievance process.

General economic conditions and tax law developments have made

1985 an especially active (and anxious) year in the municipal and revenue bond finance markets. Both the University of Maryland and the State University and College system were in the thick of it. UM borrowed $50 million to finance an assortment of auxiliary service projects through a complex, innovative variable rate financing program. Similarly, the State University and College system recently issued revenue bonds for about $8 million for auxiliary service projects at Salisbury State College and the University of Baltimore, and a lease/lease back transaction is in the works for a new Salisbury student union facility. Other noteworthy projects include major equipment lease purchase arrangements, long-term leases of campus parcels for commercial development, a child care operation, and affiliated non-profit associations.

In late summer, we circulated a comprehensive memorandum explaining changes in the federal income tax treatment of tuition reduction and remission programs. We convened a follow-up meeting in September, 1985 of personnel, fiscal and other officials from our client institutions to discuss ways to preserve tax-free tuition reductions, where permissible, and to coordinate income tax "withholding" procedures for benefits that are taxable. With the assistance of the Central Payroll Office, institution tuition reduction plans and income tax withholding procedures seem to be in "synch" with the tax law changes.

Our special seminars and legal planning efforts—central features of our ongoing preventive counseling program—are designed to aid administrators in anticipating legal problems and in averting costly disputes. The whole program, which so far encompasses two dozen sessions covering 75 topics, is based on the precept that each legal problem avoided, each dispute resolved, and each lawsuit deflected, indisputedly saves the institution time, money, and emotional toil.

It is difficult, no doubt, to quantify storms that don't happen. But there are some meaningful statistical signs that preventive planning and counseling activities are paying off, particularly in the troublesome area of personnel relations. Our litigation charts show that employment-related court cases—including the dominant category of assorted discrimination cases—declined 36% over the past four years; from 37 employment cases handled in 1982 to 24 cases during 1985. There may be other factors in addition to preventive counseling to account for this dramatic drop, but this fact should be considered: employment litigation has increased nationally over the past several years. Also the operating budgets—a barometer of sorts of business and personnel activity—of our collective clientele have increased about 50% over the same four-year period.

Medicaid Fraud

The Medicaid Fraud Control Unit successfully concluded seven criminal cases in 1985, recovering $20,000 in fines and obtaining more than 18 months of jail sentences, 48 months of suspended jail sentences, and 800 hours of court-ordered community service. Included in the number of health care providers were one transportation company, one nursing home, two hospital employees, and three physicians. In addition, the Unit identified Medicaid overpayments to 10 providers which totalled $385,585. Civil settlements were reached with four of these providers, with recoveries totalling $269,557.

As the Medicaid Fraud Control Unit has prosecuted more health care providers, it has developed a reputation within the State as an aggressive enforcement arm of the Attorney General's Office. The Unit has also sensitized State judges to the concept of Medicaid fraud as a serious white-collar criminal offense. For example, in the last year we have obtained six jail sentences against providers.

Among Medicaid Fraud Control Units nationwide, the Maryland Unit is in the forefront in using computers for case targeting. Before targeting cases for investigation, the Unit often schedules data for an entire class of providers so as to highlight providers whose practices in a given area appear unusual. This procedure is currently being used to target nursing home cases and will be used in the future to target other providers. It has already proved successful in targeting dental cases, where the State's computers were used to spot unusual patterns of billing activity submitted by dentists, allowing investigators to target those dentists likely to have committed fraud. To date, a total of six dentists have been convicted of Medicaid fraud as a result of this program.

The Medicaid Fraud Control Unit has accomplished much over the last year. The Unit has continued to build on the reputation it has developed as an aggressive agency that conscientiously uncovers fraud among health care providers. This perception no doubt acts as a deterrent to fraud and abuse on the part of some health care providers. In an era of skyrocketing health care costs, the goal of the Medicaid Fraud Control Unit must be to help contain health care costs by fighting fraud and abuse within the system and by deterring those who would otherwise abuse the Maryland Medical Assistance Program.

Criminal Appeals and Correctional Litigation

In 1985, the Division continued to represent the State in all appeals in criminal cases before the Court of Appeals, Court of Special Appeals, and the United States Supreme Court, and to represent State correctional officials in all habeas corpus actions in federal court and all civil actions brought in both State and federal court by inmates in the State prison system. One criminal appeal, *Maryland v. Macon*, was accepted for full briefing and argument by the United States Supreme Court.

At issue in *Macon* was the constitutionality of a purchase made by an undercover police officer. In a 7-2 decision, the Court agreed with our position and reinstated the defendant's conviction.

Attorneys from this Division also continued to work closely with prosecutors in the State's Attorney's Offices, participated in training programs, reviewed proposed legislation, responded to citizen inquiries, and generally shared their expertise in the areas of criminal law and correctional litigation.

The Department of Public Safety and Correctional Services

During the last year, we concluded the last of the cases concerning overcrowding in the State correctional system. These cases, which involved five of the State's major prison facilities, had been in active litigation in the federal courts since 1977. The last case to be resolved involved the Maryland Penitentiary. An agreement was negotiated which will ultimately reduce the population of the Maryland Penitentiary to a figure of 1,103 inmates in 1987. That figure will be achieved when the new Eastern Correctional Institution, currently under construction in Somerset County, and the new maximum security institution under construction in Baltimore City, are completed. We were able to obtain a successful conclusion to all of these overcrowding cases by settlement, which preserved the rights of inmates to constitutional conditions of housing as well as the State's right to address legitimate needs and budgetary constraints.

In March, 1985, we issued an extensive report concerning the personnel practices of the Maryland State Police. The report concluded an exhaustive review of the personnel practices of the Maryland State Police over a period of six months. It pointed out serious deficiencies in the personnel practices of the State Police involving the hiring, promotion, discipline and assignment of uniformed troopers. As a result of our report, a number of important reforms have been instituted by the State Police, including the retention of a firm of outside consultants to completely redesign the State Police promotional system. Additionally, we participated in a number of investigations of allegations of wrongdoing by present and former commissioned officers of the State Police that allegedly involved tampering with promotional evaluations. These investigations resulted in a major restructuring of the command of the State Police and the institution of procedures designed to prevent any manipulation of the promotional system in the future, as well as to make sure that it is fair to all.

Department of Health and Mental Hygiene

During 1985, the Attorney General's staff at the Department of Health and Mental Hygiene and the Civil Division in the central office successfully represented the Office of Environmental Programs in revoking the permit of Browning-Ferris, Inc. (BFI) to operate the Norris Farm Landfill in Baltimore County. BFI fought the revocation of the permit by seeking an adjudicatory hearing before the Office of Hearings in the Department. It also filed an action in federal court under the federal civil rights laws, alleging deprivation of its rights by the Deparment in seeking to revoke the permit, and it sued in Anne Arundel County Circuit Court under the Maryland Public Information Act for the production of State documents. The lengthy and thorough opinion of the Deputy Secretary of DHMH revoking the permit was sustained by the Baltimore County Circuit Court on BFI's motion for stay pending appeal, and the landfill closed in July, 1985. Since then, BFI and Baltimore County have negotiated the transfer of the closed landfill to the County. The federal civil rights action was dismissed by the U.S. District Court, and the dismissal was affirmed by the U.S. Court of Appeals for the 4th Circuit. The action over the production of documents was also won in Circuit Court.

In addition, during 1985 the Attorney General's Hazardous Waste Strike Force successfully concluded the criminal cases brought against American Recovery, Inc. and two of its managers under indictments obtained in 1984. In December, 1984, one of the individual defendants, the firm's plant manager, pleaded guilty to one of conspiracy to violate Maryland's hazardous waste laws and one count of felonious violation of those laws. He was sentenced to three years probation and 200 hours of community service. He thereafter cooperated with the State's prosecution of the company of the former general manager of the facility, the remaining individual charged.

American Recovery pleaded guilty in February, 1985 to several of the charges and was fined $350,000. The one-time general manager went to trial in September, 1985 and was convicted of conspiracy to obstruct justice, conspiracy to violate Maryland's hazardous waste laws, and five counts of felonious violations of those laws. He was sentenced to serve six months in prison, five years probation, a fine of $2,000 and 500 hours of community service.

Also during 1985 the Attorney General's staff at the Department of Health and Mental Hygiene conducted a day-long seminar for all members of the numerous health professional regulatory boards that fall under its jurisdiction. The health occupations in Maryland are licensed and regulated by boards composed of professionals and consumers who volunteer their time to perform this valuable service for the protection of the people in Maryland. More than 100 board members and their support staff attended the conference, entitled "White Coats and Black Robes: Health Professionals Encounter the Law." Legal issues surrounding administrative procedure, rules of evidence, the need for regulations, antitrust concerns and member liability were discussed, and case studies were reviewed in small discussion groups.

Department of General Services

In 1985, the Assistant Attorneys General representing the Department of General Services continued to aggressively pursue compensation from architects and engineers who designed State facilities that suffer from a variety of substantial defects. The Office has sought recoveries for several agencies, including the Department of Public Safety and Correctional Services. In *State v. Nes Campbell, et. al.*, a case involving the defective design of heating systems for cottages at the Western Maryland Retardation Center, the State was paid a $660,000 settlement by the defendant architects and engineers on the eve of trial.

The Office has also been actively involved in defending claims arising from construction contracts administered by the Department. In the *Appeal of Equitable Construction Company*, the Office persuaded a contractor to dismiss a $660,000 claim that had been filed in the Maryland State Board of Contract Appeals, involving delays in completion of construction of the Central Administration Building of the University of Maryland at College Park. Detailed discovery and extensive investigation of the facts of the case by the Office played a large part in convincing the contractor to dismiss its claim.

The Court of Appeals heard its first case involving Maryland's new Procurement Law in 1985. In *Maryland Port Administration and Department of General Services v. John W. Brawner, Inc. and J. Roland Dashiell, Inc*, the Court of Appeals held that a State contractor could not seek reformation of its contract on the basis of a unilateral mistake contained in the contractor's bid which was not discovered until after contract award. The Court reversed prior decisions of the Maryland State Board of Contract Appeals and the Circuit Court for Baltimore City, which both had concluded that such relief was available to a contractor. The Court of Appeals' decision leaves open the possibility that a contractor may seek rescission of its contract on the grounds of a unilateral mistake discovered after award. The Court's decision affects all State contractors and presents a clear message that bidders should review their bids for mistakes before submitting the bid and certainly before signing a contract.

The number of bid protests filed with the Department of General Services fell significantly in 1985. This reduction, we believe, is due in part to the increasing familiarity which the public and State officials have with the new Procurement Law and to the body of procurement decisions now existing as precedent in this area. In addition, the number of bid protests may have been affected favorably by the efforts of Assistant Attorneys General at the Department of General Services in conducting Procurement Training Seminars for State employees throughout the State.

Department of Employment and Training

The Assistant Attorneys General assigned to the Department of Employment and Training have been working with the agency to remove the backlog of unemployment insurance cases pending in circuit courts throughout the State. They have implemented a comprehensive plan to handle the more than 200 cases filled each year. At this time the backlog of cases awaiting the filing of administrative records has been reduced.

In 1985, the Assistant Attorneys General provided support for the promulgation of clear and concise legal guidelines for the Unemployment Insurance Board of Appeals on some hitherto cloudy issues by representing it before the Court of Appeals of Maryland in *Baltimore Lutheran High School Association, Inc. v. Employment Security Administration* and *Board of Education of Montgomery County v. Paynter*. In its decision, the Court gave guidance to the Board of Appeals and the agency in the area of religious schools and on the meaning of voluntarily quitting a job for good cause under Article 95A of the Annotated Code of Maryland, Unemployment Insurance Law, Section 6(a).

Department of Personnel

During 1985, the Assistant Attorneys General representing the Department of Personnel handled 12 court cases, three of them new lawsuits filed during the year. Four of the cases were concluded either by dismissal or settlement, all favorably for the Department. The remaining eight cases went to trial on the merits and also resulted in favorable rulings.

In the area of preventive counseling, this Division participated in a seminar entitled "Legal Aspects of Management." The purpose of the seminar was to foster the elimination of unnecessary litigation. The Division also participated in a seminar dealing with "B" Rules Appeals.

In addition to litigation and the day-to-day counseling of our clients in the Department, the Division also engaged in numerous administrative proceedings in 1985, representing our client before the Equal Employment Opportunity Commission, the Maryland Commission on Human Relations, the U.S. Department of Labor, and other agencies and groups.

Department of Transportation

Claims and bid protests before the Board of Contract Appeals continued to add significantly to the caseload of the Department of

Transportation. The Contract Litigation Unit, formed in 1983, is now responsible for 32 claims before the Board of Contract Appeals (one claim has been filed as an original matter in the Circuit Court for Anne Arundel County). Two of the cases at the Board of Contract Appeals are also the subject of parallel proceedings in the United States District court for the Eastern District of Pennsylvania, where entry of an order of dismissal on jurisdictional grounds is pending. The Unit also serves as a resource for procurement litigation statewide.

Assistant Attorneys General assigned to the Department of Transportation and the Civil Division represented the Department in 1985 and are currently representing the Department in a compliance hearing before the United States Department of Transportation involving the nationwide 55 M.P.H. speed limit. If Maryland is found not to have properly enforced the 55 M.P.H. speed limit mandated by federal regulations, sanctions may be imposed. The potential exposure is a loss of $5.8 million in federal transportation aid funds. Among other legal services, we have been advising highway officials with respects to appropriate revisions to the State's speed monitoring plan to obtain more representative data.

Assistant Attorneys General also represented the Department in significant litigation involving the Minority Business Enterprise Program. In *Warwick v. Department of Transportation*, the Court of Special Appeals was faced with the issue of whether the decertification of a certified Minority Business Enterprise is actually a "contested case." In accordance with the Court's decision, attorneys for the Department have advised the appropriate officials about restructuring decertification procedures.

On April 29, 1981, the Maryland Transportation Authority, represented by its assigned Assistant Attorney General, entered into a consent decree with the U.S. Department of Justice to settle a complaint that the Authority had engaged in a pattern and practice of sex discrimination in the hiring of Toll Facilities Police Officers. The Consent Decree addressed the recruitment, hiring and selection of females. The Toll Facilities Police Force, with the assistance of the Attorney General's Office, pursued an aggressive recruiting and hiring program and achieved the long term goal of 15% female officers in 1984. Under the terms of the Consent Decree, the Decree was dissolved in August, 1985 after the long term goal had been maintained for 18 months.

The Motor Vehicle Administration requested advice from its assigned Assistant Attorneys General on three significant issues during 1985.

First, the Adminstration was advised that the point system as presently administered is not consistent with the provisions of Sections 16-402 and 16-407 of the Transportation Article. Under the present system, points are assessed as of the date of a traffic violation, while the statutes require that the points be effective as of the date of conviction.

Second, the Administration was also advised that if a vehicle lessor uses leases intended as security and meets the other criteria of the Motor Vehicle Law with regard to acting as a dealer, the lessor must obtain a vehicle dealership license from the Administration.

Third,, with the assistance of its Assistant Attorneys General, the Motor Vehicle Administration is conducting its review of the importation and registration of so-called "gray market" vehicles, which have been manufactured and purchased abroad and are subsequently imported into the United States. The Assistant Attorneys General have advised the Administration on federal safety and environmental regulations which apply to these vehicles.

During 1985, an Assistant Attorney General assigned to the Department of Transportation gave advice in connection with the establishment of a motor carrier safety inspection program. This program, which is now in the full implementation stage, was developed to spot defective equipment through roadside inspections and take unsafe vehicles off the road.

Assistant Attorneys General assigned to the Department of Transportation , the Maryland Transportation Authority and the Maryland Port Administration advised the Department with respect to a number of highly complex real estate transactions intended to expand existing Port facilities and also intended for future expansion of the Seagirt Marine Terminal, which is scheduled to open in 1989. The Assistant Attorneys General participated in the negotiation of contracts of sale, drafted required documents, obtained necessary governmental approvals, and represented the Department at the closings.

Assistant Attorneys General assigned to the Department also provided legal service in 185 in connection with the issuance and sale of $8.8 million of County Transportation Bonds issued on behalf of three counties to finance various transportation-related projects. Significant legal services were also provided in connection with a Department contract for the sale-leaseback of mass commuting vehicles under the Economic Recovery Tax Act of 1981.

The Assistant Attorneys General assigned to the Maryland Transportation Authority also provided legal services in connection with the Authority's bond issue of nearly $202 million, which resulted in a complete refinancing of its existing debt and the financing of the local share of the recently opened Fort McHenry Tunnel.

In this year of extraordinary challenges, I am proud of the skill, energy, and committment to the public interest shown by the men and women of the Attorney General's Office. I also want to thank you and your staff for the many courtesies extended to us.

Stephen H. Sachs

Attorney General

CASES IN WHICH THE OFFICE OF THE ATTORNEY GENERAL HAS PARTICIPATED FOR CALENDAR YEAR 1985

Supreme Court of the United States (Includes Petitions for Certiorari)	56
United States Court of Appeals for the Fourth Circuit	150
Other United States Courts of Appeal	4
Total	154
United States District Court for the District of Maryland	858
Other United States District Courts	33
Total	891
Court of Appeals of Maryland (Includes Petitions for Certiorari and Answers to Petitions)	
Civil Appeals	66
Criminal Appeals	57
Total	123
Court of Special Appeals of Maryland	
Civil Appeals	200
Criminal Appeals	806
Total	1006
Circuit Court of Maryland	5434
District Court of Maryland	2067
Maryland Tax Court	1486
Workmen's Compensation Hearings	1486
Maryland State Board of Contract Appeals	4888
Miscellaneous Administrative Hearings	1760

6152 of these cases have been completed
7216 are in the process of trial
6635 new cases have been opened

FINANCIAL STATEMENT
OFFICE OF THE ATTORNEY GENERAL
FOR THE FISCAL YEAR BEGINNING JULY 1, 1984
AND ENDING JUNE 30, 1985

Appropriations and Budget Credits		
Program 001		4,836,146
Program 002		77,000
Program 004		341,267
Program 005		1,373,730
Program 006		552,716
Program 008		90,496
Program 009		1,072,819
Total	$	8,344,174

Total Appropriation		8,344,174
Less Reversion & Cancellation		209,817
Total Expenditures	$	8,134,357

Program 001

Legal Counsel & Advice

Appropriation		4,419,538
Budget Credits		416,608
Total Funds Available	$	4,836,146

Salaries	
Attorney General	62,329
Deputy Attorney General (3)	172,800
Exec Assoc Attorney General (4)	197,600
Principal Counsel (3)	133,167
Div Dir II Law Dept (3)	162,000
Asst Atty Gen VII Gen Cnsl (5)	205,643
Asst Atty Gen VI Gen Cnsl (14)	573,830
Asst Atty Gen V Gen Cnsl (14)	395,966
Asst Atty Gen IV Gen Cnsl (2)	40,896
Legal Assistant II (3)	55,429
Admin Officer II (3)	27,184
Admin Officer I (3)	68,903
Admin Spec II (1)	16,015
First Admin Asst State Law Dept (1)	25,482

Admin Aide II (3)	59,373
Admin Aide I (7)	121,716
Fiscal Administrator I (1)	31,860
Accountant Auditor IV	18,015
Fiscal Clerk III (1)	9,648
Personnel Specialist III (1)	23,655
Assoc Librarian II (1)	23,655
Services Specialist (1)	17,637
Steno Law & Legislative (14)	188,499
Office Secy III (2)	32,181
Office Secy II (3)	42,424
Office Clerk I (1)	10,332
Total Salaries	$ 2,716,239

Expenses (Exclusive of Salaries):	
Fringe Benefits	630,214
Technical and Special Fees	317,427
Communications	256,424
Travel	29,472
Motor Vehicle Operations	17,422
Contractual Services	208,625
Supplies	56,451
Equipment-Additional	41,507
Fixed Charges	562,365
Total Expenses	$ 2,119,907
Total Salaries	$ 2,716,239
Total Expenditures	$ 4,836,146
Total Funds Available	$ 4,836,146
Total General Fund Expenditures	$ 4,836,146

Program 002

Asbestos

Appropriation	77,000
Total Funds Available	$ 77,000

Salaries	
Assistant Attorney Gen VI (1)	10,691
	$ 10,691

Expenses (Exclusive of Salaries):		
Technical and Special Fees		18,487
Communications		1,981
Travel		4,057
Motor Vehicle Operations		212
Contractual Services		18,254
Supplies		885
Equipment-Additional		1,3947
Fixed Charges		8,486
Total Expenses	$	66,309
Total Salaries	$	10,691
Total Expenditures	$	77,000
Total Funds Available	$	77,000
Total General Fund Expenditures	$	77,000

Program 004

Securities Division

Appropriation		319,854
Budget Credits		21,413
Total Funds Available	$	341,267
Salaries		
Division Director II (2)		53,704
Assistant Attorney Gen VI Gen Cnsl (1)		48,000
Assistant Attorney Gen V Gen Cnsl (1)		44,126
Administrator II (1)		27,767
Admin Aide I (1)		15,715
Steno Law & Legislative (2)		27,698
Typist Clerk IV (1)		12,247
	$	229,257
Expenses (Exclusive of Salaries):		
Fringe Benefits		42,492
Technical and Special Fees		41,298
Communications		0
Travel		1,309
Motor Vehicle Operations		583
Contractual Services		14,712

Supplies		2825
Equipment-Additional		1,850
Fixed Charges		6,941
Total Expenses	$	112,010
Total Salaries	$	229,257
Total Expenditures	$	341,267

Original General Fund Appropriation		341,267
Total General Fund Expenditures	$	341,267

Program 005

Consumer Protection Division

Appropriation		1,195,220
Budget Credits		126,507
Total Funds Available	$	1,321,727

Special Funds		
Budget Credits		52,003
Total Funds Available	$	1,373,730

Salaries	
Exec Assoc Attorney General (1)	49,400
Asst Atty Gen VII Gen Cnsl (1)	43,347
Asst Atty Gen VI Gen Cnsl (2)	97,352
Asst Atty Gen V Gen Cnsl (2)	66,018
Admin Officer III (1)	29,568
Admin Officer II (1)	27,453
Admin Officer I (1)	24,983
Admin Spec II (3)	45,424
Admin Spec I (1)	37,175
Chief Investigator Consumer Protection (1)	24,739
Admin Aide I (1)	9,554
Public Affairs Officer (1)	29,568
Consumer Affairs Supervisor (3)	65,889
Consumer Affairs Specialist III (5)	74,300
Consumer Affairs Specialist II (3)	94,815
Services Supervisor III (1)	21,963
Steno Law & Legislative (4)	64,241
Office Secy III Steno (1)	16,493
Office Secy III (1)	7,560
Data Proc Oper Tech II (1)	16,170

Office Clerk II (1)		3,707
Total	$	849,719

Expenses (Exclusive of Salaries):		
Fringe Benefits		185,277
Technical and Special Fees		104,723
Communications		1,985
Travel		9,415
Motor Vehicle Operations		13,379
Contractual Services		104,739
Supplies		13,793
Equipment-Additional		4,311
Grants & Subsidies		13,123
Fixed Charges		23,390
Total Expenses	$	474,135
Total Salaries	$	849,719
Total Expenditures	$	1,323,854

Total General Fund Available	$	1,321,727
Total General Fund Expenditures	$	1,321,727
Total Special Funds Available	$	52,003
Less Cancellation		49,876
Total Special Fund Expenditures	$	2,127
Total Expenditures	$	1,323,854

Program 006

Antitrust

Appropriation		519,006
Budget Credits		33,710
Total Funds Available	$	552,716

Salaries	
Div Dir II Law Dept	48,000
Asst Atty Gen VI Gen Cnsl (2)	7,9807
Asst Atty Gen V Gen Cnsl (2)	65,000
Asst Atty Gen IV Gen Cnsl (2)	60,000
Admin Officer II (1)	10,013
Legal Assistant II (1)	2,858
Accountant Auditor III (1)	16,264
Admin Aide I (1)	17,521

Steno Law & Legislative (2)		23,309
Office Clerk II (1)		4,258
Total	$	327,030

Expenses (Exclusive of Salaries):		
Fringe Benefits		50,543
Technical and Special Fees		43,221
Communications		26
Travel		8,159
Motor Vehicle Operations		817
Contractual Services		110,571
Supplies		3,489
Equipment-Additional		4,060
Fixed Charges		4,800
Total Expenses	$	225,686
Total Salaries	$	327,030
Total Expenditures	$	552,716

Total General Funds Available	$	552,716
Total General Fund Expenditures	$	552,716

Program 008

State's Attorneys' Coordinator

Appropriation		86,235
Budget Credits		4,261
Total Funds Available	$	90,496

Salaries		
State's Attorneys' Coordinator		38,700
Steno Law & Legislative		15,400
	$	54,100

Expenses (Exclusive of Salaries):		
Fringe Benefits		9,112
Technical and Special Fees		8,106
Communications		4,031
Travel		3,369
Motor Vehicle Operations		
Contractual Services		8,061
Supplies		2,439

Equipment-Additional	437
Fixed Charges	841
Total Expenses	$ 36,396
Total Salaries	$ 54,100
Total Expenditures	$ 90,496

Total Funds Available	$ 90,496
Total General Fund Expenditures	$ 90,496

Program 009

Medicaid Fraud Control Unit

Appropriation	238,800
Budget Credits	20,505
Total General Funds Available	$ 259,305
Federal Appropriation	813,514
Total Funds Available	$ 1,072,819

Salaries	
Div Dir I Law Dept (1)	40,900
Principal Counsel (1)	47,000
Asst Atty Gen VII Gen Cnsl (1)	26,703
Asst Atty Gen VI Gen Cnsl (2)	49,516
Asst Atty Gen V Gen Cnsl (2)	62,788
Fiscal Administrator II (1)	32,330
Fiscal Administrator I (1)	30,931
Fiscal Specialist III (3)	43,899
Chf Investigtr Medicaid Fraud (1)	34,100
Medicaid Fraud Investigator III (1)	25,482
Medicaid Fraud Investigator II (4)	93,929
Admin Spec III (1)	23,655
Admin Aide I (1)	17,637
Steno Law & Legislative (3)	45,661
Office Assistant III (1)	10,524
	$ 585,055

Expenses (Exclusive of Salaries):	
Fringe Benefits	126,959
Technical and Special Fees	16,023
Communications	17,520
Travel	8,732

Motor Vehicle Operations		8,751
Contractual Services		18,266
Supplies		9,462
Equipment-Additional		8,071
Grants, Subsidies		54,951
Fixed Charges		59,087
Total Expenses	$	327,822
Total Salaries	$	585,055
Total Expenditures	$	912,877

Total General Funds Available	$	259,305
Less General Fund Reversion		38,456
Total General Fund Expenditure	$	220,849
Total Federal Funds Available	$	813,514
Less Federal Fund Cancellation		121,486
Total Federal Fund Expenditure	$	692,028
Total Expenditures	$	912,877

OFFICIAL OPINIONS

of the

ATTORNEY GENERAL

of

MARYLAND

OPINIONS PUBLISHED IN FULL

See also page 227 for Synopses of additional Opinions

ABORTIONS

State Regulation—Effect of Recent Supreme Court Decisions on Requirements Concerning Parental Notification, Hospitalization, Recordkeeping, and Informed Consent.

December 31, 1985

The Honorable Adele Wilzack
Secretary, Department of Health and Mental Hygiene

In three cases decided in 1983, the Supreme Court considered the validity of various state and local statutes regulating the performance of abortions. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft*, 462 U.S. 476 (1983); and *Simopoulos v. Virginia*, 462 U.S. 506 (1983). You have requested our opinion concerning the impact of those decisions on similar provisions of the Health-General Article ("HG" Article) and the Health Occupations Article ("HO" Article).[1]

For the reasons stated below, it is our opinion that HG §20-103, which requires parental notification before an abortion may be performed on an unmarried minor; and HG §20-208, HG §20-210, and HO §14-504(24), which restrict performance of all abortions to hospitals, are unconstitutional. HG §§4-204, 4-205, 4-213, 4-217, and 4-222, and COMAR 10.03.01.07 are also unconstitutional, to the extent that they permit public disclosure of the information contained in the records and reports of abortions. However, the recordkeeping requirements of those provisions, in themselves, are constitutional. HG §20-211, which mandates disclosure of information on agencies

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[1]Two additional abortion cases are presently before the Supreme Court: *Diamond v. Charles*, No. 84-1379, *prob. juris. noted*, 105 S.Ct. 2356 (1985); and *Thornburgh v. American College of Obstetricians & Gynecologists*, No. 84-495, *question of juris. postponed*, 105 S.Ct. 2015 (1985). In both of these cases, federal courts of appeal held state statutes regulating abortions to be unconstitutional, relying on the three Supreme Court cases about which you have inquired. *See Charles v. Carey*, 627 F.2d 772 (7th Cir. 1980), *after remand*, *Charles v. Daley*, 749 F.2d 452 (7th Cir. 1984); *American College of Obstetricians & Gynecologists v. Thornburgh*, 737 F.2d 283 (3d Cir. 1984).

offering financial and other assistance to a woman who carries her pregnancy to normal delivery, is also constitutional.[2]

Accordingly, this opinion confirms the advice previously given to your department. *See* Letter from Jack Schwartz, Assistant Counsel for Opinions and Advice, to Deborah Lewis-Idema, Assistant Secretary for Health Regulatory Services (September 17, 1984).

I

Background

A. *The 1983 Decisions*

In *Akron*, the Supreme Court invalidated in its entirety a city ordinance requiring, among other things: (i) that all abortions after the first trimester of pregnancy be performed in a hospital; (ii) that the consent of parents or a guardian be obtained before an abortion could be performed on an unmarried minor; and (iii) that the attending physician disclose specified information to the patient before performing an abortion.[3]

In *Ashcroft*, the Supreme Court invalidated a Missouri statute requiring that abortions after 12 weeks of pregnancy be performed in a licensed hospital. However, the Court upheld a provision that

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[2]Certain other provisions relating to abortions are outside the scope of this opinion: HG §4-215 concerns burial-transit permits required of morticians for final disposition or removal of a body or fetus. HG §§20-201 through 20-206 deal with abortion referral services. Because the Supreme Court did not have comparable provisions before it in *Akron*, *Ashcroft*, or *Simopoulos*, its decisions in those cases have no direct bearing on any of these provisions. Consequently, we will not discuss these sections in this opinion.

You also inquired whether these decisions have any impact on previous opinions of this office concerning Medicaid funding for abortions. We believe they do not. In *Maher v. Roe*, 432 U.S. 464 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980), the Supreme Court upheld the right of governments to implement a policy favoring childbirth over abortion by providing funding for the former while refusing to fund the latter. The Court reafirmed those holdings in *Akron*. 462 U.S. at 444 n. 33.

[3]The ordinance also included provisions imposing a 24-hour waiting period between a woman's consent to an abortion and performance of the abortion and requiring that fetal remains be disposed of in a "humane and sanitary" manner. The Court also held these provisions to be unconstitutional, finding that no "legitimate state interest is furthered by an arbitrary and inflexible waiting period" and that the disposal provision was impermissibly vague. 462 U.S. at 450-52. Maryland law, however, has no similar provisions.

required a pathology report for each abortion performed and another that required minors to secure parental *or* judicial consent for an abortion.[4]

Finally, in *Simopoulos*, the Supreme Court affirmed the criminal conviction of a doctor who had been prosecuted for performing a second-trimester abortion in his office, in violation of a statute requiring hospitalization.

In deciding these three cases, the Supreme Court looked to the guidelines and analytical framework established in the landmark decisions of *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), as well as to the legal principles enunciated in the Court's subsequent decisions concerning abortion.[5] Since the *Wade* and *Bolton* decisions, "the Court repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy." *Akron*, 462 U.S. at 420 n. 1. At the same time, the Court has also consistently recognized two separate concerns—protecting public health and preserving potential life—compelling enough, under certain circumstances, to warrant state regulation of abortions.

B. *State Regulation of Abortion: Governing Principles*

A state has a legitimate interest in protecting the health of pregnant women and in maintaining medical standards. However, that interest becomes compelling only after the end of the first trimester of pregnancy. *Roe v. Wade*, 410 U.S. at 163. Before that time, the relative simplicity and safety of abortion procedures require that a state permit the pregnant woman to decide—in unfettered consul-

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[4]The Court also upheld the validity of a statute requiring the attendance of a second physician during an abortion performed after viability. Under the statute—which permitted an abortion after viability only if necessary to preserve the life or health of the woman—the second physician was charged with giving medical care to the fetus. The Court concluded that the statute was a legitimate protection of the compelling state interest in the life of a viable fetus enunciated in *Roe v. Wade*, 410 U.S. 113, 164-65 (1973). *Ashcroft*, 462 U.S. at 486.

[5]Those cases include *H.L. Matheson*, 450 U.S. 398 (1981); *Harris v. McRae*, 448 U.S. 297 (1980); *Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Poelker v. Doe*, 432 U.S. 519 (1977) (per curiam); *Maher v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438 (1977); *Bellotti v. Baird*, 428 U.S. 132 (1976) (*Bellotti I*); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Connecticut v. Menillo*, 423 U.S. 9 (1975) (per curiam).

tation with her doctor—whether or not to have an abortion and, also, to effectuate that decision "free of interference by the State." *Roe v. Wade*, 410 U.S. at 163.[6]

Thus, for example, in *Doe v. Bolton*, 410 U.S. 179 (1973), the Supreme Court invalidated a Georgia statute that required (i) that the performance of each abortion be sanctioned by the abortion committee of the hospital where it was to be performed and (ii) that two doctors concur in the attending physician's judgment as to the necessity for the abortion. 410 U.S. at 183-84. These requirements, the Court held, substantially impaired the woman's right to receive medical care according to her physician's best medical judgment, intruded upon the physician-patient relationship, and infringed upon the physician's protected right to practice. 410 U.S. at 197, 199.

From the outset of the second trimester, the state may regulate the abortion procedure in any way that "reasonably relates to the preservation and protection of maternal health." *Wade*, 410 U.S. at 163.[7] Nonetheless, those regulations may not depart from accepted medical practice. *Akron*, 462 U.S. at 431. The restrictions adopted as health standards must be legitimately and directly related to the health objective. Moreover, they must not be overbroad or unreasonably burdensome upon a woman's access to an abortion, since during this period the state may not seek to "directly restric[t] a woman's decision whether or not to terminate her pregnancy." *Colautti v. Franklin*, 439 U.S. 379, 386 (1979).

In *Doe v. Bolton*, for example, the Court invalidated Georgia's requirement that all abortions be performed in hospitals licensed by the state and accredited by the Joint Commission on Accreditation of Hospitals. The Court found that the provision was not based upon differences reasonably related to the statute's purpose. No other type of surgery, the Court noted, was limited to similarly accredited hospitals, and the provision had no particularized concern

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[6]Because abortion is a medical procedure requiring the advice and assistance of competent, trained medical personnel, a woman cannot exercise her fundamental right alone. For this reason, states must give the physician room to exercise sound medical judgment in assisting the woman to make and implement her decision. *See Akron*, 462 U.S. at 427; *Colautti v. Franklin*, 439 U.S. 379, 397 (1979); *Doe v. Bolton*, 410 U.S. 179, 192 (1973).

[7]The Court provided examples of regulations it considered permissible during the second trimester, including requirements as to the qualifications of the person performing the abortion, the licensing of the facility in which the abortion would be performed, and the nature of the facility in which the procedure would take place. 410 U.S. at 163.

with abortion as a medical procedure. 410 U.S. at 193-94. Further, the hospitalization requirement applied to abortions performed during the first trimester. 410 U.S. at 195. Accordingly, the Court held that provision to be unconstitutional.

A state also has a legitimate interest in protecting the potentiality of human life. *Roe v. Wade*, 410 U.S. at 162. This interest becomes compelling only at "viability," when the attending physician—"on the particular facts of the case before him"—concludes that there is a reasonable likelihood of the fetus's "sustained survival" and meaningful "life outside the womb." *Colautti*, 439 U.S. at 387-88; *Roe v. Wade*, 410 U.S. at 163.[8]

Thus, after viability, states may regulate abortions even to the point of proscribing them altogether, "except where necessary to preserve the life or health of the mother." *Roe v. Wade*, 410 U.S. at 163-64.[9] Nonetheless, the Court has carefully examined statutes that impose special duties or criminal sanctions on the physician after "viability." Such laws must not be impermissibly vague or overbroad, interfere with the doctor-patient relationship, or have a chilling effect on the woman's exercise of her constitutional right. *See, e.g., Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 82-83 (1976) (overbreadth); *Colautti*, 439 U.S. at 389-400 (vagueness, chilling effect, overbreadth).

II

Analysis of the Maryland Statutes

With these principles in mind, we turn to the relevant provisions of Maryland law.

A. *Parental Notification*

1. *Maryland Statute*

HG §20-103 provides as follows:

"(a) Except as provided in subsections (b) and (c) of this

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[8]In *Roe v. Wade*, the Court observed that most physicians placed viability at about seven months, though some considered it possible as early as six months, the end of the second trimester. 410 U.S. at 160.

[9]"Serious ethical and constitutional difficulties" are presented, however, if such measures do not clearly prevent the doctor from "trad[ing] off" the health of the woman for that of the fetus. *Colautti*, 439 U.S. at 400. *See also Ashcroft*, 462 U.S. at 485 n. 8 (plurality); 462 U.S. at 501 (dissent).

section, a physician may not perform an abortion on an unmarried minor unless the physician first gives notice to a parent or guardian of the minor.

(b) The physician may perform the abortion without notice to a parent or guardian if:

(1) The minor does not live with a parent or guardian; and

(2) A reasonable effort to give notice to a parent or guardian is unsuccessful.

(c) (1) The physician may perform the abortion, without notice to a parent or guardian of a minor if, in the professional judgment of the physician, notice to the parent or guardian may lead to physical or emotional abuse of the minor.

(2) The physician is not liable for civil damages or subject to a criminal penalty for a decision under this subsection not to give notice.

(d) The postal receipt that shows an article of mail was sent by certified mail, return receipt requested, bearing a postmark from the United States Postal Service, to the last known address of a parent or guardian and that is attached to a copy of the notice letter that was sent in that article of mail shall be conclusive evidence of notice or a reasonable effort to give notice, as the case may be."

2. *Supreme Court Decisions*

The Supreme Court first addressed statutory parental notification or consent requirements in *Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*).[10] In that case, the Court held unconstitutional a Massachusetts statute providing that an unmarried minor woman could receive an abortion only by obtaining either parental consent or judicial authorization.

The statute required a court to authorize an abortion if it found

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[10] In *Bellotti I*, the Supreme Court vacated a three-judge District Court's judgment holding the notification requirement unconstitutional. The Supreme Court found that the statute could be construed in a way that "would avoid or substantially modify the federal constitutional challenge". *Bellotti v. Baird*, 428 U.S. 132, 148 (1976) (*Bellotti I*). Therefore, the Court held, the District Court should have abstained and certified the question of the statute's meaning to the state court. 428 U.S. at 151.

that the abortion would serve the minor's best interests. At the same time, it also permitted the court to deny authorization if the court determined that an abortion would not serve the minor's best interest—even if the court had found that the minor had made or was capable of making an informed decision to have an abortion. 443 U.S. at 630. Moreover, unless the need for an abortion constituted an emergency, a minor could not seek judicial authorization without first seeking parental approval. *Id.* And the minor's parents, if available, were to be notified of the court proceedings in all cases. *Id.*

The plurality concluded that the statute was unconstitutional for two reasons:

> "First, it permits judicial authorization for an abortion to be withheld from a minor who is found by the superior court to be mature and fully competent to make this decision independently. Second, it requires parental consultation or notification in every instance, without affording the pregnant minor an opportunity to receive an independent judicial determination that she is mature enough to consent or that an abortion would be in her best interests." 443 U.S. at 651 (footnotes omitted).

The opinion in *Bellotti II* thus suggested that a state may not require *either* parental consent *or* parental notification as a prerequisite to a minor's abortion. Subsequently, the Court addressed the issue of parental notification directly, in *H. L. v. Matheson*, 450 U.S. 398 (1981).

The Utah statute at issue in that case required the physician to "[n]otify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor[,] or the husband of the woman, if she is married". 450 U.S. at 400. The minor plaintiff in *Matheson* resided with and was dependent on her parents, was not emancipated by marriage or otherwise, and had made no claim or showing as to her maturity or her relationship with her parents.[11] The Court held that under those circumstances

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[11]Minors are classified in three ways. Emancipated minors are married women under the age of 18 or minors who do not live with their parents and who are financially independent of their parents. Mature minors are those who, although dependent on their parents, are deemed capable of making an informed decision regarding abortion. Immature minors are those who are dependent upon their parents and are not deemed capable of making an informed decision regarding abortion. *See H. L. v. Matheson,* 450 U.S. at 407-08.

only the statute's application was not unconstitutional. 450 U.S. at 413. Indeed, two members of the majority, in a separate concurrence, emphasized that the Court did not decide "whether [the statute] unconstitutionally burdens the right of a mature minor or a minor whose best interests would not be served by parental notification." 450 U.S. at 414 (Powell, J., concurring, joined by Stewart J.).

The question whether a notice requirement would be constitutional as applied to emancipated or mature minors, which was left open in *Matheson*, has now apparently been settled by *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983). The ordinance at issue in *Akron* required a physician to notify the parents of an unmarried minor of her intent to seek an abortion unless the abortion had been ordered by a court having jurisdiction over the minor. 462 U.S. at 422 n. 4. The Supreme Court noted that a state's interest in encouraging parental involvement in a minor's decision to have an abortion "must give way to the constitutional right of a mature minor or of an immature minor whose best interests are contrary to parental involvement". 462 U.S. at 428-29 n. 10. Thus, a procedure whereby parents would be notified when any minor filed a petition seeking court approval of an abortion is unconstitutional as applied to a mature minor or one whose best interests the procedure violates. 462 U.S. at 441, n. 31.

The statute at issue in *Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft*, 462 U.S. 476 (1983), in contrast, permitted a pregnant minor to seek judicial authorization of an abortion without notice to her parents or guardians. 462 U.S. at 479-80 n. 4. Moreover, the statute authorized a court to deny such a petition only if it found that the minor was not mature enough to make the abortion decision herself and that an abortion would not be in her best interests. 462 U.S. at 492. On that basis, the Supreme Court concluded that the statute "avoids any constitutional infirmities." *Id.*

From these decisions it is clear that, in general, notification statutes applicable equally to mature and immature minors are unconstitutional. Further, states must provide alternative procedures in connection with either consent or notification statutes, for a state may not give a parent absolute veto power over the decision of a pregnant minor to have an abortion. *Bellotti II*, 443 U.S. at 649-50. Thus, an unemancipated minor must be permitted to demonstrate to an independent decisionmaker that "she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests". *Akron*, 462 U.S. at 439-40. *See also Ashcroft*, 462 U.S. at 493; *Bellotti II*, 443

U.S. at 650. This alternative is particularly important because "there are few [other] situations in which denying a minor the right to make an important decision will have consequences so grave and indelible." *Bellotti II*, 443 U.S. at 642.

The plurality opinion in *Bellotti II* described a judicial authorization alternative that would satisfy constitutional requirements:

> "[E]very minor must have the opportunity—if she so desires—to go directly to a court without first consulting or notifying her parents. If she satisfies the court that she is mature and well-informed enough to make intelligently the abortion decision on her own, the court must authorize her to act without parental consultation or consent. If she fails to satisfy the court that she is competent to make this decision independently, she must be permitted to show that an abortion nevertheless would be in her best interests. If the court is persuaded that it is, the court must authorize the abortion. If, however, the court is not persuaded by the minor that she is mature or that the abortion would be in her best interests, it may decline to sanction the operation." *Id.* at 647-48.[12]

Moreover, the Court stated:

> "The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained. In sum, the procedure must ensure that the provision requiring parental consent does not in fact amount to the 'absolute, and possibly arbitrary, veto' that was found impermissible in [*Planned Parenthood v. Danforth*, 428 U.S. 52 (1976)]." 443 U.S. at 644.

Lower federal courts have indicated that the alternative approval procedure must include provisions for (i) proceeding *pro se* or by court-appointed counsel, (ii) an indigency waiver of the filing fee

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[12]The plurality also noted that, while this parental bypass procedure must be assigned to an independent decisionmaker, a nonjudicial alternative such as an administrative agency or officer might be preferable to a court. 443 U.S. at 643 n. 22. *See also Ashcroft*, 462 U.S. at 492 n. 20. Arguably, it would be permissible to delegate the maturity determination to the minor's physician. *See Indiana Planned Parenthood Affiliates Association, Inc. v. Pearson*, 716 F.2d 1127, 1134 (7th Cir. 1983) (noting that Indiana delegated emancipation determination to physician, but holding that delegation of maturity determination to physician is not required by Constitution).

and other court costs, (iii) immediate access to the independent decisionmaker at all times, (iv) a simplified petition form, (v) an expedited confidential appeal available to the minor should the lower court rule against her, and (vi) confidentiality of the record. *See, e.g., Indiana Planned Parenthood Affiliates Association, Inc. v. Pearson*, 716 F.2d 1127, 1138-39 (7th Cir. 1983); *Planned Parenthood League of Mass. v. Bellotti*, 641 F.2d 1006. 1008, 1011 and n. 8 (1st Cir. 1981).

3. *Analysis of Maryland Statute*

HG §20-103 provides that a physician *must* give notice to the parents or guardian of a minor prior to performing an abortion unless (i) the minor does not live with the parent or guardian and an attempt to give notice has been unsuccessful or (ii) the physician determines that notice may lead to physical or emotional abuse of the minor. Thus, it requires notification of the parents of emancipated or mature, as well as unemancipated and immature, minors. *See Akron*, 462 U.S. at 441 n. 31. In addition, it offers no alternative procedure whereby an unemancipated minor may demonstrate that she is mature enough to make an informed decision without parental involvement or that, although immature, notification would not be in her best interests. *See Bellotti II*, 443 U.S. at 651. Under HG §20-103(b) and (c), neither the minor's maturity nor her best interest necessarily would permit waiving parental notification.

To be sure, the fact that a minor does not live with a parent or legal guardian might evidence her maturity, and a likelihood of abuse would certainly indicate that notification would not be in her best interests. However, the statute fails to provide a mechanism for waiving notification under any other, equally justifiable circumstances. Consequently, we conclude that HG §20-103 is unconstitutional.[13]

B. *Licensed Hospital Requirement*

1. *Maryland Statute*

HG §20-208 provides in pertinent part:

"(a) No person shall terminate or attempt to terminate or

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[13]Maryland law does not contain a parental consent requirement. In fact, HG §20-102 provides that a minor has the same capacity as an adult to consent to medical treatment for or advice about pregnancy. *See In re Smith*, 16 Md. App. 209, 224-25, 226 (1972). The constitutionality of this statute is unquestionable.

assist in the termination or attempt at termination of a human pregnancy otherwise than by birth, except that a physician licensed by the State of Maryland may terminate a human pregnancy or aid or assist or attempt a termination of a human pregnancy if said termination takes place in a hospital accredited by the Joint Commission for Accreditation of Hospitals and licensed by the State Board of Health and Mental Hygiene. . . .

. . .

(b) In no event shall any physician terminate or attempt to terminate or assist in the termination or attempt at termination of a human pregnancy otherwise than by birth unless all of the following conditions exist:

. . .

(2) Authorization therefor has been granted in writing by a hospital abortion review authority appointed by the hospital."

HG §20-210 provides:

"(a) A person is guilty of a misdemeanor if he

(1) Sells or gives, or causes to be sold or given, any drug, medicine, preparation, instrument, or device for the purpose of causing, inducing, or obtaining a termination of human pregnancy other than by a licensed physician in a hospital accredited by the Joint Commission for Accreditation of Hospitals and licensed by the State Board of Health and Mental Hygiene; or

(2) Gives advice, counsel, or information for the purpose of causing, inducing, or obtaining a termination of human pregnancy other than by such physician in such a hospital; or

(3) Knowingly assists or causes by any means whatsoever the obtaining or performing of a termination of human pregnancy other than by such physician in such a hospital.

(b) Any person who violates any provision of this section, upon conviction, is subject to a fine of not more than five thousand dollars for each offense, or to imprisonment for not more than three years, or both such fine and imprisonment. The penalties in this section are in addition to and not in substitution for any other penalty or penalties applicable to particular classes of persons under other laws of this State."

Finally, HO §14-504(24) makes it a disciplinary offense for a physician to "perfor[m] an abortion outside a licensed hospital". Under HG §19-301(f), a "hospital" is defined as an institution that:

> "(1) Has a group of at least 5 physicians who are organized as a medical staff for the institution;
>
> (2) Maintains facilities to provide, under the supervision of the medical staff, diagnostic and treatment services for 2 or more unrelated individuals; and
>
> (3) Admits or retains the individuals for overnight care."

2. *Supreme Court Decisions*

In *Akron* and *Ashcroft* the Supreme Court held unconstitutional statutory provisions that required all abortions subsequent to the first trimester to be performed in "hospitals," defined as excluding ambulatory or outpatient facilities. *Akron*, 462 U.S. at 438-39; *Ashcroft*, 462 U.S. at 481-82 n. 6.[14]

The Court found that such a requirement "places a significant obstacle in the path of women seeking an abortion. *Akron*, 462 U.S. at 438. The hospitalization requirement substantially increases the cost of an abortion and might, by requiring a woman to travel to a facility, impose additional health risk. 462 U.S. at 438. Nor can a hospitalization requirement for all second trimester abortions be justified as a reasonable health regulation, because abortions may be performed as safely in an outpatient clinic as in a full-service hospital well into the second trimester. 462 U.S. at 436. Thus, the requirement "'has the effect of inhibiting . . . the vast majority of abortions after the first 12 weeks . . . and therefore unreasonably infringes upon a woman's constitutional right to obtain an abortion.'" 462 U.S. at 438-39 (quoting *Planned Parenthood v. Danforth*, 428 U.S. 52, 79 (1976)).

The companion decision in *Simopoulos* upheld a Virginia statute restricting the performance of second trimester abortions to "hos-

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[14]The ordinance at issue in *Akron* defined "hospital" as "a general hospital or special hospital devoted to gynecology or obstetrics which is accredited by the Joint Commission on Accreditation of Hospitals or by the American Osteopathic Association." 462 U.S. at 432. Because the statute at issue in *Ashcroft* did not define the term "hospital," the Court assumed that the term had "its common meaning of a general, acute care facility" other than a ambulatory facility. *Ashcroft*, 462 U.S. at 481-82 n. 6.

pital[s] licensed by the State Department of Health." 462 U.S. at 505. The Supreme Court of Virginia had construed the statute to incorporate a definition of "hospital" contained in the state's general health laws—a definition that included out-patient facilities. *Id.* Thus, the Virginia statute, in clear contrast to those at issue in *Akron* and *Ashcroft*, did not require that all second trimester abortions be performed in full-service hospitals. 462 U.S. at 516. On that basis, the Court concluded that the requirement was "not an unreasonable means of furthering the State's compelling interest in 'protecting the woman's own health and safety.'" 462 U.S. at 519 (quoting *Roe v. Wade*, 410 U.S. at 150).

3. *Analysis of Maryland Statute*

It is clear that the Maryland hospitalization requirement embodied in HG §§20-208 and 20-210 and the sanction for its violation in HO §14-504(24) are effectively identical to the provisions invalidated in *Akron* and *Ashcroft*.[15] Under the Maryland statute, every abortion must be performed in a full-service hospital. In our view, this requirement is unconstitutional insofar as it applies to abortions performed during the first and second trimesters.[16]

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[15] Indeed, because HG §§20-208 and 20-210 require hospitalization for first-trimester abortions, they are invalid under the much earlier holding in *Doe v. Bolton*. *See* 410 U.S. at 193-95.

[16] These Supreme Court decisions thus confirm prior holdings of the Maryland Court of Special Appeals and the federal courts in this district, as well as an earlier opinion of this Office, that the provisions of Maryland law requiring performance of abortions exclusively in hospitals accredited by the Joint Commission on Accreditation of Hospitals and licensed by the State are unconstitutional. *See Vuitch v. Hardy*, Civ. No. 71-1129-Y (D. Md. June 22, 1972), *aff'd per curiam*, 473 F.2d 1370 (4th Cir. 1973); *State v. Ingel*, 18 Md. App. 514 (1973); 62 *Opinions of the Attorney General* 3, 4 (1977). *See also Coleman v. Coleman*, 57 Md. App. 755 (1984).

This Office has also pointed out in the past that HG §20-208(a)(1), (2), (3), and (4), which limits abortions to situations where one or more of the enumerated conditions exist; HG §20-208(b)(1), which prohibits abortions after 26 weeks' gestation in virtually all cases; and HG §20-208(b)(2), which requires authorization of abortions by a hospital abortion review committee, are all unconstitutional. 62 *Opinions of the Attorney General* 3, 7-9 (1977). We continue to believe that these provisions are unconstitutional, for the reasons stated in that opinion. *See also* Revisor's Note to HO §14-504.

C. *Recordkeeping and Reporting*

1. *Maryland Statutes*

Under HG §4-213, a mortician or "the attending individual" must file with the Department of Health and Mental Hygiene a "fetal death certificate," giving personal information and certifying the cause of death, whenever a "fetal death" occurs after a gestation period of 20 weeks. The Secretary of Health and Mental Hygiene must send a copy of each fetal death certificate to the appropriate county registrar, who must preserve it for three years. HG §§4-204, 4-205.

The county records are open to inspection by the Secretary or the Secretary's designee and "an official of a municipal corporation or county." HG §4-205. Copies of fetal death certificates are also available to surviving relatives or their authorized representatives. HG §4-217; COMAR 10.03.01.07. The Hall of Records Commission is entitled to a copy of every death certificate and may make the personal information contained in it available to researchers at the Hall of Records. HG §4-222.

In HG §4-101(e), "fetal death" is defined as the "death of a product of human conception, before its complete expulsion or extraction from the mother, regardless of the duration of the pregnancy." Thus, a "fetal death" includes an abortion. 55 *Opinions of the Attorney General* 122, 167 (1970).

2. *Supreme Court Decisions*

In *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52 (1976), the Supreme Court upheld a statute requiring health facilities and physicians to keep records of all abortions, regardless of the state of pregnancy at which performed, and to maintain the records in the health facility's files for seven years. 428 U.S. at 79. The Court found that "[r]ecordkeeping of this kind, if not abused or overdone, can be useful to the State's interest in protecting the health of its female citizens, and may be a resource that is relevant to decisions involving medical experience and judgment." 428 U.S. at 81.[17] Because the statute expressly required that the records be

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[17]The Court also cautioned that recordkeeping provisions must not be "utilized in such a way as to accomplish, through the sheer burden of recordkeeping detail, what we have held to be an otherwise unconstitutional restriction." 428 U.S. at 81.

kept confidential and required their retention for only a limited time, the Court concluded that it did not have significant impact on the abortion decision or the physician-patient relationship. *Id.* The Court noted that, in general, "[r]ecordkeeping and reporting requirements that are reasonably directed to the preservation of maternal health and that *properly respect a patient's confidentiality and privacy* are permissible." 428 U.S. at 80 (emphasis added).

In *Ashcroft*, the Court reaffirmed the need for confidentiality. In that opinion, the Court noted that the pathology reports required by the statute at issue were extended "the identical safeguards found reassuring in *Danforth*." 462 U.S. at 490 n. 14.

3. *Analysis of Maryland Statutes*

Maryland's reporting requirement applies to all abortions, without regard to the stage of pregnancy at which they are performed. Insofar as the requirement applies during the first or second trimester, *Danforth* and *Ashcroft* clearly establish that it is constitutional only if it (i) has no significant impact on the woman's exercise of her right to choose between abortion and childbirth, (ii) is reasonably related to the preservation of maternal health, (iii) is consistent with generally accepted medical standards, and (iv) protects the woman's privacy. *Ashcroft*, 462 U.S. at 486-90; *Danforth*, 428 U.S. at 80-81. *Accord Akron*, 462 U.S. at 430.

During the third trimester, the State's interest in the potentiality of human life is certainly compelling enough to support the recordkeeping requirement itself, for then the State's interest would support even a prohibition of any abortion not necessary to preserve the woman's life or health. *Roe v. Wade*, 410 U.S. at 163. However, during that stage also, any recordkeeping requirement must maintain confidentiality to protect the woman's fundamental right of privacy. *See Roe v. Wade*, 410 U.S. at 152-53.

On this basis, we believe that HG §§4-204, 4-205, 4-213, 4-217, and 4-222 and COMAR 10.03.01.07 are unconstitutional, to the extent that they permit public disclosure of fetal death certificates. Recordkeeping and reporting requirements are permissible only to the extent that they "properly respect a patient's confidentiality and privacy." *Danforth*, 428 U.S. at 79. As noted, fetal death records are available to surviving relatives and their authorized representatives, to unspecified public officials, and to researchers at the Hall of Records. Unlike the recordkeeping requirements approved in *Danforth* and *Ashcroft*, this State's law and regulations afford no safeguards of confidentiality or protection of the woman's privacy. While those decisions clearly establish the State's authority to require that the records of abortions be kept, in our view they also establish that the records must be kept confidential.[18]

D. *Informed Consent*

1. *Maryland Statute*

HG §20-211 provides that:

"(a) This section does not apply if the attending physician certifies that an abortion is necessary to save the life of the woman.

(b) Before a physician performs an abortion, the woman undergoing the procedure shall be advised of the extent to which:

(1) Financial and other material assistance to carry the pregnancy to a normal delivery is available;

(2) Financial and other material assistance to raise and support her child is available; and

(3) Assistance from a licensed and regulated adoption agency is available if she chooses not to keep the baby.

(c) In cooperation with the Department of Health and Mental Hygiene, the Department of Human Resources shall prepare annually, periodically update, and publish a list of federal, State, and private sources of the types and extent of assistance referred to in subsection (b) of this section, and shall distribute this published information to each hospital, clinic, physician's office, and other facility where an abortion is performed.

(d) The signed document, of a woman who seeks an abortion, indicating that she has been counseled concerning the published information referred to in subsection (c) of this section is evidence that the requisite information was given to the woman. The signed document shall become part of the medical record.

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[18]HG §20-208(b) and (c) provide that a hospital review authority at each hospital approve all abortions, require the review authority to maintain written records of all requests for abortion authorization and its decisions, and direct the review authorities to make annual reports. As noted above, these provisions also are unconstitutional. *See* notes 15 and 16 above and accompanying text.

(e) A person who willfully violates any provision of subsection (b) of this section is guilty of a misdemeanor and on conviction is subject to a fine of not more than $500."[19]

2. *Supreme Court Decisions*

In *Akron*, the Supreme Court declared unconstitutional a statute requiring that, before an abortion, the woman be "orally informed by her attending physician" of the number of weeks of the pregnancy; the stage of development of the fetus; the date of possible viability; the physical and emotional complications that may result from an abortion; the availability of other agencies to give assistance and advice on birth control, adoption, and childbirth; and the particular risks associated with her pregnancy and the abortion technique to be employed. 462 U.S. at 423 n. 5. The Court acknowledged that a state may require written consent to an abortion to ensure that the woman has been fully informed concerning the procedure and its consequences. *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 67 (1976). However, the Court cautioned in *Akron* that a state does not have "unreviewable authority to decide what information a woman *must* be given." *Akron*, 462 U.S. at 443.

Statutes or regulations that are designed to influence a woman's choice between abortion or childbirth or that interfere with the discretionary judgment of her physician will not be upheld. 462 U.S. at 445. The Court concluded that the lengthy and inflexible list of information required by the Akron ordinance—including a "parade of horribles" concerning the possible physical and psychological complications of abortion—were "designed not to inform the woman's consent but rather to persuade her to withhold it altogether." *Id.* In addition, the statute intruded upon the physician's exercise of medical judgment as to the information relevant to a particular patient. *Id.*

The Court included within its holding a section of the ordinance requiring the physician to inform the patient of assistance available to her during pregnancy and after childbirth if she chose not to have an abortion. The Court noted that "[t]his information, to the extent it is accurate, certainly is not objectionable, and probably is routinely made available to the patient". However, the Court con-

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[19]HG §20-209, which essentially was duplicative of HG §20-211, was repealed in 1983. Chapter 583, Laws of Maryland 1983.

cluded, "it is unreasonable for a State to insist that only a physician is competent to provide the information and counseling relevant to informed consent." 462 U.S. at 449. The state's interest is in ensuring that the woman's consent is informed; the identity of the person from whom she obtains information is not critical. 462 U.S. at 448.

3. *Analysis of Maryland Statute*

The information required under HG §20-211 concerns assistance available during pregnancy and after childbirth. Thus, it is virtually identical to the information required under the analogous section of the Akron ordinance, which the Supreme Court found was not inherently objectionable. Unlike the Akron ordinance, HG §20-211 does not specify the identity of the person who must give the information. Hence, Maryland's law is not subject to the objection that invalidated Akron's ordinance and, in our view, is constitutional.

Conclusion

In summary, it is our opinion that the provisions of Maryland law requiring parental notification of a minor's abortion, requiring the performance of all abortions in hospitals, and permitting public disclosure of information contained in reports of abortions are unconstitutional. Those provisions may not be enforced. The provisions mandating disclosure to the patient of information on agencies offering assistance during pregnancy and after childbirth, however, are constitutional in their present form.

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Opinions and Advice

Editor's Note: Since the issuance of this opinion, the two cases referred to in note 1 as "presently before the Supreme Court" have been decided. In *Diamond v. Charles*, 106 S.Ct. 1697 (1986), the Supreme Court held that the appellant, who had intervened in support of a restrictive Illinois law, lacked standing; the Court therefore dismissed the appeal for want of jurisdiction. In *Thornburgh v. American College of Obstetricians & Gynecologists*, 106 S.Ct. 2169 (1986), the Court affirmed the lower court decision that a restrictive Pennsylvania law was unconstitutional. In so holding, the Court observed that "[t]he States are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies." 106 S.Ct. at 2178.

ASSESSMENTS AND TAXATION

PROPERTY TAX ASSESSMENT APPEAL BOARDS—APPEAL PROCEDURES—A PTAAB MAY INCREASE PROPOSED ASSESSMENT, BUT ONLY ON REQUEST OF A PROPER PARTY AND NOT ON ITS OWN MOTION.

May 14, 1985

Mr. Craig C. Biggs, Administrator
Property Tax Assessment Appeal Boards

You have requested our opinion on the scope of powers of a Property Tax Assessment Appeal Board (a "PTAAB") in reviewing decisions of supervisors of assessments. Specifically, you ask the following questions:

1. Does a PTAAB have the power to increase a property assessment beyond that proposed by the supervisor of assessments?

2. If a PTAAB does have that power, may it order such an increase on its own motion?

For the reasons given below, we have concluded that a PTAAB has the power to increase assessments beyond that proposed by the supervisor of assessments, but only on the request of a proper party before it. A PTAAB may not make such increases on its own motion.[1]

I

Background

The Property Tax Assessment Appeals Boards were created by Chapter 784, Laws of Maryland 1973, as independent State agencies.

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[1] In *MPTH Associates v. State Department of Assessments & Taxation*, 302 Md. 319 (1985), the Court of Appeals had before it a case in which a PTAAB had increased a supervisor's assessment, apparently on its own motion. However, the parties to that action did not question—and, accordingly, the Court did not address—the validity of the PTAAB's action. 302 Md. at 321 n. 1.

The PTAABs succeeded the Appeal Tax Courts or County Commissioners of the various counties as the second tier of Maryland's three-tiered system for administrative review of property tax assessments.[2]

Under the current system, a party aggrieved by a proposed assessment must first protest and demand a hearing before the supervisor of assessments. Article 81, §255(a). Thereafter, the local PTAAB "has jurisdiction over all appeals . . . concerning property tax assessments" within the county (or Baltimore City) where it sits. Article 81, §250. A third administrative appeal may be taken from the PTAAB to the Maryland Tax Court. Article 81, §256(a). Each of these reviews is de novo. Article 81, §§255(c) and 229(e).[3]

II

PTAABs' Power to Increase Assessments

A. *Existence of the Power*

Article 81, §255(b)(1) authorizes any "county, or city, or the Attorney General[, or] the State Department of Assessments and Taxation", as well as any taxpayer, to appeal to the local PTAAB from a decision of a supervisor of assessments "as to the assessment of any property or any unit of tax value, or as to the increase, reduction or abatement of, or refusal to increase, reduce or abate, any such assessment". In our view, this broad grant to governmental entities of a right to appeal clearly indicates the General Assembly's intent to permit the PTAABs to hear and rule on both (i) a taxpayer's request for a lower assessment than that proposed by the supervisor of assessments and (ii) a government's request for a higher assessment than that proposed by the local supervisor of assessments. Indeed, under §255(b)(1), a taxpayer even has the right to seek a

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[2]Under the former system, the County Commissioners of each county were authorized to create an Appeal Tax Court for the county, with exclusive jurisdiction to hear appeals from the county's supervisor of assessments. If they did not create such a body, the Commissioners themselves heard those appeals. Former Article 81, §§186, 186A, and 186B (as enacted by Chapter 717, Laws of Maryland 1943).

[3]Chapter 8, Laws of Maryland 1985, effective February 1, 1986, has recodified these and related statutory provisions, without substantive change, as part of the new Tax-Property Article ("TP" Article) of the Maryland Code. *See generally* TP Title 3, governing the establishment and basic jurisdiction of PTAABs, and TP Title 14, Subtitle 5, governing appeal procedures.

higher assessment of another taxpayer's property. *Cf. County Comm'rs of Anne Arundel County v. Buch*, 190 Md. 394, 399 (1948) (under former law, taxpayer had legal right to complain of under-assessment of another's property).

Article 81, §256(a) reflects the General Assembly's intent to empower the PTAABs to increase, as well as decrease, assessments. That section grants taxpayers, supervisors of assessments, and State and local governments the right to appeal to the Tax Court from "any assessment or classification, or [from] any increase, reduction, abatement, modification, change or alteration or failure or refusal to increase, reduce, abate, modify or change any assessment, or [from] any classification or change in classification, or refusal or failure to make a change, by any property tax assessment appeal board under §255 of this article". In thus enumerating the actions of a PTAAB from which an appeal will lie to the Tax Court, §256(a) clearly recognizes the power of a PTAAB to take any of these enumerated actions, including its power to "increase" assessments beyond that proposed by the supervisor of assessments.

Article 81, §§234 and 234A similarly reflect a PTAAB's power to increase assessments. Section 234 authorizes supervisors of assessments "to appeal to the Maryland Tax Court from *any* assessments or rulings which the supervisors consider improper when made by the property tax assessment appeal board in the counties or in Baltimore City". And, under §234A(a), assessors must "give due consideration to the reasons for the valuation determined" whenever "any assessment [was] adjusted by a property tax assessment appeal board" in the preceding year. These provisions neither expressly nor impliedly limit the PTAABs to "adjusting" assessments by way of reduction alone.

Moreover, the Court of Appeals has implicitly recognized the power of a PTAAB to increase assessments beyond that proposed by the supervisor of assessments. In *Montgomery County Board of Realtors v. Montgomery County*, 287 Md. 101 (1980), the Court invalidated a county statute that imposed, at the time of sale of real property, a tax on the amount by which the property's "taxable value", determined from its sale price, exceeded its assessed valuation. 287 Md. at 103. The Court noted that the statute had apparently been enacted in response to "what [the county] regarded as inadequate real property assessments". 287 Md. at 102. In striking down the county's local solution to that perceived problem, the Court expressly pointed out that "Montgomery County is not without remedies in any situation in which it believes the supervisor of assessments has undervalued any given property for tax purposes", because the statutory provisions that permit aggrieved parties to seek administrative review of assessments "specifically includ[e] a county". 287 Md. at 109.

In thus noting that the statutory review process specifically envisions the possibility that administrative review might result in increasing a supervisor's assessment, the Court expressly dealt only with reviews by supervisors and the Tax Court. Nonetheless, it is clear that the PTAABs—the intermediate review body—must have the same power in this regard as the other two bodies, if they are to carry out the General Assembly's intent "to afford the taxpaying public a systematic and efficient method of fact-finding and policy-formation" in real property taxation. *Maryland-National Capital Park & Planning Comm'n v. Washington National Arena*, 282 Md. 588, 597 (1978).

B. *Scope of the Power*

However, a PTAAB's power to increase or decrease assessments upon petition of an aggrieved party does not, in our view, encompass the additional power to make such changes on its own motion. To be sure, the predecessors of the PTAABs did have statutory authority to initiate assessment hearings for any property within their jurisdiction. The County Commissioners or Appeal Tax Courts were expressly given that power in 1959, by an amendment to Article 81, §255 that provided:

> "At any time before the said date of finality, the County Commissioners or the Appeal Tax Court of any county, as the case may be, may *on their own motion* hold a hearing and review any assessment on property assessed locally, to the same extent and in the same manner as if said hearing were demanded by a taxpayer, city, the Attorney General or Department, as hereinabove set out; and to that end may employ such technical advice and assistance as they may deem necessary or advisable under the circumstances." Chapter 757, Laws of Maryland 1959 (emphasis added).

That provision, however, was repealed by the same law that also created the PTAABs, Chapter 784, Laws of Maryland 1973. Today, the PTAABs are authorized to hold hearings only upon a "demand" of a proper party. Article 81, §255(b). *See also Maryland-National Capital Park & Planning Comm'n v. Washington National Arena*, 282 Md. 588, 608 (1978) (determination of supervisor of assessments becomes final and binding if taxpayer waives or fails tc assert right to appeal).

Similarly, the precursor of Article 81, §234 gave County Commissioners or Appeal Tax Courts, when reviewing the reports of supervisors of assessments, "the power to obtain additional data, and in case the assessment so determined upon is not satisfactory, [to] order a new valuation". Former Article 81, §168 (as enacted by Chapter 226, Laws of Maryland 1929). On that basis, the Court of Appeals held in 1948 that "it is clear that upon a proper showing the commissioners have the power and duty to 'order a new valuation' at any time before the date of finality, wholly apart from the continuous assessment plan". *County Comm'rs of Anne Arundel County v. Buch*, 190 Md. 394, 401 (1948).

Under current law, however, "the Director [of Assessments and Taxation] shall order and enforce a review of any properties upon receipt of a request to do so from the final assessing authority for the county or city in which the properties are located". Article 81, §232(8)(a). The "final assessing authority" for a county is the local PTAAB. *County Executive for Montgomery County v. Supervisor of Assessments*, 275 Md. 392, 394 n. 3 (1975). *See also* Chapter 577, Laws of Maryland 1978 ("for the purpose of specifying that . . . the Supervisors of Assessments and the Property Tax Assessment Appeal Boards are respectively the initial and the final assessing authorities"). Thus, if a PTAAB is not satisfied that certain property has been "valued at its full cash value on the date of finality", as required by Article 81, §14(b)(1)(i), or if it needs additional information to determine the matter, the PTAAB may require the Director of Assessments and Taxation to review the assessment. However, the present statute makes no provision for a PTAAB to "order a new valuation"—that is, to itself increase a property assessment—on its own initiative.

Both the supervisors of assessments and the Maryland Tax Court, in contrast, have *express* statutory authority to make such increases. Thus, at the initial assessment level, a supervisor of assessments may "make or increase the valuation or change the classification [of property] ex parte" if, after notice of the proposed increase, the taxpayer does not appear before the supervisor to protest. Article 81, §29(d). And, at the final level of administrative review, the Tax Court "is empowered to assess anew [or] classify anew" any property, as well as to modify decisions made below. Article 81, §229(h).

Significantly, in our view, Article 81 contains no similar grant of power to the PTAABs. Instead, §255 refers only to appeals brought before a PTAAB by others, thereby clearly leaving the decision whether to challenge a supervisor's assessment to the sole discretion of the parties enumerated in §255(b)(1). *Maryland-National Capital Park & Planning Commission v. Washington National Arena*, 282 Md. at 608. The references in §256(a) to a PTABB's increasing or refusing to increase an assessment follow of necessity from §255—that is, they refer to a party's right to appeal from a PTAAB action that had been taken by the PTAAB at the prior request of an aggrieved party.

For a PTAAB to order an increase in an assessment in the absence of such a request would, in our view, be inconsistent with the apparent legislative intent in delineating the PTAABs' role in the assessment process. Notably, neither the Department of Assessments and Taxation nor the Tax Court is subject to the provisions of the Administrative Procedure Act (the "APA") governing adjudicatory hearings. State Government ("SG") Article, §10-202(a)(ii) and (viii). The PTAABs, in contrast, are generally subject to those provisions—subject only to any specific, overriding provisions of Article 81. *See* SG §§10-201(b)(1) and 10-202(a) (APA applies to every State officer or unit authorized to adjudicate contested cases, except those expressly exempted). Thus, the General Assembly has clearly distinguished between the "non-APA" bodies, to which it has given full power to make assessments, and the APA-governed PTAABs, to which it has assigned a more limited appellate function. *Compare* Article 81, §§229 and 232 *with* Article 81, §250. *See also Holy Cross Hospital of Silver Spring v. Health Services Cost Review Comm'n*, 283 Md. 677, 683 (1983) (since an administrative agency is a creature of statute, its authority does not reach beyond the statutory warrant).

Moreover, a PTAAB's attempt to act beyond its assigned appellate function could create a difficulty for which no provision has been made. When it hears an appeal from a supervisor's assessment, a PTAAB exercises a quasi-judicial function. Accordingly, "it is not a party to the proceeding before it or before an appellate body authorized to review its decision". *Maryland Port Administration v. C. J. Langenfelder & Son, Inc.*, 50 Md. App. 525, 533 (1982). That is, the PTAAB has no right to appear before the Tax Court to defend its decision. Thus, if a PTAAB increased an assessment on its own motion, there might well be no one to defend that position before the Tax Court.

For example, a taxpayer whose property has been assessed at $100,000 might appeal to the local PTAAB, arguing that the property's true assessed value is only $50,000. The supervisor of assessments would present the evidence supporting his or her $100,000 assessment, as required by Article 81, §247. If no other parties appear, but the PTAAB unilaterally increases the assessment to $125,000, the taxpayer would almost certainly appeal to the Tax Court. Yet, on appeal, it would be highly unlikely that the supervisor of assessments would be in a position to argue in favor of the PTAAB's $125,000 evaluation, an assessment significantly higher than that supported by the assessor's own evidence and expert opinion. And nowhere has the General Assembly made any provision for a PTAAB to appear before the Tax Court to present evidence in support of its own valuation of the property.

What the General Assembly *has* provided, however, is the right of the local government to appear before the PTAABs and assert the alleged underassessment of property by the supervisor of assessments. If the evidence presented by the local government is persuasive to a majority of the PTAAB, then the PTAAB has clear statutory authority to increase the assessment. In establishing this system, the General Assembly retained in the hands of the local government (but *not* in the PTAABs) the former power of the County Commissioners or their appointed Appeal Tax Courts "to obtain additional data" concerning the proper valuation of property. Thus, it is the local government—which is in the best position to know the local situation—that is expected to advance local interests before the PTAAB. The PTAABs themselves, however, were cast as "primarily adjudicatory" appeal boards. *Maryland National Capital Park and Planning Commission v. Washington National Arena*, 282 Md. at 603. Hence, the PTAABs should act only on the basis of evidence presented by proper parties to their proceedings.

III

Conclusion

In summary, it is our opinion that a Property Tax Assessment Appeal Board has the power to increase an assessment beyond that proposed by a supervisor of assessments, but only on the request of a proper party before it. A Property Tax Assessment Appeal Board may not make such increases on its own motion.

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MARYLAND INSURANCE GUARANTY ASSOCIATION—"AGENCY, UNIT, OR INSTRUMENTALITY OF STATE GOVERNMENT"—COUNSEL—MIGA IS NOT PRECLUDED FROM EMPLOYING PRIVATE COUNSEL.

June 14, 1985

Mr. Stephen J. Bernhardt, Chairman
Maryland Insurance Guaranty Association

The Maryland Insurance Guaranty Association ("MIGA") has requested our opinion on whether it has the authority to retain private counsel to advise and represent it.

For the reasons given below, we have concluded that MIGA may continue to employ private counsel, although legislative clarification is warranted.

I

Background

The Maryland Insurance Guaranty Association was established in 1971 by Chapter 703, Laws of Maryland 1971. The law governing MIGA is codified in Article 48A, §§504 through 519 of the Maryland Code.

MIGA's purpose is to protect the public by (i) providing a mechanism to avoid financial loss to policyholders and claimants resulting from the insolvency of insurers and (ii) assisting in the detection and prevention of insurer insolvencies [§504(a)]. To that end, all insurers providing insurance other than life insurance, health insurance, and annuities must be members of MIGA as a condition of their authority to transact business in Maryland [§§504(b) and 506]. MIGA is designated a "non-profit unincorporated legal entity" [§506]; to perform its statutory duties, it is authorized to hire or retain employees to handle claims [§508(b)(1)].

MIGA is also authorized to borrow funds [§508(b)(2)]; to sue or be sued [§508(b)(3)]; to enter into contracts [§508(b)(4)]; and to perform other acts necessary to effectuate its purposes [§508(b)(5)]. MIGA uses no public funds, but is funded from assessments paid by its members [§508(a)(3)]. It is exempt from all State and local taxes, except property taxes [§515], and it is exempt from liability for any action taken in the performance of its powers and duties [§517].

II

Analysis

MIGA's concern over its representation by private counsel has been brought about by the decision in *A. S. Abell Publishing Co. v. Mezzanote*, 297 Md. 26 (1983). In that case, the Court of Appeals held that MIGA is "a unit or instrumentality of the State government" within the meaning of the State's Public Information Act.[1]

That conclusion raises the question of whether MIGA is similarly covered by the provisions of §6-106(c) of the State Government Article ("SG" Article). SG §6-106(c) states:

> "Except as provided in . . . any other law, an officer or unit of the State government may not employ or be represented by a legal adviser or counsel other than the Attorney General or a designee of the Attorney General."

The controlling issue, therefore, is whether MIGA is a "unit of the State government" within the meaning of SG §6-106(c).

As the Court of Appeals noted in *A. S. Abell*, the Court "has repeatedly recognized that there is no single test for determining whether a statutorily-established entity is an agency or instrumentality of the State for a particular purpose. All aspects of the interrelationship between the State and the statutorily-established entity must be examined in order to determine its status." 297 Md. at 35. We believe the same flexible standard should be applied in determining whether an entity is a "unit of the State government" for purposes of SG §6-106(c).[2]

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[1]At the time *A.S. Abell* was decided, the Public Information Act was codified in Article 76A of the Code and used the phrase "agency or instrumentality of the State" [former Article 76A, §1(b)]. The Act has since been recodified a Title 10, Subtitle 6, Part III of the State Government Article and now uses the substantively similar phrase "unit or instrumentality of the State government" [SG §10-611(f)].

[2]*See* note 1 above.

Given the wide variety of public and quasi-public entities in modern State government—serving an equally wide variety of needs and purposes—a purely mechanistic approach to the application of SG §6-106(c) is unwise and unwarranted. Moreover, it is well established that an entity may be considered an agency, unit, or instrumentality of government for one purpose, but not for another. For example, in an earlier opinion concluding that the Maryland Legal Services Corporation is not a State entity for the purposes of the Maryland Public Ethics Law, we noted that our conclusion had no bearing on whether the Corporation might be considered a State entity for other purposes. 67 *Opinions of the Attorney General* 244, 247 n. 1 (1982). *Cf.* 65 *Opinions of the Attorney General* 356, 363 n. 3 (1980) (county boards of education are designated as State agencies for some purposes, local agencies for others).

Thus, MIGA's characterization as a "unit or instrumentality of the State government" for purposes of the Public Information Act is not determinative of whether it is a "unit of the State government" for purposes of the statutory ban against retaining private counsel. Similarly, for example, the United States Court of Appeals for the Ninth Circuit concluded that the American Red Cross is not a federal agency for purposes of the federal Freedom of Information Act (the "FOIA"), notwithstanding its characterization as a federal instrumentality for other purposes. *Irwin Memorial Blood Bank v. American Nat'l Red Cross*, 640 F.2d 1051 (9th Cir. 1981). *Cf. Department of Employment v. United States*, 385 U.S. 355, 358 (1966) (Red Cross is instrumentality of United States for purposes of immunity from state taxation). The Ninth Circuit found it "significant that none of the [earlier] characterizations were made within the context of the FOIA", concluding that characterizations made in other contexts are of little relevance in construing the FOIA. 640 F.2d at 1052.

It has been suggested that Article 48A, §508(b)(1), which permits MIGA to "employ or retain such persons as are necessary to handle claims and perform [its] duties", authorizes the employment of private counsel and, as such, overrides SG §6-106(c). However, we do not read Article 48A, §508(b) as conclusive that the provisions of SG §6-106(c) do not apply to MIGA. In our view, the statutory authorization for MIGA to employ "persons . . . necessary to handle claims and perform [its] duties" does not necessarily encompass the authority to procure legal representation in matters arising from the performance of those duties.

Nonetheless, we seriously doubt that the General Assembly ever intended to constitute MIGA as the type of public body covered by

SG §6-106(c). MIGA is a "non-profit unincorporated legal entity", and its primary duties require it to operate much as a private insurance pool would in connection with paying the claims of insolvent members. Thus, it is statutorily required to pay claimants on covered claims against an insolvent insurer; to allocate claims paid and expenses incurred subsequent to an insolvency and assess its member insurers accordingly; and to designate member insurers as "servicing facilities" for the handling of claims, subject to the approval and right of removal of the Insurance Commissioner [§§508(a) and 510(b)(3)].

These requirements that MIGA act as a surrogate for private insurers and take actions that are virtually the same as those of a typical private insurance pool suggest that the General Assembly intended it to operate in most respects as a private entity in the day-to-day handling and service of its claims and cases. Its needs for legal counsel and advice would thus be the same as those of any private insurance pool and, presumably, could best be met by attorneys who specialize in insurance practice and are retained in the same fashion as a private insurance pool retains its counsel. These factors suggest that the Office of the Attorney General was not intended to provide legal services to MIGA.

We are, however, most persuaded by the long-standing—albeit informal—construction of the statute by MIGA, the Insurance Commissioner, and this Office. Since the inception of MIGA in 1971, MIGA has consistently and continually been represented by privately retained counsel. This fact has been well known to the Insurance Commissioner, to this Office, and, we can assume, the General Assembly. *Cf. Jackson Marine Sales v. State Dep't of Assessments & Taxation*, 32 Md. App. 213, 217, *cert. denied*, 278 Md. 725 (1976) (legislature's inaction in face of long-standing administrative practice is indicative that its intent is being carried out). MIGA has never asked for representation by the Office of the Attorney General, nor, to our knowledge, has its authority to seek private representation been questioned during that time. In light of this history, we are very hesitant to disturb a well-settled practice in the absence of an unequivocal legislative or judicial pronouncement that this practice is inappropriate.

III

Conclusion

In summary, although the matter is not altogether free from doubt, it is our opinion that SG §6-106(c) does not apply to MIGA and, consequently, MIGA need not be represented by the Office of the Attorney General.

We emphasize, however, that a determination of this sort is essentially an *ad hoc* one, considering the particular agency involved and the particular purposes that the statutory provision in question serves. *Cf. A. S. Abell*, 297 Md. at 32 (purpose of Public Information Act required that MIGA's language be broadly construed). Given this, it is difficult to predict with certainty how a court might rule should the present practice be challenged.

We therefore suggest that MIGA seek legislative clarification of the General Assembly's intent regarding its mode of representation. This would not be at all unprecedented: Several acts creating various quasi-governmental agencies have specifically authorized those entities to retain private counsel. *See, e.g.*, Article 48A, §243F(a) (Maryland Automobile Insurance Fund).[3] A similar provision regarding MIGA would conclusively demonstrate the General Assembly's intent to authorize MIGA's representation other than through the Office of the Attorney General.

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Editor's Note: Chapter 161, Laws of Maryland 1986, redesignated MIGA as the Property and Casualty Insurance Guaranty Corporation. The Guaranty Corporation "is not and may not be deemed a department, unit, agency, or instrumentality of the State for any purpose." Article 48A, §506(f).

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[3]For a discussion of the constitutionality of such statutes, *see* 67 *Opinions of the Attorney General* 3 (1982).

BUDGETARY ADMINISTRATION

"MONEYS OF THE STATE"—THE FUNDS OF THE CHESAPEAKE BAY TRUST ARE "MONEYS OF THE STATE," SUBJECT TO DEPOSIT IN THE STATE TREASURY AND WITHDRAWAL ONLY IN ACCORDANCE WITH THE APPROPRIATION PROCESS.

November 26, 1985

The Honorable Harry Hughes
Governor

In our letter approving for constitutionality and legal sufficiency the legislation that established the Chesapeake Bay Trust, we reserved for a future opinion the question of whether the funds of the Trust are "moneys of the State," within the meaning of Article VI, §3 of the Maryland Constitution. *See* Bill Review Letter (Senate Bill 583, 1985 Regular Session) from Stephen H. Sachs, Attorney General to Harry Hughes, Governor (May 25, 1985).

For the reasons given below, we conclude that the funds of the Trust are "moneys of the State." Accordingly, they must be deposited in the State Treasury and withdrawn only in accordance with the appropriations process prescribed in the Constitution.[1]

I

The Chesapeake Bay Trust

The Trust was established by Chapter 789, Laws of Maryland 1985 (Regular Session), "to promote public awareness and participation in the restoration and protection . . . of the Chesapeake Bay." §8-1901 of the Natural Resources Article ("NR" Article). The Trust is governed by a 15-member board of trustees, comprising five State officials and "10 individuals appointed by the Governor, who shall represent the interests of local government, education, business,

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[1]Our bill review letter stated as a separate question whether funds to be remitted to the Treasurer upon the expiration of the Trust are "moneys of the State." These remitted funds, like the rest of the Trust's funds, are "moneys of the State." *See* note 7 below.

environmental conservation, and the general public." NR §8-1903. It is "a body corporate," the purpose of which is declared to be "of general benefit to the citizens and charitable in nature." NR §8-1902.

In order to carry out its purpose, the Trust has various powers, including the power to:

> "(1) Solicit and accept any gift, grant, legacy, or endowment of money from the federal government, State government, local government, or any private source in furtherance of the Trust;
>
> (2) Provide grants . . . for citizen involvement projects;
>
> . . .
>
> (5) Make, execute, and enter into any contract or other legal instrument;
>
> (6) Receive appropriations as provided in the State budget;
>
> . . . [and]
>
> (9) Take any other action necessary to carry out the purposes of the Trust." NR §8-1905(a).

Money received by the Trust is to be deposited in financial institutions meeting certain qualifications or invested in certain kinds of public securities, "as directed by the Trust." NR §8-1908. The Trust is exempt from various provisions of State law, including the provisions on budgetary administration now codified in the State Finance and Procurement Article. NR §8-1909.[2] Upon the expiration of the Trust on July 1, 1989, any funds "remaining to the credit of the Trust" are to be "held by the State Treasurer until legislation is enacted providing for the disposition of the funds." NR §8-1910.

II

"Moneys of the State"

A. *Constitutional provisions*

Under Article VI, §3 of the Maryland Constitution, "[t]he Trea-

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[2]NR §8-1909 grants the Trust an exemption, except as to State appropriations, "from the provisions of Article 15A," which are now generally found in Titles 3 and 7 of the State Finance and Procurement Article. However, "[t]he books, records, and accounts of the Trust are subject to audit by the State." NR §8-1908(d).

surer shall receive the moneys of the State, and, until otherwise prescribed by law, deposit them, as soon as received, to the credit of the State, in such bank or banks as he may, from time to time, with the approval of the Governor, select . . ., and he . . . shall disburse the same for the purposes of the State according to law." Article III, §32 provides that "[n]o money shall be drawn from the Treasury of the State, by any order or resolution, nor except in accordance with an appropriation by Law." Finally, Article III, §52(1) directs that "[t]he General Assembly shall not appropriate any money out of the Treasury except in accordance with" the budgetary procedures specified in the remainder of Article III, §52.

Thus, if the funds of the Trust are "moneys of the State," the Constitution requires that they be held as part of the State Treasury and may be withdrawn from the Treasury only through the appropriations process.

B. *Case law*

The Court of Appeals has twice held that particular pools of funds were not "moneys of the State." Although neither case purported to address "moneys of the State" issues comprehensively, their reasoning suggests the criteria to be applied in resolving such questions.

In *Wyatt v. State Roads Comm'n*, 175 Md. 258 (1938), tolls that were statutorily dedicated to the redemption of revenue bonds were held not to fall within the term "moneys of the State." Hence, the tolls were not required to be paid to and disbursed by the Treasurer.

In reaching its decision, the Court of Appeals noted that the funds in question were "made trust funds" by the road construction statute and that the State's role was "to disburse them in fulfillment of the special purpose for which they are to be created"—to pay the bondholders. 175 Md. at 269. This "arrangement" did not violate the Constitution:

> "The fund from tolls will be one coming into existence only for the special, peculiar, application to the bonds, and is completely appropriated to that purpose; and nothing more than a medium of collection and transmission is required. The State will have no right to the fund, and it would be a misapplication to put it into the ordinary channels for state revenues. The sections of the Constitution cited are not intended to deal with a fund so completely appropriated to outside persons." *Id.*

Thirty years after the decision in *Wyatt*, the Court of Appeals concluded that the moneys of the Subsequent Injury Fund were not "moneys of the State." *Subsequent Injury Fund v. Pack*, 250 Md. 306 (1968). The Court of Appeals noted that the Fund is composed of assessments levied by the State on employees and insurers for the benefit of previously injured employees who sustain a subsequent injury. Moreover, payments are not discretionary; they are made as a result of adjudicatory orders by the Workmen's Compensation Commission. 250 Md. at 308-09.

Thus, as in *Wyatt*, the State had no "right" to the fund and no discretion over its expenditures, because payments from it primarily benefited private parties. Under these circumstances, "the assessments paid into the Subsequent Injury Fund do not constitute 'moneys of the State' as contemplated by Article VI." 250 Md. at 312.

C. *Opinions*

Whether funds serve a public purpose and whether the State has control over disbursement are the principal factors that have guided this Office in assessing whether or not agency funds are "moneys of the State."

In 53 *Opinions of the Attorney General* 1 (1968), this Office concluded that the funds held by the State Accident Fund are not "public money in the sense of being money of the state to be used for, and on behalf of, the state for a state expenditure." 53 *Opinions of the Attorney General* at 6 (citation omitted). Rather, "[t]he fund is a public fund only in the sense of being administered by a public body." *Id.* (citation omitted).

In 58 *Opinions of the Attorney General* 88 (1973), the assets of the Maryland Automobile Insurance Fund (MAIF), like those of the State Accident Fund, were found not to be "moneys of the State." MAIF was created for the benefit of drivers whose applications for liability insurance are rejected by private insurers. The Treasurer's duty is merely to receive all moneys due MAIF and credit them to the account of the Fund.

Most recently, in 68 *Opinions of the Attorney General* 86 (1983), we concluded that federal block grants are "moneys of the State." *See also* 67 *Opinions of the Attorney General* 356, 365 (1982) (federal funds paid to and appropriated by the State for social service programs are "moneys of the State").[3] We emphasized the degree of discretion that the State could exercise in the use of the funds:

> "They are plainly intended to aid the State in the carrying out of State functions. Within the limits specified in the grant, the State may use the funds as it wishes." 68 *Opinions of the Attorney General* at 88.

Moreover, we wrote, the General Assembly does not have authority to adopt a statutory device "to avoid the constitutional requirement that 'moneys of the State' be deposited in the Treasury." 68 *Opinions of the Attorney General* at 90.[4] The opinion observed that: "If State funds could be channeled to accounts outside the Treasury, the Constitution's elaborate budget process might well be circumvented." 68 *Opinions of the Attorney General* at 91.

The one opinion seemingly to the contrary, 63 *Opinions of the Attorney General* 492 (1978), concerned the Maryland Historical Trust. That opinion suggested—but did not hold—that the Historical Trust's funds might not be "moneys of the State." 63 *Opinions of the Attorney General* at 494. However, the opinion did not analyze the question or determine how the criteria developed in prior cases and opinions applied to the Historical Trust. Rather, the opinion concluded that, whether or not the Historical Trust's funds were "moneys of the State," the agency was authorized by statute to hold and administer its funds outside the Treasury. This conclusion was overruled by 68 *Opinions of the Attorney General* 86 (1983).

D. *Summary of Criteria*

The mere possession of funds by the State or its agencies does not alone make those funds "moneys of the State." Instead, the

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[3]Neither the prior opinions nor this one should be understood as a definitive treatment of the applicability of "moneys of the State" requirements to the various types of federal funds that are received by State entities. Each situation must be considered in its own context.

[4]The phrase "until otherwise prescribed by law" in Article VI, §3 does not authorize a separate procedure for the maintenance and disbursement of "moneys of the State." Rather:

> "[T]his language was intended to reflect (i) the authority of the General Assembly (and later, on passage of the Executive Budget Amendment, the Governor) to prescribe, through the budgetary process, the appropriation of funds *from* the Treasury and (ii) the authority of the General Assembly to prescribe, through the legislative process, the deposit of Treasury funds in financial institutions other than banks." 68 *Opinions of the Attorney General* at 90 (emphasis in original).

relevant court cases and past opinions of this Office suggest that several interrelated factors must be considered in determining whether funds are "moneys of the State": whether the State exercised its sovereign power to acquire the funds; whether the "ordinary channels for state revenues" are inconsistent with the purposes for which the funds are assembled; whether the expenditure of the funds primarily benefits private persons or the public at large;[5] and whether the State, having a "right" to the funds, may exercise broad discretion over their expenditure. These general criteria necessarily are to be applied case-by-case, in light of all pertinent circumstances attending the particular funding arrangement.

Although no one factor by itself is determinative, we regard the degree of State control over the expenditure of the funds as the most important factor. *Cf. A.S. Abell Pub. Co. v. Mezzanote*, 297 Md. 26, 35 (1983) (test for whether entity is a State agency). The closer that the State entity is to a mere "medium of collection and transmission" [*Wyatt*, 175 Md. at 269], the more likely is the conclusion that the funds in question are not "moneys of the State." Conversely, the freer the State is to expend the funds as a matter of discretion, the more likely is the conclusion that the funds are "moneys of the State."

III

Application of Criteria to the Trust

The funds of the Chesapeake Bay Trust are expected to be derived from both public and private sources. NR §8-1905(a)(1) and (6). If the Trust accepts a gift to which conditions are attached, those conditions must be complied with. *See* 68 *Opinions of the Attorney General* at 94 n. 13.

However, funds derived from private gifts and other sources alike are to be used to promote the State's—that is, the public's—interest in restoring the Chesapeake Bay, not for anyone's private benefit.

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[5]To be sure, a public purpose ultimately underlies even those statutory arrangements that involve private beneficiaries. Bondholders, for example, play an integral role in the quintessentially public program of road construction. But the "moneys of the State" provision in Article VI, §3 requires focus on whether the funds for the accomplishment of the public purpose are channeled to a particular and predetermined category of private recipient—e.g., bondholders (*Wyatt*) or injured employees (*Pack*).

Additionally, the State, through the Trust's board, has broad discretion over the expenditure of these funds. The Trust will decide who gets its grants, in what amounts, and for what use. Subjecting such discretion to the control of the appropriations process is not incompatiable with the carrying out of the Trust's purposes.

In short, the Trust does not simply collect and transmit the money. It is not an entity that does no more than transfer funds to designated beneficiaries or pay adjudicated claims. In our view, considering all of the pertinent factors—especially the degree of discretion exercised over expenditures—the Trust's funds are "moneys of the State."[6]

IV
Conclusion

In sum, it is our opinion that the funds of the Chesapeake Bay Trust are "moneys of the State," which must be deposited in the State Treasury and withdrawn only in accordance with the appropriation process.[7]

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Editor's Note: The conclusion in this opinion was overruled in 71 *Opinions of the Attorney General* (1986) [Opinion No. 86-056 (October 29, 1986)]. The later opinion concluded that the Chesapeake Bay Trust is an autonomous activity for fiscal purposes and is there-

[6]Although the Trust's funds are "moneys of the State," there is no constitutional impediment to the exercise of the Trust's authority, under NR §8-1908(a), in effect to determine how the Treasurer should invest its funds. *See* note 4 above.

[7]Likewise, given the State's discretion over the disposition of the Trust funds upon the expiration of the Trust, these funds should be regarded as "moneys of the State." *See* note 1 above.

fore not subject to the "moneys of the State" requirement of Article VI, §3. However, the later opinion did not disagree with the above opinion's discussion of the factors pertinent to determining whether funds held by an activity that is generally subject to Article VI, §3 are nevertheless not "moneys of the State."

CONSTITUTIONAL LAW

FIRST AMENDMENT—COMMERCIAL SPEECH—HEALTH OCCUPATIONS—DENTISTS—SURVEY OF DENTAL ADVERTISING RESTRICTIONS—PROHIBITIONS AGAINST FALSE OR MISLEADING ADVERTISING ARE CONSTITUTIONAL—VARIOUS OTHER PROHIBITIONS ARE OVERBOARD AND UNCONSTITUTIONAL.

July 22, 1985

Stanley E. Block, D.D.S., President
Maryland State Board of Dental Examiners

The State Board of Dental Examiners has requested our opinion about the constitutionality of the advertising restrictions contained in the Health Occupations Article ("HO" Article) of the Maryland Code and in the Board's implementing regulation, COMAR 10.44.06.

This Office first examined the constitutionality of dental advertising prohibitions in 62 *Opinions of the Attorney General* 256 (1977). That Opinion (the "1977 Opinion") applied newly-emerging principles of First Amendment protection for commercial speech to the statutory prohibitions then in effect. The Board of Dental Examiners has asked us to revisit the issue in light of additional case law, changes in the statute, and the Board's subsequent adoption of implementing regulations.

For the reasons set forth below, we conclude that certain provisions of the statute and regulation are constitutional and, therefore, may be enforced by the Board of Dental Examiners. Other provisions are unconstitutional and unenforceable.

1. The following provisions are constitutional:

Guarantees—

HO §4-502(a)(1)
COMAR 10.44.06.03B(10)

Superiority claims—

HO §4-502(a)(3)
COMAR 10.44.06.03B(5)

Deception—

HO §4-502(a)(4)
COMAR 10.44.06.03A
COMAR 10.44.06.03B(1)
COMAR 10.44.06.03B(2)
COMAR 10.44.06.03B(7)

Specialty designations—

HO §4-502(b)(1)(ii)
HO §4-503(a)
COMAR 10.44.06.03B(4)

Advertising by unlicensed persons—

HO §4-502(c)
HO §4-602(a)(1)

Claims "likely to" raise "unjustified expectations"—

COMAR 10.44.06.03B(3)

Predictions—

COMAR 10.44.06.03B(8)

Procedural requirements for broadcast advertising—

COMAR 10.44.06.03B(11)(a), (b), and (c)

Disclosure of advertiser's identity—

COMAR 10.44.06.03B(13)

Deceptive types of fee advertising—

COMAR 10.44.06.04

Assignment of responsibility for advertising—

COMAR 10.44.06.05

2. The following provisions are unconstitutional:[1]

Representations of "painless[ness]"—

HO §4-502(a)(2)

Use of particular drugs or methods—

HO §4-502(a)(5)

Display of dental appliances—

HO §4-502(a)(6)

Advertising of non-routine services—

HO §4-502(a)(7)
COMAR 10.44.06.03B(6)
COMAR 10.44.06.03B(12)

Titles on signs—

HO §4-502(b)(1)(i)

Testimonials and endorsements—

COMAR 10.44.06.03B(9)

Content of broadcast advertising—

COMAR 10.44.06.03B(11)(d)

I

Dental Advertising Prohibitions

Advertising by dentists is subject to the following statutory restrictions, set forth in HO §4-502:

"(a) A licensed dentist may not advertise:

(1) To guarantee any dental work;

(2) To do any dental work painlessly;

(3) To do dental work in a superior manner;

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[1]The constitutionality of HO §4-314(a)(8), which subjects to discipline a dentist who "[u]ses another person as an in-person solicitor of business", is also highly questionable. *See* note 7 below.

(4) In a manner that tends to deceive or mislead the public;

(5) That the dentist uses any anesthetic, drug, formula, material, medicine, method, or system;

(6) By exhibiting any dental appliance to the general public at the place of practice of the licensee; or

(7) To do nonroutine dental work free or for a stated price.

(b) (1) A licensed dentist may not:

(i) Use the designations 'Doctor of Dental Surgery', 'Doctor of Dental Medicine', or 'Dental Surgeon' on a sign that bears the name of the licensee; or

(ii) Include a specialty designation in a card, letterhead, sign, telephone directory listing, or other printed matter that bears the name of the licensee, unless:

1. The licensee is identified by the Board [of Dental Examiners] as a specialist in the designated field under §4-503 of this subtitle; and

2. The language used to refer to the speciality is approved by the Board.

(2) A licensed dentist may use the designations 'dr.', 'dentist', 'D.D.S.' or 'D.M.D.' on a sign that bears the licensee's name."

(c) A person who is not licensed to practice dentistry may not solicit or advertise to the general public in any manner that the person alters, constructs, duplicates, repairs, or supplies a dental appliance."

In addition, HO §4-503(a) provides:

"A licensed dentist may not represent to the public that the licensee is a specialist in any field of specialized dental practice unless identified as a specialist in that field by the Board".[2]

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[2]HO §4-503(b) directs the Board to determine, upon request, "whether the licensee qualifies for Board identification as a specialist". HO §4-503(c) lists eight branches of dentistry as "specialties"—endodontics, oral pathology, oral surgery, orthodontics, pedodontics, periodontics, prosthodontics, and public health—and authorizes the Board to approve "any other field of specialized dental practice".

The Board's regulation recognizes these same eight specialities. COMAR 10.44.14.03. It also specifies the qualifications "for identification as specialist by the Board". COMAR 10.44.14.04. *See* Part III J below.

Finally, HO §4-602(a)(1) contains an additional prohibition of advertising by unlicensed persons:

> "Except as otherwise provided in this section, unless authorized to practice dentistry under this title, a person may not represent to the public by title, by description of services, methods, or procedures, or otherwise, that the person is authorized to practice dentistry in this State."[3]

The Revisor's Note that accompanies HO §4-502 states that, during the 1981 revision of these statutes, several provisions in the predecessor statute were deleted as patently unconstitutional.[4] The Revisor's Note goes on to observe that at least one retained provision, HO §4-502(a)(7), is of "doubtful" constitutionality; understandably, though, the state of the law at the time of the revision did not permit a more definitive conclusion.

Since the 1977 Opinion, the State Board of Dental Examiners has adopted a regulation to govern advertising by dentists. COMAR 10.44.06. In essence, the regulation amplifies the statutory prohibition against advertising "that tends to deceive or mislead the public". HO §4-502(a)(4). The regulation does so by itemizing the types of statements or claims that the Board considers to be "deceptive or misleading".

II

Constitutional Status of Commercial Speech

A. *Virginia Pharmacy*

The principles that govern the application of the First Amendment to commercial speech have been evolving over the past decade. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), involving a ban on the advertising of prescription drug prices, the Supreme Court held that a state may not "completely suppress dissemination of concededly truthful in-

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[3]The exception "provided in this section" permits "a holder of a dental degree who does not directly or indirectly practice or attempt to practice dentistry in this State to use the degree or an abbreviation for the degree in connection with the name of the holder." HO §4-602(b).

[4]For example, former Article 32, §12(a) completely prohibited advertising by dentists. *See generally* 62 *Opinions of the Attorney General* at 263-70.

formation about entirely lawful activity". 425 U.S. at 773. Such a ban is incompatible with the protection that commercial speech enjoys under the First Amendment.[5] However, the Supreme Court also cautioned that "some forms of commercial speech regulation are surely permissible". 425 U.S. at 770. The Court identified as "permissible" not only reasonable "time, place and manner restrictions", but also the flat prohibition of advertisements that are "false or misleading in any way". 425 U.S. at 771.

B. *Bates*

In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the Supreme Court applied the First Amendment protection of commercial speech announced in *Virginia Pharmacy* to "truthful advertisement concerning the availability and terms of routine legal services". 433 U.S. at 384.[6] As in *Virginia Pharmacy*, the Supreme Court was careful to observe that, although truthful advertising by attorneys "may not be subjected to blanket suppression", a state may prohibit "advertising that is false, deceptive, or misleading":

> "Indeed, the public and private benefits from commercial speech derive from confidence in its accuracy and reliability. Thus, the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena. . . . In fact, because the public lacks sophistication concerning legal services, the statements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising. For example, advertising claims as to the quality of services—a matter we do not address today—are not susceptible to measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction." 433 U.S. at 383-84.

Moreover, a state may impose "reasonable restrictions on the time,

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[5] Before *Virginia Pharmacy*, it had been supposed that commercial speech was outside the protection of the First Amendment. *See Valentine v. Chrestensen*, 316 U.S. 52 (1942).

[6] In *Virginia Pharmacy*, the Supreme Court had expressly left open the possibility that the advertising of professional *services* might be on a different constitutional footing than the advertising of standardized *products*. *See Virginia Pharmacy*, 425 U.S. at 773 n. 25. *Bates* settled the matter by holding that commercial speech about professional services was likewise entitled to First Amendment protection.

place, and manner of advertising". 433 U.S. at 384. "And the special problems of advertising on the electronic broadcast media will warrant special consideration." *Id.*

C. *Friedman v. Rogers*

Two years later, in *Friedman v. Rogers*, 440 U.S. 1 (1979), the Supreme Court made clear that its previously announced criteria for permissible restrictions on commercial speech were not merely theoretical. It upheld the constitutionality of a Texas statute that flatly prohibited the use of trade names by optometrists. The Supreme Court found the prohibition to be justified because of both "a significant possibility" and an actual record of deception. In so finding, the Supreme Court distinguished the use of trade names from the price advertising at issue in *Virginia Pharmacy* and *Bates:*

> "In those cases, the State had proscribed advertising by pharmacists and lawyers that contained statements about the products or services offered and their prices. These statements were self-contained and self-explanatory. Here, we are concerned with a form of commercial speech that has no intrinsic meaning. A trade name conveys no information about the price and nature of the services offered by an optometrist until it acquires meaning over a period of time by associations formed in the minds of the public between the name and some standard of price or quality. Because these ill-defined associations of trade names with price and quality information can be manipulated by the users of trade names, there is a significant possibility that trade names will be used to mislead the public." 440 U.S. at 12-13.

See also Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978).[7]

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[7]*Ohralik* held that a state "constitutionally may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent"—namely, "those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct.'" 436 U.S. at 449, 462. But there is no indication in *Ohralik* that a state may prohibit all forms of in-person solicitation for example, the employment of someone to distribute handbills to passers-by or the employment of telephone solicitors. Thus, the constitutionality of HO §4-314(a)(8), which subjects to discipline a dentist who "[u]ses another person as an in-person solicitor of business", is highly questionable; the Board should exercise caution in enforcing this provision.

D. *Central Hudson*

Then, in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), involving a state ban on promotional advertising by an electric utility, the Supreme Court drew together the various doctrinal strands of the commercial speech cases into a summary of its analytical approach:

> "At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest [underlying the restriction of speech] is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted and whether it is not more extensive than is necessary to serve that interest." 447 U.S. at 566.

The Supreme Court again emphasized that misleading commercial speech may be suppressed altogether: "The government may ban forms of communication more likely to deceive the public than to inform it". 447 U.S. at 563.

E. *R.M.J.*

In the next pertinent case, *In re R.M.J.*, 455 U.S. 191 (1982), the Supreme Court returned to the question of advertising by lawyers, this time advertising regarding a lawyer's background and areas of practice. This case involved a Missouri court rule that permitted lawyer advertising but "restricted [it] to certain categories of information, and in some instances, to certain specified language". 455 U.S. at 193. In particular, the pertinent rule, as interpreted by the court-appointed committee that enforced it, permitted the advertising of areas of practice only in the exact ways specified in the rule. Disciplinary action was brought against a lawyer for advertising in ways not permitted by the rule—for example, listing areas of speciality not specifically denominated in the rule.

After cataloging its prior cases, the Supreme Court summarized the applicable principles as follows:

> "Commercial speech doctrine, in the context of advertising for professional services, may be summarized generally as follows: Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. When

> the particular content or method of the advertising suggests that it apparently is misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information may also be presented in way that is not deceptive. Thus, the Court in *Bates* suggested that the remedy in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or explanation. . . . Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception." 455 U.S. at 203.[8]

Applying these principles, the Supreme Court found that the First Amendment rights of the advertising lawyer had been violated. There had been no finding that the advertising was in fact misleading. "Nor could we say that it was inherently misleading, or that restrictions short of an absolute prohibition would not have sufficed to cure any possible deception." 455 U.S. at 206-07. In particular, the lawyer's advertising of areas of practice that deviated from the precise listing of approved areas was found to be constitutionally protected. The listing "present[ed] no apparent danger of deception", and no substantial state interest was promoted by the restriction. 455 U.S. at 205. "[A]lthough the States may regulate commercial speech, the First and Fourteenth Amendments require that they do so with care and in a manner no more extensive than reasonably necessary to further substantial interests." 455 U.S. at 207.

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[8]The Supreme Court also reiterated the recognition in *Central Hudson* that even nondeceptive commercial speech may be regulated under some circumstances:

> "Even when a communication is not misleading, the State retain some authority to regulate. But the State must assert a substantial interest and the interference with speech must be in proportion to interests served. . . . Restrictions must be narrowly drawn, and the State lawfully may regulate only to the extent regulation furthers the State's substantial interest. Thus, in *Bates*, the Court found that the potentially adverse effect of advertising on professionalism and the quality of legal services was not sufficiently related to a substantial state interest to justify so great an interference with speech." 455 U.S. at 203-04.

F. *Zauderer*

Finally, in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), the Supreme Court firmly reiterated the basic constitutional protection afforded nondeceptive commercial speech.

In pertinent part, *Zauderer* involved three issues concerning advertising by lawyers: First, could Ohio prohibit truthful advertising on the grounds that it constituted "self-recommendation and . . . unsolicited legal advice"? Second, could it prohibit illustrations in advertising? Third, could it require certain additional disclosures in an advertisement about fees?

1. *Unsolicited legal advice*

The advertisement in question was intended to attract clients who might have tort claims regarding the Dalkon Shield contraceptive device:

> "The advertisement's information and advice concerning the Dalkon Shield were . . . neither false nor deceptive: in fact, they were entirely accurate. The advertisement did not promise readers that lawsuits alleging injuries caused by the Dalkon Shield would be successful, nor did it suggest that [the lawyer who advertised] had any special expertise in handling such lawsuits other than his employment in other such litigation. Rather, the advertisement reported the indisputable fact that the Dalkon Shield has spawned an impressive number of lawsuits and advised readers that [the lawyer] was currently handling such lawsuits and was willing to represent other women asserting similar claims." 471 U.S. at 639-40.

In short, the advertisement was truthful, and Ohio did not contend otherwise. Rather, Ohio argued "that although [Zauderer's] advertising may itself have been harmless—may even have had the salutary effect of informing some persons of rights of which they would otherwise have been unaware—the State's prohibition on the use of legal advice and information in advertising by attorneys is a prophylactic rule that is needed to ensure that attorneys, in an effort to secure legal business for themselves, do not use false or misleading advertising to stir up meritless litigation against innocent defendants." 471 U.S. at 643.

The Supreme Court rejected this argument, which was said to be "in tension with our insistence that restrictions involving commercial speech that is not itself deceptive be narrowly crafted to serve the State's purposes". 471 U.S. at 644.[9] Quoting *R.M.J.*, the Court stated that " 'the States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information may also be presented in a way that is not deceptive.' " *Id.* (quoting 455 U.S. at 203).

Although not necessarily foreclosing any "prophylactic rule . . . in this area", the Supreme Court did emphatically reject Ohio's proffered justification for its prohibition—namely, "that it is intrinsically difficult to distinguish advertisements containing legal advice that is false or deceptive from those that are truthful and helpful, much more so than is the case with other goods or services". Such "difficulty" is not sufficient justification for a flat ban:

> "Were we to accept the State's argument in this case, we would have little basis for preventing the government from suppressing other forms of truthful and nondeceptive advertising simply to spare itself the trouble of distinguishing such advertising from false or deceptive advertising. The First Amendment protections afforded commercial speech would mean little indeed if such arguments were allowed to prevail. Our recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful" 471 U.S. at 646.

2. *Illustrations*

Zauderer's advertisement contained an accurate drawing of a Dalkon Shield. Despite its accuracy, the drawing nonetheless violated

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[9] In ordinary First Amendment jurisprudence, "[a] law is void on its face if it 'does not aim specifically at evils within the allowable area of [governmental] control, but . . . sweeps within its ambit other activities that constitute an exercise' of protected expressive or associational rights." Tribe, *American Constitutional Law* §12-24, at 710 (1978) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940)). Such a law is overbroad, and it is subject to challenge because its very existence may chill constitutionally protected expression. However, in *Bates*, the Supreme Court held that the overbreadth doctrine does not apply to "professional advertising, a context where it is not necessary to further its intended objective". 433 U.S. at 381. *See also Central Hudson*, 447 U.S. at 565 n. 8. Nonetheless, sound policy suggests that the Board delete from its regulation provisions that are unconstitutionally overbroad and hence unenforceable as written.

Ohio's rule prohibiting the use of any of illustrations in lawyers' advertising. Ohio sought to justify its rule by asserting that the use of illustrations in advertising would "creat[e] unacceptable risks that the public will be misled, manipulated, or confused", because illustrations "play on the emotions of [the] audience and convey false impressions". 471 U.S. at 648.

However, the Supreme Court held that the arguments "amount to little more than unsupported assertions". *Id.* Accepting them would permit a state to "prohibit the use of pictures or illustrations in connection with advertising of any product or service simply on the strength of the general argument that the visual content of advertisements may, under some circumstances, be deceptive or manipulative." But, the Court wrote:

> "[B]road prophylactic rules may not be so lightly justified if the protections afforded commercial speech are to retain their force. We are not persuaded that identifying deceptive or manipulative uses of visual media in advertising is so intrinsically burdensome that the State is entitled to forego that task in favor of the more convenient but far more restrictive alternative of a blanket ban on the use of illustrations." 471 U.S. at 649.

3. *Required disclosures*

Ohio required lawyers who advertised contingent-fee rates to disclose whether or not the fee was computed before or after payment of court costs. Zauderer's Dalkon Shield advertisement referred to his contingency representation of plaintiffs in such cases ("If there is no recovery, no legal fees are owed by our clients."), but it failed to disclose the status of court costs.

The Supreme Court held that this aspect of Ohio's lawyer advertising rules could constitutionally be enforced:

> "We do not suggest that disclosure requirements do not implicate the advertiser's First Amendment rights at all. We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser's rights are adequately protected so long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." 471 U.S. at 651.

The particular disclosure required by Ohio, the client's responsibility for court costs, "easily passes muster under this standard". Given the public's lack of awareness about the difference between "fees" and "costs"—of which the Court was willing to take judicial notice—the possibility of deception is . . . . self-evident" and need not be further demonstrated. 471 U.S. at 652.

III

Application of Constitutional Principles

A. *Introduction*

As the summary of pertinent case law in Part II makes clear, the statutory and regulatory prohibitions against various forms of dental advertising may constitutionally be enforced only against false, deceptive, or misleading advertising. We are aware of no constitutionally acceptable basis for the dental advertising prohibitions other than this prevention of deception. For example, fears about the commercialization of the profession of dentistry or of distasteful advertising, are not cognizable. *See, e.g., R.M.J.*, 455 U.S. at 203–04.

A category of dental advertising may be banned altogether only if it is "inherently misleading". *R.M.J.*, 455 U.S. at 206. Otherwise, the Board may not simply ban a category of advertising and prosecute all who violate the ban; rather, it must bear "the costs of distinguishing the truthful from the false". *Zauderer*, 471 U.S. at 646. Moreover, the Board may not impose a flat ban if deception can be averted through required disclosures.

Against this background, we examine each of the statutory and regulatory prohibitions.

B. *Guarantees*

HO §4-502 (a) (1) provides that a dentist "may not advertise . . . . [t]o guarantee any dental work".

In considering the constitutionality of the predecessor of this provision, the 1977 Opinion pointed out that "the word 'guarantee' as used in this context can be taken to mean either a guarantee that the patient's money will be returned in the event that the dental work proves to be unsatisfactory, or it could refer to a guarantee that good results would flow from the dentist's work." 62 *Opinions of the Attorney General* at 264.[10] The 1977 Opinion concluded—and we agree—that the provision is unconstitutional and hence unenforceable with respect to the advertising of the former type of guarantee:

> "A money back guarantee is not inherently misleading or deceptive and serves to protect the consumer of dental services. The guarantee constitutes no more than one part of the financial transaction involved in arranging dental services, and a restriction on the advertising of such a guarantee would be unenforceable." *Id.*

On the other hand, advertising purporting to unconditionally guarantee a satisfactory result from treatment may, we think, be prohibited. The General Assembly could reasonably have concluded that the wide variety of dental ailments, the incomplete knowledge of disease causation, and the patient's own unpredictable diligence in the maintenance of dental hygiene make a "guarantee" of successful treatment inherently misleading. *See Bates*, 433 U.S. at 383-84. *Cf. Zauderer*, 471 U.S. at 640 n. 9 (Supreme Court decisions "have left open the possibility that States may prevent attorneys from making nonverifiable claims regarding the quality of their services").

The Board has, by regulation, acted to assure that this statutory provision will be enforced in a constitutional manner. The regulation prohibits advertisements that "[c]ontain or imply any guarantee of satisfaction, except the guarantee to return a fee if the patient is not satisfied with the treatment rendered". COMAR 10.44.06.03B(10). Given this regulatory gloss, which effectively permits truthful forms of "guarantee" advertising, we see no constitutional difficulty with HO §4-502(a)(1).

C. *Representations of "painless[ness]"*

HO §4-502(a)(2) prohibits a dentist from advertising that he or she will "do any dental work painlessly".

The 1977 Opinion regarded the predecessor of HO §4-502(a)(2) as

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[10]The predecessor provision prohibited "advertising to guarantee any dental service". Former Article 32, §11(k)(1).

constitutional. [11] The 1977 Opinion simply stated, in conclusory terms, that "claims of painless surgery . . . are likely to be false or misleading". *Id.*[12]

This conclusion is too broad, in our view. Certainly, an undifferentiated claim of "painless dentistry" would be inherently misleading, for most dental procedures necessarily entail at least some pain (if only the paid that accompanies the administration of locally injected anesthetic).[13] But, we understand, some procedures can now be performed without pain, and technological developments will likely expand the range of dental work that can be performed painlessly. If a dentist in fact does perform a procedure painlessly, the State may not constitutionally prohibit the dentist from informing potential patients of that fact.

We recognize that deceptive claims of painlessness have historically been used to seize the attention of those who fear dental treatment. The Board is constitutionally free both to prosecute claims and to require whatever accompanying disclosures are reasonably necessary to prevent deception—e.g., disclosure of the circumstances under which a procedure is in fact "painless". However, the First Amendment does not permit the suppression of a range of potentially true claims in order to safeguard against some deceptive ones. *Zauderer*, 471 U.S. at 646.

Therefore, HO §4-502(a)(2) is unconstitutional and unenforceable.

D. *Superiority claims*

HO §4-502(a)(3) prohibits claims by a dentist that work is done "in a superior manner". Similarly, COMAR 10.44.06.03B(5) prohibits claims that "[s]tate or imply superior service".

In the 1977 Opinion, the predecessor of HO §4-502(a)(3) was simply treated as constitutional, without further explanation. 62 *Opin-*

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[11]Former Article 32, §11(k)(1) prohibited "advertising. . . to perform any dental operation painlessly".

[12]The 1977 Opinion took the statutory phrase "dental operation" to mean dental surgery. The Revisor of Statutes obviously understood the term to refer to dental procedures generally, not just dental surgery.

[13]Similarly, we regard other similarly broad claims—i.e., assertions about "painlessness" not linked to specific procedures—to be inherently misleading, given the wide range of procedures that inevitably necessitate some pain.

ions of the Attorney General at 264-65.[14] Apparently the 1977 Opinion viewed such advertising as a quality claim "not susceptible of measurement or verification . . . [and therefore] so likely to be misleading as to warrant restriction". *Bates*, 433 U.S. at 383-84. *See also Zauderer*, 471 U.S. at 640 n. 9.

We agree. As the Supreme Court said in *Bates*, "the public and private benefits from commercial speech derive from confidence in its accuracy and reliability." 433 U.S. at 383. But a wholly subjective and unverifiable claim of superiority will often be inaccurate and will always be unreliable. It is, in our view, inherently misleading. We emphasize, however, that a mere factual reference to a dentist's qualifications, training, or experience cannot reasonably be taken to claim or imply superiority and is outside the scope of the prohibition. [15]

It may be said that superiority claims are merely harmless puffery. But, as the Supreme Court has intimated and as one lower court has squarely held, puffery that might be acceptable elsewhere is not acceptable in health care advertising:

> "In view of . . . the serious nature of the services to be advertised, we are convinced that only the highest standards of truthfulness should apply. We are not concerned here with the 'squeezable softness of Charmin' or the advantages of 'mountain grown coffee.' The practice of puffery—well established in non-professional advertising—has no place in the advertising of healing arts professionals. The well-being of people who may be unsophisticated in health care matters is a compelling interest of the state. The licensor of healing arts professionals has the right and the duty to demand strict adherence to truthful advertising—advertising that is verifiable." *Bolton v. Kansas State Bd. of Healing Arts*, 473 F. Supp. 728, 734 (D. Kan. 1979).

See also Spencer v. Honorable Justices of Supreme Court of Pa., 579 F. Supp. 880, 887–88 (E.D. Pa. 1984) (sustaining ban on "the use of terms which subjectively evaluate a lawyer's credentials or the quality of his services").

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[14]Former Article 32, §11(k)(2) prohibited "advertising professional superiority or the performance of professional services in a superior manner".

[15]If the prohibition against "imply[ing] superior service" in COMAR 10.44.06.03B(5) were read to forbid such factual statements, it would be unconstitutional and unenforceable.

E. *Deception*

HO §4-502(a)(4) prohibits advertising "[i]n a manner that tends to deceive or mislead the public". Similarly, COMAR 10.44.06.03A contains the following basic ban of deceptive or misleading advertising:

> "A dentist may not, on behalf of himself, his partner, or his associate or for any other dentist affiliated with him, use or participate in the use of any form of public communication which contains a deceptive or misleading statement or claim."

As every commercial speech case has emphasized, the prevention of deceptive or misleading advertising is a proper basis for State prohibition. Thus, HO §4-502(a)(4) and the basic ban stated in COMAR 10.44.06.03A are constitutional.

However, the regulation follows its basic ban with an itemization of the categories of statements or claims that are "deceptive or misleading". Of course, the mere labeling of a category of advertising as misleading does not suffice to meet the constitutional test, and we shall discuss the constitutionality of each item separately.

The first two specific categories indeed identify inherently misleading claims: advertising statements that "[c]ontain a material misrepresentation of fact" or that "[f]ail to state any fact necessary to make the statement not misleading" are prohibited. COMAR 10.44.06.03B(1) and (2). These provisions identify well-established elements of deception and are thus constitutional. *See, e.g., Katherine Gibbs School, Inc., v. FTC*, 612 F.2d 658, 665 (2d Cir. 1979) ("The failure to disclose material information may cause an advertisement to be false or deceptive even though it does not state false facts."). Likewise, the prohibition in COMAR 10.44.06.03B(7) of statements that "[c]ontain a representation or implication that is likely to cause an ordinary prudent person to misunderstand or to be deceived" merely restates an element of deception and is unquestionably constitutional.

The other items, however, raise different questions, as discussed in the sections below.

F. *Use of particular drugs or methods*

HO §4-502(a)(5) prohibits a representation that "the dentist uses any anesthetic, drug, formula, material, medicine, method or system".

The 1977 Opinion described the predecessor of this provision as presenting "a difficult constitutional problem". 62 *Opinions of the Attorney General* 266.[16] That is an understatement: one can readily envision a wide variety of accurate advertisements of this kind. The 1977 Opinion sustained the constitutionality of the provision—albeit recognizing that it presents "special dangers of overreaching and unconstitutional application"—with this puzzling observation:

> "Advertising of the type here prohibited could be misleading if the patient were led to believe that he or she, rather than the dentist, would choose the particular treatment, anesthetic, drug, etc. advertised. The dentist may not abdicate his responsibility for the patient's treatment, and he therefore may not directly or indirectly indicate his willingness to abdicate his responsibility." 62 *Opinions of the Attorney General* at 267.

Frankly, we do not understand this point. The advertisement by a dentist that he or she uses a particular methodology or medication can hardly be understood as an open invitation to patients to choose their preferred method of treatment. The claims prohibited by HO §4-502(a)(5) are not inherently misleading.

Therefore HO §4-502(a)(5) is unconstitutional and unenforceable.

G. *Display of dental appliances*

HO §4-502(a)(6) prohibits advertising by "exhibiting any dental appliance to the general public at the place of practice of the licensee".

The predecessor of HO §4-502(a)(6) was treated in the 1977 Opinion as constitutional, for the same reason as was said to justify the prohibition on advertising the use of particular drugs or methods. *See* Part III F above. [17] We do not see why the display of a dental appliance is inherently misleading. The display of the appliance is an implied representation that the appliance is used in the dentist's practice. If it is in fact so used, the display is truthful commercial speech.

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[16] Former Article 32, §11(k)(3) prohibited "advertising to use any anesthetic, drug, formulae, material, medicine, method or system".

[17] Former Article 32, §11(k)(3) prohibited "advertising by public exhibit at residence of practice any appliances used in restorative dentistry".

Therefore, HO §4-502(a)(6) is unconstitutional and unenforceable.

H. *Advertising of non-routine services*

1. *Prohibitions*

HO §4-502(a)(7) prohibits the representation that a dentist will "do non-routine dental work free or for a stated price". This provision reflects an effort to preserve a constitutional form of restriction on price advertising.

In addition, COMAR 10.44.06.03B(6) prohibits all advertising relating to fees, except for the following:

> "(a) A statement of the fee for an initial consultation,
>
> (b) A statement of the fixed fees for routine dental services, provided there is reasonable disclosure of all relevant variables so that the statement would not be misunderstood or be deceptive to a layman,
>
> (c) The availability of credit arrangements[.]"

The previous ban on "advertising prices for professional service" (former Article 32, §11(k)(2)) was patently unconstitutional. *See* 62 *Opinions of the Attorney General* at 265. But even the revised provision, limited as it is to "non-routine dental work", was described in the Revisor's Note as of "doubtful" constitutionality.[18]

The Board has given regulatory content to the statutory term "non-routine dental work" by defining its opposite in COMAR 10.44.06.03B(12):

> "[R]outine dental services . . . are services that:
>
> (a) Are performed frequently in the practice,
>
> (b) Are usually provided at a set fee,
>
> (c) Are provided with little or no variation in technique, [and]

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[18]"The Commission [to Revise the Annotated Code] believes that the constitutionality of this provision is doubtful. However, the reported judicial decisions on price advertising address only 'routine' services, and, consequently, the commission is unable to say with certainty that a ban on advertising price of 'non-routine' services is unconstitutional." Revisor's Note to HO §4-502.

(d) Include all professionally recognized components within generally accepted standards".

This regulation bans *all* advertising that "relate[s] to other than routine dental services".

Thus, a dentist is presumably permitted to advertise, for example, the price of a tooth extraction. But a dentist may presumably say nothing about the price of "diagnosis and treatment of jaw problems (temporo-mandibular joint dysfunction)", to take an example from the current Yellow Pages. Indeed under the regulation, the mere mention of such a "non-routine" service in advertising is prohibited.

In our view, the statutory flat ban on price advertising of "non-routine dental work" and the ancillary regulatory prohibition in COMAR 10.44.06.03(B)(6) cannot survive constitutional scrutiny. Obviously, a dentist must base his or her charges for non-routine services on some methodology. It follows, then, that truthful advertising about that pricing methodology is quite possible—for example, a statement of a price range.

To be sure, a procedure may be so uncommon or highly variable that any statement of price about it would be misleading. But if so, the dentist responsible for the advertising would be subject to discipline for violating the ban on deceptive or misleading advertising in HO §4-502(a)(4), the constitutionality of which is clear.

For the same reason, the ban in COMAR 10.44.06.03B(12) on *all* advertising related to "non-routine" services is unconstitutional and unenforceable. Surely many advertisements of this kind—for example, the simple representation that a non-routine service is available—would not be misleading.

Therefore, HO §4-502(a)(7) and the ancillary prohibitions in COMAR 10.44.06.03B(6) and (12) are unconstitutional and unenforceable.

2. *Mandated disclosure*

Although a flat ban on price and other advertising of nonroutine dental services is impermissible, the Board remains constitutionally free to require appropriate disclaimers or additional disclosures, in order to reduce the risk of deception. Of course, any required disclosure must be reasonable—that is, not so "unduly burdensome" as to "chil[l] protected commercial speech". *Zauderer*, 471 U.S. at 651. *See* Part II F 3 above.

Thus, the Board acts within its constitutional discretion when it requires "reasonable disclosure of all relevant variables so that [a] statement [about the prices] would not be misunderstood or be deceptive to a layman". COMAR 10.44.06.03B(6)(b). We understand the phrasing "*reasonable* disclosure of all *relevant* variables" to be a sufficient safeguard against disclosure requirements so burdensome as to unconstitutionally chill the exercise of First Amendment rights.[19]

I. *Titles on signs*

HO §4-502(b)(1)(i) prohibits the "[u]se [of] the designations 'Doctor of Dental Surgery', 'Doctor of Dental Medicine', of 'Dental Surgeon' on a sign that bears the name of the licensee". This prohibition on the use of certain titles must be read in conjunction with HO §4-502(b)(2), which does allow the use of certain specified designations on a sign: "A licensed dentist may use the designations 'dr.', 'dentist', 'D.D.S.', 'D.M.D.' on a sign that bears the licensee's name."

The 1977 Opinion regarded the predecessor of this statutory restriction to be constitutional:

> "To the degree the statute prohibits the inclusion of certain titles such as "dental surgeon" . . . . the statute is constitutional. The legislature may act to prohibit false or misleading claims. . . . The claim to an improper title may be so inherently misleading to a potential patient or to the public that some action prescribing such claims would be constitutional." 62 *Opinions of the Attorney General* at 269.[20]

We disagree. Again, we believe that the flat ban on the use of particular designations is not "the least restrictive possible means" of averting deception. *Zauderer*, 471 U.S. at 644. "The states may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive." *R.M.J.*, 455 U.S. at 203.

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[19]Because price advertising of nonroutine services is now prohibited by statute and regulation, the affirmative disclosure requirement of COMAR 10.44.06.03B(6)(b) explicitly applies ony to fee advertising "for routine dental services". Should the Board wish to extend this disclosure requirement to all fee advertising, the regulation will need to be revised.

[20]Former Article 32, §16 contained the same forbidden and permitted designations as HO §4-502(b)(1)(i) and (2).

If a dentist holds the degree of Doctor of Dental Surgery or Doctor of Dental Medicine, we do not see why the use of the full title on a sign is misleading—especially since the abbreviated form of the same designation is obviously regarded by the statute as nondeceptive.[21] Similarly, if a dentist holds the degree of Doctor of Dental Surgery, the statement on a sign that he or she is a "dental surgeon" is not misleading.

Therefore, HO §4-502(b)(1)(i) is unconstitutional and unenforceable. Of course, deceptive misuse of titles—for example, the "claim to an improper title" to which the 1977 Opinion adverted—remains subject to prohibition under HO §4-502(a)(4).

J. *Specialty designations*

HO §4-502(b)(1)(ii) prohibits the use of "a speciality designation in a card, letterhead, sign, telephone directory listing, or other printed matter that bears the name of the licensee", unless:

> "(1) The licensee is identified by the Board as a specialist in the designated field under §4-503 of this subtitle; and
>
> (2) The language used to refer to the specialty is approved by the Board."

Moreover, HO §4-503(a) prohibits any "represent[ation] to the public that the licensee is a specialist in any field of specialized dental practice unless identified as a specialist in that field by the Board". HO §4-503(c) lists the recognized specialties.[22]

The 1977 Opinion approved the predecessor of HO §4-502(b)(1)(ii), because "the claim of a specialty area not generally recognized as such . . . may be so inherently misleading to a potential patient or to the public that some action pr[o]scribing such claims would be constitutional." 62 *Opinions of the Attorney General* at 269.[23]

Since the 1977 Opinion, the Board has adopted regulations that

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[21] Under HO §4-302(d), "[t]o qualify for a license to practice dentistry, the applicant shall hold a degree of Doctor of Dental Surgery, Doctor of Dental Medicine, or the equivalent".

[22] *See* note 2 above.

[23] The predecessor statute, former Article 32, §16, permitted certain limited displays of only those speciality designations approved by the American Dental Association.

further elaborate on the process of specialty identification. One provision in the Board's advertising regulation prohibits representations which "[s]tate or imply that a dentist is a certified or recognized specialist other than as recognized by the Council on Dental Education of the American Dental Association". COMAR 10.44.06.03B(4). And a recently adopted regulation prescribes the procedures for "identification as [a] specialist by the Board". COMAR 10.44.14 (adopted December 20, 1984).[24]

Taken as a whole, we believe that these statutory and regulation restrictions are constitutional. Unlike the situation in *R.M.J. (see* Part II E above), the restrictions here do *not* forbid accurate advertising of a wide range of specialized services. Thus, to cite some examples from the current Yellow Pages, dentists are not prohibited from advertising "cosmetic dentistry", "implant dentistry", and "TMJ and myofacial paintherapy", if in fact they do perform such services. These are not "specialties", as defined in HO §4-503(c); hence advertising concerning them is outside the scope of the restriction.[25]

Rather, HO §§4-502(b)(1)(ii) and 4-503(a) and COMAR 10.44.06.03B(4)

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[24]It is not clear how specialty recognition by the ADA's Council on Dental Education correlates with specialty identification by the Board under COMAR 10.44.14. A serious constitutional problem would arise if COMAR 10.44.06.03B(4) were enforced inconsistently with the specialty identification procedure in COMAR 10.44.14. That is, a dentist who has been identified as a specialist by the Board may not be prohibited from advertising that fact simply because he or she might not have been recognized by the Council on Dental Education.

[25]This reading is consistent with that of the predecessor statute in *Barnett v. Board of Dental Examiners*, 293 Md. 361 (1982). In that case, a dentist was charged with deceptive or misleading advertising for using a term ("polydontics") concerning his practice that, in the context of the particular ads, a lay person would take to mean "a dental specialty . . . [in which the dentist] possessed some special expertise not held by most general practitioners". 293 Md. at 370-71. The Court of Appeals explicitly noted that the Board was not seeking to ban all advertisements containing the word "polydontics"— as, presumably, the Board would have sought had it construed the statutory restriction on the use of specialty designations to flatly prohibit the use of references to specialized services other than the specific "specialties" already approved.

Although the language of the statute and regulation doubtlessly permits a more sweeping reading than our narrow construction, we would have grave doubt about the constitutionality of the restriction if it were read as an absolute prohibition against the mention of any form of dental practice other than those defined in HO §4-503(c)(1). *Cf. R.M.J.*, 455 U.S. at 205 (lawyer may not be prohibited from advertising areas of practice that deviated from state-prescribed list, if the advertising is not misleading). It is a fundamental principle of statutory construction that statutes be construed to avoid constitutional problems whenever "reasonably possible". *In re James D.*, 295 Md. 314, 327 (1983).

prohibit specific advertising reference to any of the defined specialties unless the dentist who so advertises has the appropriate credential of specialization. For example, a dentist may not advertise that he or she is an "orthodontist" without having been identified by the Board as such. Thus, the restriction here is the converse of that at issue in *R.M.J.*.

We believe that a court would sustain this restriction. It serves the compelling State interest of assuring that those who hold themselves out to be specialists in fact are specially qualified. To be sure, a licensed dentist is, without more, authorized to practice in any of the specialized areas. *See* HO §4-308. *Cf.* HO §4-603. But the explicit holding of oneself out to be an "orthodontist", for example, draws patients precisely because of the implied claim of comparative expertise over those dentists who do not advertise that specialty. *See generally Barnett v. Board of Dental Examiners*, 293 Md. 361, 370–71 (1982).

The restriction in question here assures that when a dentist lays claim to being an "orthodontist", or any of the other statutorily recognized specialties, the critical term "orthodontist" will have a defined meaning—namely, a dentist who meets the certification requirements of the Board. In essence, then, the statutory and regulatory scheme in this area is little different than the long-accepted governmental function of bringing order to the marketplace and forestalling deception through the imposition of standardized definitions of critical trade terms. *See, e.g.*, 16 C.F.R. §251.1(b) (FTC guide prescribing meaning of the word "free" in advertising).

K. *Advertising by unlicensed persons*

HO §§4-502(c) and 4-602(a)(1) prohibit the advertising of dental services by persons who are not licensed to practice dentistry.

These provisions merely augment the basic prohibition against the practice of dentistry by unlicensed persons. *See* HO §§4-301 and 4-601(a). There is no question but that HO §§4-502(c) and 4-602(a)(1) are constitutional. *See Bates v. State Bar of Arizona*, 433 U.S. 350, 384 (1977) ("Advertising concerning transactions that are themselves illegal obviously may be suppressed.").

L. *Claims that raise "unjustified expectations"*

COMAR 10.44.06.03B(3) prohibits statements that "[a]re intended or are likely to create unjustified expectations".

This provision is unconstitutional and unenforceable to the extent that it purports to ban advertising solely because of the advertiser's particular intent. If an advertisement is *not* deceptive or misleading, it may not be banned, regardless of the advertiser's intent.[26]

However, we see no constitutional defect in the provision to the extent that it bans advertisements that "are *likely* to create unjustified expectations", despite the imprecision of this phrasing. A patient's expectation would prove "unjustified" if there were a wide gap between the representation in the advertisement and the reality of the treatment. Under those circumstances, the advertisement would be misleading and the Board could enforce this prohibition against the advertiser. We caution, however, that the Board may not wield this provision to suppress advertising that the Board finds distasteful or overly aggressive but that does not contain a misleading representation linked to probable patient expectations.

M. *Predictions*

COMAR 10.44.06.03B(8) prohibits statements that "[c]ontain statistical data or other information based on past performance to predict future success".

Properly construed, this provision does not prohibit—and, indeed, may not constitutionally be enforced to prohibit—the mere presentation of past data. Rather, it must be read as prohibiting only the use of that data *coupled with* a claim of "future success".[27]

In our view, such an explicit linkage of past data to "future success" would be inherently misleading. Given the variability of dental disease, past experience would be utterly unreliable as a prediction of a comparable "success rate" in the future. Moreover, the seeming precision of statistics as a basis for prediction could well mask a host of definitional and other problems with the data. In short, we regard COMAR 10.44.06.03.B(8) as constitutional and enforceable.

N. *Testimonials and endorsements*

COMAR 10.44.06.03B(9) prohibits advertising statements or claims that "contain a testimonial about, or endorsement of, a dentist,

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[26]Conversely, innocent intent is no defense if an advertisement *is* deceptive or misleading. *See, e.g., Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976).

[27]On the need to construe provisions to avoid constitutional problems, see the second paragraph of note 25 above.

except that any individual may attest to the quality of a specific, identifiable dental service based on the individual's own personal knowledge or experience as a patient of the dentist who is the subject of the testimonial or endorsement".

Testimonials, we recognize, have long been a potential source of consumer deception. *See, e.g.*, 16 C.F.R. Part 255 (FTC guides concerning use of endorsements and testimonials in advertising). However, this prohibition is constitutionally defective because it is far too overinclusive.

One can readily envision testimonials from persons other than patients that are not inherently misleading—e.g., a testimonial from a professional colleague. We think that the First Amendment requires policing of misleading testimonials on a case by case basis, not through a flat ban against all testimonials by persons other than patients. *See Zauderer*, 471 U.S. at 646.

Therefore, COMAR 10.44.06.03B(9) is unconstitutional and unenforceable.

O. *Broadcast advertising*

COMAR 10.44.06.03B(11) imposes the following restrictions on "electronic media" advertising, "including television, radio, and motion pictures":

> "(a) Broadcast advertising shall be communicated to the public only over radio or television stations that are approved by the Federal Communications Commission or over cable television,
>
> (b) Broadcast advertisements shall be pre-recorded, and approved for broadcast by the advertising dentist,
>
> (c) A recording of the actual transmission shall be retained by the advertising dentist for a period of 3 years,
>
> (d) Dental advertising in the broadcast media may not contain:
>
> > (i) Cartoons and animation,
> >
> > (ii) Lyrics
> >
> > (iii) Portrayals, dramatizations, actual demonstrations of dental skills, or methods of practicing dentistry".

The first three of these requirements do not restrict the content of broadcast advertising. Instead, they impose certain "time, place, and manner" requirements. These are constitutional. *See Bates*, 433 U.S. at 384. However, we believe that the last requirement—the prohibition against the use of animation, lyrics, dramatization, and actual demonstrations—is unconstitutional and unenforceable, although the issue is not entirely free from doubt.

In *Bates*, the Supreme Court expressly reserved decision on the applicability of commercial speech protections to broadcast advertising: "The special problems of advertising on the electronic broadcast media will warrant special consideration." 433 U.S. at 384. And none of the Supreme Court's subsequent forays into commerical advertising have resolved the issue of what special considerations, if any, apply to broadcast advertising. The absence of definitive guidance from the Supreme Court has permitted two lower courts, in passing on Iowa's lawyer advertising rules, to sustain restrictions on the content of broadcast advertising comparable to those in COMAR 10.44.06.03B(11)(d). *See Bishop v. Committee on Professional Ethics*, 521 F. Supp. 1219, 1229 (S.D. Iowa 1981) ("promotional content of [electronic media advertising] is potentially deceptive or misleading, and therefore is not protected by the First Amendment"]); *Committee on Professional Ethics v. Humphrey*, 355 N.W.2d 565, 571 (Iowa 1984), *vacated and remanded for reconsideration in light of Zauderer*, 472 U.S. 1004 (1985) ("It is no insult to the advertising industry, or to the electronic media, to believe that, when their efforts are combined on behalf of a lawyer, a line can and should be drawn between what informs the public and what promotes the lawyer. . . . All that is prohibited are the tools which would manipulate the viewer's mind and will.").[28]

In our view, however, this kind of reasoning cannot survive scrutiny under *Zauderer*. While that case did not involve broadcast media advertising, we see no reason why its analysis as to the use of illustrations in printed advertising ought to be any different simply because the advertising is broadcast:

> "The use of illustrations or pictures in advertisements serves important communicative functions: it attracts the attention of the audience to the advertiser's message, and it may also serve to impart information directly. Accordingly, commercial illustrations are entitled to the First Amendment protections afforded verbal commercial speech: re-

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[28]*But see Baker v. Registered Dentists of Okla.*, 543 F. Supp. 1177, 1181 (W.D. Okla. 1982) (flat ban on radio and television advertising by dentists unconstitutional).

> strictions on the use of visual media of expression in advertising must survive scrutiny under the *Central Hudson* test." 471 U.S. at 647.

Ohio's justification for its ban on illustrations in printed advertising was very similar to the rationale of the courts that sustained Iowa's ban on dramatizations and visual displays in broadcast advertising:

> "The use of illustrations in advertising by attorneys, the State suggests, creates unacceptable risks that the public will be misled, manipulated, or confused. Abuses associated with the visual content of advertising are particularly difficult to police, because the advertiser is skilled in subtle uses of illustrations to play on the emotions of his audience and convey false impressions. Because illustrations may produce their effects by operating on a subconscious level, the State argues, it will be difficult for the State to point to any particular illustration and prove that it is misleading or manipulative. Thus, . . . the State's argument is that its purposes can only be served through a prophylactic rule". 471 U.S. at 648.

But, as discussed in Part II F 2 above, the Supreme Court rejected this argument. It is possible to distinguish "deceptive or manipulative uses of visual media in advertising" from nondeceptive ones, and the First Amendment requires that the policing be accomplished through case by case enforcement against deceptive or misleading advertisements rather than "through a blanket ban on the use of illustrations". 471 U.S. at 649. It is noteworthy that, in requiring Ohio to "polic[e] the use of illustrations in advertisements on a case-by-case basis", the Supreme Court cited with approval a case that concerned deceptive television advertising. *See FTC v. Colgate-Palmolive co..*, 320 U.S. 374 (1965).

Therefore, COMAR 10.44.06.03B(11)(d) is unconstitutional and unenforceable.

P. *Disclosure of advertiser's identity*

COMAR 10.44.06.03B(13) assures an accurate, explicit disclosure of who exactly will perform an advertised service. It prohibits advertisements that "[f]ail to include the name and address of the dentist rendering the service".

This provision is a form of required disclosure "reasonably related to the State's interest in preventing disception of consumers". *Zau-*

derer, 471 U.S. at 651. *See* Part II F 3 above. For this reason, it is constitutional, but, as with other forms of required disclosure, it must be administered reasonably, so as to avoid "chilling" protected speech.[29]

Q. *Deceptive types of fee advertising*

COMAR 10.44.06.04 identifies two types of fee advertising that "shall be considered deceptive or misleading":

> "if the dentist:
>
> A. Renders the service at more than the fees advertised; [or]
>
> B. Fails to offer the service at the fee advertised for a reasonable period of time following the advertisement unless a specific time limit is included in the original advertisement."

Such advertising would be inherently deceptive or misleading. *See generally* 16 C.F.R. Part 233 (FTC guides against deceptive pricing). Therefore, the regulation prohibiting it is constitutional and enforceable.

R. *Assignment of responsibility for advertising*

COMAR 10.44.06.05 provides as follows:

> "A dentist shall be responsible for an advertisement of service regardless of whether the advertising has been generated by him personally, by his employees, or by a proprietorship, partnership, corporation, union, public school clinic, state institution, or eleemosynary institution which uses his services."

This provision does not itself prohibit any form of advertising, and we see no constitutional defect in it.

IV

Conclusion

In summary, it is our opinion that certain provisions of the statute and regulation restricting advertising by licensed dentists are con-

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[29]For example, a requirement that a dental clinic's ad set forth the name of each and every dentist practicing in the clinic might be unduly burdensome.

stitutional and, therefore, may be enforced by the Board of Dental Examiners. Other provisions are unconstitutional and unenforceable.

1. *The following provisions are constitutional:*

Guarantees—

HO §4-502(a)(1)
COMAR 10.44.06.03B(10)

Superiority claims—

HO §4-502(a)(3)
COMAR 10.44.06.03B(5)

Deception—

HO §4-502(a)(4)
COMAR 10.44.06.03A
COMAR 10.44.06.03B(1)
COMAR 10.44.06.03B(2)
COMAR 10.44.06.03B(7)

Specialty designations—

HO §4-502(b)(1)(ii)
HO §4-503(a)
COMAR 10.44.06.03B(4)

Advertising by unlicensed persons—

HO §4-502(c)
HO §4-602(a)(1)

Claims "likely to" raise "unjustified expectations"—

COMAR 10.44.06.03(3)

Predictions—

COMAR 10.44.06.03B(8)

Procedural requirements for broadcast advertising—

COMAR 10.44.06.03B(11)(a), (b), and (c)

Disclosure of advertiser's identity—

COMAR 10.44.06.03B(13)

Deceptive types of fee advertising—

COMAR 10.44.06.04

Assignment of responsibility for advertising—

COMAR 10.44.06.05

2. *The following provisions are unconstitutional:*[30]

Representations of "painless[ness]"—

HO §4-502(a)(2)

Use of particular drugs or methods—

HO §4-502(a)(5)

Display of dental appliances—

HO §4-502(a)(6)

Advertising of non-routine services—

HO §4-502(a)(7)
COMAR 10.44.06.03B(6)
COMAR 10.44.06.03B(12)

Titles on signs—

HO §4-502(b)(1)(i)

Testimonials and endorsements—

COMAR 10.44.06.03B(9)

Content of broadcast advertising—

COMAR 10.44.06.03B(11)(d)

STEPHEN H. SACHS, *Attorney General*

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[30]The constitutionality of HO §4-314(a)(8), which subjects to discipline a dentist who "[u]ses another person as an in-person solicitor of business", is also highly questionable. *See* note 7 above.

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Editor's Note: Since the issuance of this opinion, the General Assembly has substantially revised HO §4-502, to correct the various constitutional defects in the former law. *See* Chapter 744, Laws of Maryland 1986. In light of additional information from the Board of Dental Examiners about the risk of public confusion, we advised the Board in a follow-up letter that a statutory prohibition against the use of the term "dental surgeon" on signs "might well be sustained against constitutional challenge." Letter from Attorney General Sachs and Assistant Attorney General Jack Schwartz to Dr. D. M. Sullivan (February 10, 1986). Accordingly, the General Assembly retained that prohibition in HO §4-502(b)(1)(i).

The question of broadcast advertising, discussed in Part III O, remains unsettled. The *Humphrey* decision of the Iowa Supreme Court was reaffirmed after remand, and the Supreme Court dismissed an appeal "for want of a substantial federal question." *Committee on Professional Ethics v. Humphrey*, 377 N.W. 2d 643 (1985), *appeal dismissed*, 106 S.Ct. 1626 (1986).

CONSTITUTIONAL LAW—FIRST AMENDMENT—ESTABLISHMENT CLAUSE—MARYLAND STATUTES GRANTING EMPLOYEES A DAY OF REST NOT CLEARLY UNCONSTITUTIONAL.

August 5, 1985

Mr. Larry Chambers
Department of Legislative Reference

You have requested our views concerning the effect on Maryland statutes of the recent Supreme Court decision in *Thornton v. Caldor, Inc.* , 472 U.S. 703 (1985), striking down a Connecticut statute granting employees the right not to work on their Sabbath. The Maryland statutes in question are found at Article 27, §534H (Prince George's County); Article 27, §534J (Montgomery County); Article 27, §534L-2 (Baltimore City and County); Article 27, §534N-3 (Anne Arundel County); Article 27, §534Q (Frederick and Carroll Counties); Article 27, §534R-1 (Harford County); and Article 27, §534W-2 (Howard County). Article 27, §534N-3(c)(1), which reads, in pertinent part, as follows, is typical of these provisions:

> "Except in cases of an emergency declared by the federal, State, or county government, every nonmanagerial or nonprofessional person employed in any retail or wholesale establishment *may choose Sunday or his Sabbath as a day of rest* and, upon the filing of written notice by the employee with the employer that the employee chooses this day as a day of rest, no employer may discharge, discipline, discriminate against, or penalize the employee in any manner for exercising his rights under this subsection." (Emphasis added.)[1]

In our view, the Maryland statutes are significantly different than the law at issue in *Thornton* and are not clearly unconstitutional.

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[1]Depending upon the county, this prohibition is enforceable via a criminal fine or both a fine and a civil treble damage remedy keyed to the employee's wages for the day he or she was forced to work. There is no administrative mechanism for enforcing these provisions.

I

Thornton v. Caldor

The law challenged in *Thornton* provided that:

> "No person who states that a particular day of the week is *observed as his Sabbath* may be required by his employer to work on such day. An employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal." Conn. Gen. Stat., §53-303e(b) (emphasis added).

The Supreme Court held that this statute, which it characterized as "unyielding", 472 U.S. at 710, had the effect of impermissibly advancing a particular religious practice—observance of a Sabbath—and, thus, violated the Establishment Clause of the First Amendment.[2]

In so holding, the Court relied on two significant features of the statute. First, as interpreted by Connecticut's courts, the statute granted an "absolute right not to work" on the day designated as one's Sabbath, regardless of the effect that may have on co-workers and employers. 472 U.S. at 709-10. Second, the statute was written so as to grant that right only to persons who actually observe a Sabbath. *Id.*[3]

II

Application to Maryland Statutes

In our view, a number of key distinctions between the Maryland statutes and the invalid Connecticut law might well make a constitutional difference.

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[2]"Congress shall make no law respecting an establishment of religion. . . ." U.S. Const. amend. I.

[3]The court below also found that the statute fostered excessive governmental entanglement with religion by placing the Connecticut Board of Mediation and Arbitration in a position where it would have to consider which religious activities constituted observance of a Sabbath. *Caldor, Inc. v. Thornton*, 464 A.2d 785, 794 (Conn. 1983). And the Connecticut court rejected Thornton's argument that the law merely allowed employees to designate a day of rest and thus served a secular purpose. 464 A.2d at 792-94. In the court's view, such a position was untenable in light of the commonly accepted meaning of the word "Sabbath." Moreover, the law would be unnecessary if that were its purpose, because Connecticut law already protected employees from being forced to work more than six days a week. Conn. Gen. Stat. §53-303e(a).

First, it is much easier to characterize the Maryland laws as being concerned with the secular purpose of affording employees a day of rest rather than with the religious purpose of benefitting Sabbath observers. As we read the Maryland prohibition, all employees—regardless of motive, religious belief, the day of their Sabbath, or even whether they have a Sabbath—have the right to designate Sunday as their day of rest. Alternatively, an employee could designate "his Sabbath" as his or her day of rest.

Significantly, the Maryland laws—unlike Connecticut's—have *not* been construed by the courts to require that an employee observe the "Sabbath", in a religious sense, as a prerequisite to designating a day other than Sunday "as a day of rest". Indeed, unlike Connecticut, Maryland has established no administrative procedure for testing the bona fides of an employee's choice of Sabbath. *Cf. Thornton*, 472 U.S. at 708.

The penalty provisions of the Maryland statutes lend some support to this reading. These provisions punish employers who compel persons to work on the employee's "chosen day of rest". *See e.g.*, Article 27, §534J-7. In light of the particular features of the Maryland scheme that would appear to promote a "day of rest" for employees, we cannot definitely characterize the "primary purpose" of the statute as advancing religion.[4] *See McGowan v. Maryland*, 366 U.S. 420, 456 (1961).

Even if the term "Sabbath" in the Maryland laws were construed to have retained its original religious meaning, nevertheless the context and purpose of the Maryland provisions are essentially secular. In Maryland, unlike Connecticut, the employee "day of rest" provision applies only to those mercantile establishments that, in counties where the Blue Laws have been liberalized, are likely to be open both weekend days. The purpose of the provision is to extend the same "day of rest" benefit to non-Sunday Sabbath observers as to Sunday Sabbath observers. And, the Supreme Court has observed, such an extension of the plainly constitutional Sunday "day of rest" requirement "may well be the wiser solution to the problem" of accommodating "those people who, because of religious conviction, observe a day of rest other than Sunday". *Braunfeld v. Brown*, 366 U.S. 599, 608 (1961).

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[4]One way to insure the constitutionality of these existing provisions of Maryland law would be to amend them by deleting the word "Sabbath" and substituting "day of rest".

Plainly, the Maryland laws unlike Connecticut's do not grant the Sabbath observer a privilege wholly denied to other employees. The Connecticut statute "gives Sabbath observers the valuable right to designate a particular weekly day off—typically a weekend day, widely prized as a day off. Other employees who have strong and legitimate, but nonreligious reasons for wanting a weekend day off have no rights under the statute." 472 U.S. at 710 n. 9. By contrast, the Maryland provisions give everyone, Sabbath observer or not, a right to a "prized" weekend day off.

Unlike the Connecticut statute, the Maryland provisions are not "unyielding". The Maryland statutes do give some consideration to the burdens placed upon employers by exempting emergency situations and by excluding professional and managerial employees.[5] In addition, as discussed above, the employee day of rest prohibition applies only to retail and wholesale establishments. Because many of these establishments are typically open on weekends, they are better able than other employers to accommodate their employees' differing choices of days off.

III

Conclusion

In summary, it is our view that Maryland statutes protecting the right of employees not to work on the day they have designated as their day of rest are not clearly unconstitutional.

In any event, because of the *Thornton* decision and its yet undetermined impact on laws such as ours, we suggest that any new legislation enacting employee day of rest protection to include an express severability clause to prevent any impact on other provisions of the bill or of existing law.

STEPHEN H. SACHS, *Attorney General*

ROBERT A. ZARNOCH, *Assistant Attorney General*

KATHRYN M. ROWE, *Staff Attorney*

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[5]Managers and professionals are often excluded from labor standards laws. *See* 29 U.S.C. §213(a)(1); Article 100, §76 of the Maryland Code. Thornton was a managerial employee.

AVERY AISENSTARK, *Chief, Counsel*
Opinions and Advice

Editor's Note: The preceding opinion was originally written as a letter of advice. Because of the importance of the issue, it is published here in a slightly revised format.

CONSTITUTIONAL LAW—COMMERCE CLAUSE—VEHICLE LAWS—EXEMPTIONS—AN EXEMPTION FROM VEHICLE WEIGHT LIMITATIONS GRANTED TO CERTAIN VEHICLES TITLED AND REGISTERED IN MARYLAND DOES NOT VIOLATE THE COMMERCE CLAUSE.

December 16, 1985

Colonel George B. Brosan
Superintendent
Maryland State Police

Your predecessor requested our opinion on whether an exemption from certain Maryland vehicle weight limitations is unconstitutional. More specifically, the question is whether §24-109(a) of the Transportation Article ("TR" Article), under which vehicles titled and registered in the State prior to December 31, 1983 are exempted from the new limitations, violates the Commerce Clause of the United States Constitution.

For the reasons stated below, we conclude that TR §24-109(a) does not violate the Commerce Clause.

I

Federal and State Truck Weight Legislation

A. *Weight Limitation Formula*

The federal Surface Transportation Assistance Act of 1982, which authorizes appropriations for highway construction, also establishes uniform length, width, and weight limitations for the interstate highway systems and other federal-aid highways. 23 U.S.C. §§103, 104, and 127. One stated aim of the Act was to "eliminat[e] the . . . so-called 'barrier states' which have not adjusted their weight laws in conformity with the other states and which thus impose an undue burden on interstate commerce." H.R. Rep. No. 555, 97th Cong., 2d Sess. 1, 23, *reprinted in* 1982 U.S. Code Cong. and Ad. News 3639, 3661. States that fail to conform their laws to the federal formula for calculating truck weights risk the loss of certain federal highway aid. 23 U.S.C. §127(a).[1]

In compliance with this federal mandate, the General Assembly altered Maryland's formula for determining the gross weight of trucks. Chapter 537, Laws of Maryland 1983. This formula and the permissible weights derived from it are set out in TR §24-109(b) and (c). The effect of the change is to force some trucks to carry less weight than their capacity.

B. *Exemption*

The federal Act also confers broad authority for states to determine what vehicles will enjoy the benefit of a "grandfather clause" exemption—that is, permission for continued access to federal-aid highways even though, under the federal weight measurement formula, the trucks are overweight. The Act provides as follows:

> "This section shall not be construed to deny apportionment [of federal funds] to any State allowing the operation within such State of any vehicles or combinations thereof which the State determines could be lawfully operated within such State on July 1, 1956, except in the case of the overall gross weight of any group of two or more consecutive axles, on the date of enactment of the Federal-Aid Highway enactments of 1974." 23 U.S.C. §127(a).

The legislative history indicates a congressional intent 'that deference be given to the state's determination of whether their laws comply with the grandfather clause." 128 Cong. Rec. H8917 (daily ed. Dec. 6, 1982).

The Maryland grandfather clause, under which certain vehicles are exempted from the new truck weight measurement formula, is set out in TR §24-109(a):

> "(1) The provisions of subsections (b) and (c) of this section providing for the formula to be applied to interior axle measurements may not apply to those vehicles qualified in

[1]Federal law requires that vehicular weight be calculated using a wheelbase measurement from the second to the last axle. 23 U.S.C. §127(a). This is known as the "interior bridge formula." Prior to 1983, Maryland law required caculation of vehicular weight under the "exterior bridge formula," using a wheelbase measurement from the first to last axle. *See* former TR §24-109(a)(2).

> this subsection. For those vehicles qualifying under this subsection the measurement may be made only between the first and last axles of the vehicle or combination of vehicles.
>
> (2) To qualify under this subsection the vehicle must have been titled and registered in this State prior to December 31, 1983, and . . . cannot comply with the weight limitations imposed by the interior axle measurements.
>
> (3) This exception shall also apply to a single unit vehicle that has been titled and registered in this State prior to December 31, 1983, and which cannot comply with the weight limitations imposed by the exterior axle measurements.
>
> (4) Upon application to the Department [of Transportation] by the owner of a vehicle qualifying under paragraph (2) or (3) of this subsection, the Department may issue a special registration or permit to allow the operation of the vehicle under the exemption provided in this subsection until April 30, 1991."

It is our understanding that the impact of the change in method of weight measurement under the new law is greatest for comparatively small trucks. These trucks "cannot comply with the weight limitations," because physical compliance would lead to serious economic losses. The purpose of the grandfather clause is to allow truck owners time to depreciate their current fleet and purchase trucks that can legally carry loads up to their full capacity.

II

Analysis of State Exemption Under Commerce Clause

A. *Introduction*

The Commerce Clause empowers Congress to "regulate commerce . . . among the several States." U.S. Const. art. I, §8, cl. 3. The jurisprudence of the Commerce Clause divides into two broad inquiries: whether federal legislation precludes a state's regulation of interstate commerce; and whether, apart from congressional action, a state's regulation impinges too severely on the flow of interstate commerce. *See generally* Nowak, Rotunda, and Young, *Constitutional Law* 266-68 (1983).

With respect to the first inquiry, "Congress has complete authority to define the distribution of federal and state regulatory power over what is conceded to be interstate commerce." Tribe, *American Constitutional Law* 377 (1978). Thus, if Congress has demonstrated—either explicitly or implicitly—an intent to occupy a given field, state legislation in that field is preempted. Similarly, if the federal and state laws conflict, the federal law governs.[2]

The second broad inquiry under the Commerce Clause examines the impact of state legislation on interstate commerce. If the questioned provision on its face discriminates against interstate commerce, the statute is invalid. Even if no such discrimination is found, a statute would violate the Commerce Clause if it burdened interstate commerce. This analysis entails a balancing of the local interests protected by the statute against the burden imposed by it. *See* Tribe, *American Constitutional Law* at 376-384.

B. *Exercise of Congressional Power*

As discussed in Part I above, the federal Act expressly gives the states broad authority to fashion grandfather clauses. Because there is no federal occupation of the field, TR §24-109(a) is not preempted.

For the same reason, there is no conflict between TR §24-109(a) and the federal Act.

C. *Impact on Interstate Commerce*

An intent by Congress to remove state actions altogether from the reach of the Commerce Clause must be "unmistakably clear." *South-Central Timber Development, Inc. v. Wunnicke,* 467 U.S. 82, 91 (1984). Hence, we believe that TR §24-109(a) must also be examined in light of its actual impact on interstate commerce.

1. *Discrimination Against Commerce*

The initial inquiry is whether the questioned provision, on its face, discriminates against out-of-state businesses. If the law is

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[2]This principle arises not only from the Commerce Clause, but also from the Supremacy Clause, under which "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the . . . Laws of any State to the contrary notwithstanding." Art. VI, cl. 2.

facially discriminatory, it "is unconstitutional without any further consideration." *Detroit Automotive Purchasing Services, Inc. v. Lee*, 463 F. Supp. 954, 961 (D. Md. 1978).

Such discrimination is not present here. In-state as well as out-of-state vehicles were subject to the same titling and registration qualifications for the exemption under TR §24-109(a). Any business or person wishing to take advantage of the exemption had six months after the effective date of the legislation to register and title a vehicle.[3] This six-month "grace period" put the exemption within reach of anyone who desired to qualify for it, including both in-state and out-of-state businesses. For these reasons, it is our view that TR §24-109(a) does not discriminate against interstate commerce.

2. *Local Interests*

If a "statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Thus, the next step in analyzing a statute under the Commerce Clause is to ascertain what local interests the law seeks to protect.

The State's interest in requiring vehicles to have been registered and titled in Maryland in order to qualify for the exemption is substantial. The requirement assures that those who are given the right to drive heavy loads on Maryland highways have contributed their fair share to the maintenance and repair of those highways. The State's right to exact compensation from those who use its highways is clear, as is its right to exact more compensation from those whose vehicles inflict greater damage. *See Aero Mayflower Transit Co. v. Board of Railroad Comm'rs*, 332 U.S. 495, 503-504 (1947).[4]

In addition, the relationship between the fees paid and the ben-

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[3]The effective date of the legislation was July 1, 1983; the cut-off date for obtaining the exemption was December 31, 1983.

[4]Indeed, Maryland could require *all* vehicles which use its highways to be registered and titled in the State. *Hendrick v. Maryland*, 235 U.S. 610 (1915). This practice is followed by some states with respect to trucks.

efits conferred under this statute is clear.[5] Twenty percent of the excise tax is earmarked for the Transportation Revenue Sharing Account in the Transportation Trust Fund. TR §13-814(b)(1). The remainder is used for debt service on unpaid highway construction bonds. TR §13-814(b)(2). Any balance left from the excise tax, and all registration fees, are paid into the Gasoline and Motor Vehicle Revenue Account of the Transportation Trust Fund. TR §8-402(b). This account is used to pay the allocations of highway user revenues to the counties, municipalities, and Baltimore City, with the remainder to be used for other Transportation Trust Fund purposes.

The requirement that the grandfathered vehicles be registered and titled in Maryland also serves the related State purpose of reducing potential damage to its highways. By imposing this limit, the State protected its highways from being flooded with heavily loaded trucks diverted from other routes or sold to companies with Maryland routes in order to take advantage of the Maryland exemption.

In sum, the exemption serves to protect legitimate and important state interests.

3. *Balancing of Local Interests Against Burdens Imposed*

Finally, Commerce Clause analysis requires that the local interests be weighed against the burden, if any, that the law imposes on interstate commerce. The burden in this case was the cost of titling and registering the vehicle by the deadline. This burden is minor in comparison to the benefits accruing to the State, especially in light of the fact that the owner is also receiving a benefit. In general, courts are reluctant to interfere with legislative policy decisions regarding the imposition of taxes and other economic burdens, and will usually defer to the legislative judgment if what is involved is simply part of a "reasonably fair distribution of burdens." *Austin v. New Hampshire*, 420 U.S. 656, 665 (1975). *See also Williams v. Vermont*, 472 U.S. 14, 22 (1985).

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[5] In fact, it apparently has been the administrative practice not to collect the excise tax from truck companies that are residents of other states but that title their vehicles in Maryland in order to benefit from the State's grandfather clause. We do not believe that this practice, which favors out-of-state concerns, is constitutionally required. In any event, the fact that out-of-state vehicles have not been made to pay full compensation for the use of State highways does not change our analysis or undermine the constitutionality of TR §24-109(a).

Furthermore, failure to have titled and registered a vehicle in the State does not result in a total exclusion from Maryland highways. Rather, those who do not qualify for the exemption still have full access to the State highway system, so long as they load their trucks in compliance with the formula in TR §24-109(b). With respect to the vast majority of vehicles in interstate commerce, which primarily use the interstate system, compliance requires no more than that they meet the same weight limits to which they are subject in nearly every other state.

IV

Conclusion

In summary, it is our opinion that TR §24-109(a) does not violate the Commerce Clause.

STEPHEN H. SACHS, *Attorney General*

ROBERT A. ZARNOCH, *Assistant Attorney General*

KATHRYN ROWE, *Staff Attorney*

JACK SCHWARTZ
Chief Counsel
Opinions and Advice

CREDIT REGULATION

CONSUMER PROTECTION—COMMERCIAL LOANS—CREDIT DENIAL DISCLOSURE REQUIREMENTS.

December 9, 1985

The Honorable Laurence Levitan
Senate of Maryland

You have requested our views on several issues that have been posed under the recently enacted Chapters 115 (House Bill 1288-providing consumer protection for individuals receiving commercial loans) and 669 (House Bill 1001—amending the disclosure requirements for denials of credit), Laws of Maryland 1985. Specifically, you have asked the following questions:

Chapter 115

1. What is the effect of the phrase "if the borrower is authorized to postpone the maturity date one time" in §12-404(c)(3)(i) of the Commercial Law Article ("CL Article")?

2. Does the subsequent modification of a commercial loan agreement by including a secondary mortgage on residential real property in an amount less than $75,000 subject the entire transaction to the limitations of Title 12, Subtitle 4?

3. What limitations are placed on a commercial loan of less than $15,000 that are not secured by a mortgage residential real property?

Chapter 669

1. Does Title 14, Subtitle 17 of the Commercial Law Article apply only to lenders who must be licensed in order to extend credit?

2. Does CL §14-1706 vest the Commissioner of Consumer Credit with authority to investigate and adjudicate violations of general lending laws by nonlicensees of the Commissioner?

These issues are discussed in the order posed in your inquiry.

I

Chapter 115—Commercial Loans to Individuals

This bill was enacted as a result of vividly-documented cases of abuse by unscrupulous lenders who gouged unsuspecting borrowers in loan transactions documented as "commercial" loans in order to reap practically unlimited interest rates. The record before the legislative committees was replete with instances in which a lender would fabricate a commercial purpose for a loan and charge the borrower unconscionable rates of interest with the end result being the loss of a family home upon the inevitable loan default.

Chapter 115 clearly evidences a solution to this devastating loophole in consumer protection that is both equitable and easily applied. Rather than requiring improved loan documentation or revising the definition of a "commercial loan," the General Assembly simply imposed existing consumer protections on all commercial loans less than $75,000 if the loan is to be secured by a lien on residential property. Accordingly, the painstaking analysis inherent in other approaches to determine on a case-by-case basis whether a particular loan was a legitimate "commercial" loan was largely eliminated by this legislative scheme. It is against this abundant legislative history and unambiguous legislative intent that we parse the enactment in the Secondary Mortgage Loan Law that is the subject of your inquiry.

CL §12-404(c)(3) provides as follows:

> "A commercial loan of $75,000 or less made under this subtitle need not be amortized in equal or substantially equal payments and may contain a balloon payment at maturity if the borrower *is authorized to postpone the maturity date one time* and continue to make installment payments as provided in the original loan agreement and the postponed maturity date does not exceed:
>
> 1. 24 months if the original maturity date is more than 12 months after the loan is made; or
>
> 2. 6 months if the original maturity date is 12 months or less after the loan is made.
>
> (ii) No new closing costs, processing fees, or similar

> fees may be imposed *on a borrower who elects to postpone* the maturity date in accordance with this subsection." (Emphasis added.)

You have inquired about the parameters of the phrase "if the borrower is authorized to postpone the maturity date one time" for purposes of providing for a balloon payment in the loan transaction under this new provision. Your inquiry suggests that the substitution of this phrase for the formulation "[r]equired to be postponed one time, upon becoming due, at the borrower's request . . ." contained in CL §12-404(c)(2)(iii) evidences an intent to apply a different standard for "commercial"—as opposed to "noncommercial"—secondary mortgages.

In order to comply with the provisions of CL §12-404(c)(3), the loan transaction must clearly give the borrower the right to postpone on a one-time basis (and subject to the applicable limitations) the maturity date of the loan. This reading results from the ordinary meaning and import of the phrase "authorized to postpone". You have advised on the commonly accepted industry interpretation that CL §12-404(c)(2) authorizes the borrower to determine the length of the extension up to the statutory limitations. In our opinion, CL §12-404(c)(3) does not command a different result simply because a different formulation is stated. Indeed, any artificially-imposed limitation on the borrower's authorization by the lender could easily result in a determination that a borrower has not been "authorized to postpone" the maturity date.[1]

Several elements of analysis militate in favor of this approach. The legislative history reveals a general intent to apply existing protections to this newly-defined class of transactions. This intent is manifested by the substantial parallel between CL §12-404(c)(2) and CL §12-404(c)(3). Additionally, the protections against new fees for "a borrower who elects to postpone the maturity date" in CL §12-404(c)(3)(ii) further evidence an intent to provide the borrower with a meaningful right to opt for the postponement of the balloon payment. In substance, this language differs little from the "at the borrower's request" formulation in CL §12-404(c)(2). In the absence of bright lines demarcating a clear difference between these two sections, prudent counsel would dictate that the accepted practice

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[1]You have suggested that a lender could hypothetically comply with the literal language of CL §12-404(c)(3) by "authorizing" the postponement of the debt for one day. However, such a stratagem falls woefully short of the requirement that a borrower be "authorized to postpone" the maturity date.

in the industry be continued for loans made under CL §12-404(c)(3). Finally, this result is entirely consistent with a well-established rule of statutory construction requiring that where enactments are remedial in nature—designed to correct existing law, to redress existing grievances and to introduce regulations conducive to the public good—they are to be liberally construed in order to advance the remedy and obviate the mischief. *State v. Barnes*, 273 Md. 195, 208 (1974), and numerous cases cited therein. Anything less would run a substantial risk of failing to meet the purview of the CL §12-404(c)(3) requirement that a borrower is "authorized to postpone the maturity date".

Your second question concerns whether Title 12, Subtitle 4 of the Commercial Law Article would apply to a prior commercial loan that is subsequently modified to include a secondary mortgage taken as additional collateral. Because your inquiry does not pose a specific factual circumstance, our response must necessarily be correspondingly general.

The issue you raise was posed—from a complementary perspective—in 54 *Opinions of the Attorney General* 19 (1969). That opinion established the following interpretative guidelines under the Secondary Mortgage Loan Law:

> "The authorization of a higher rate in the Secondary Mortgage Loan Law is designed to compensate lenders for the greater risk entailed in making loans which are effectively unsecured save for a junior lien on real property. It would be anomalous if taking of a secondary mortgage loan as *additional security* to other collateral such as stocks and bonds were to automatically entitle a lender to a higher rate . . . Where the security for a loan is partially made up of stocks and bonds, not sufficient in themselves to fully secure the loan, and partially of a secondary mortgage, a different result might obtain." 54 *Opinions of the Attorney General* at 20. (Emphasis in the original.)[2]

We also note that if the structure of the "modification" referred to in your inquiry could be characterized as a "loan" for purposes of applying the definition of "secondary mortgage loan" set forth in CL §12-401(i), then all the limitations of the Secondary Mortgage Loan Law would apply. *Duckworth v. Bernstein*, 55 Md. App. 710

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[2]Unrelated portions of this opinion were subsequently modified in 55 *Opinions of the Attorney General* 17 (1970).

(1983); *Schmidt v. Beneficial Fin. Co.*, 285 Md. 148 (1979). This result would inure even if the secondary mortgage were not the entire security for the loan. *See* CL §12-401(i)(1) (defining a secondary mortgage loan as a loan secured "in whole or in part" by a secondary mortgage).[3] General guidance for determining whether the modification is truly supplemental to the original loan can be found in a series of published opinions and letters of advice from the Office of the Attorney General interpreting the necessity of paying a recordation tax for the recorded instrument under the exemption set forth in Article 81, §277(h) of the Maryland Code. *See* 24 *Opinions of the Attorney General* 966 (1939); 43 *Opinions of the Attorney General* 116 (1958); 44 *Opinions of the Attorney General* 373 (1959); Letter of Advice to J. Basil Wisner, Jr., Chief Deputy Comptroller (September 9, 1983). *See also Hammond v. Philadelphia Electric Power Co.*, 192 Md. 179 (1949); *Hampton Plaza Joint Venture, Inc. v. Clerk*, 55 Md. App. 50 (1983).

Your final inquiry about Chapter 115 can be resolved without extensive analysis. CL §12-103(e) sets forth types of loans for which Title 12, Subtitle 1 of the Commercial Law Article prescribes no interest limitation. As amended by Chapter 115, a commercial loan not made to a corporation that is less than $15,000 is subject to the applicable limitations on the rate of interest set forth in the subtitle even if the loan is not secured by a lien on residential real property. Accordingly, the prior authorization to lend free of interest limitations if the loan were a commercial loan in excess of $5,000 has been altered by Chapter 115.

II

Chapter 669—Disclosure Requirements for a Denial of Credit

Chapter 669 has raised an issue of applicability to the following factual situation:

"a) Does [Chapter 669] require the occasional individual maker

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[3]We are advised by the Office of the Commissioner of Consumer Credit that modifications of an existing loan constituting a novation of the loan are administratively viewed as secondary mortgage loan transactions and, as such, subject to applicable statutory constraints. In light of the statutory formulation "in whole or in part", it is not immediately apparent under what circumstances a subsequent loan transaction requiring a secondary mortgage could be viewed as not constituting a loan secured "in part" by the secondary lien.

of a secondary mortgage loan to comply with the requirements of Sections 14-1702 and 14-1703 if, pursuant to Section 12-302 of the Financial Institutions Article, the individual is exempt from the Maryland Secondary Mortgage Loan Law—Licensing Provisions?

b) If the individual is not exempt from the Maryland Secondary Mortgage Loan Law—Licensing Provisions, does the answer to the question differ?"

For the reasons stated below, we conclude that the licensure of a lender is irrelevant in determining the application of Chapter 669. Accordingly, if a lender is subject to the "lending" provisions—as opposed to the "licensing" provisions—of the Secondary Mortgage Loan Law, the lender is potentially subject to the requirements of Chapter 669.

By Chapter 669, the General Assembly created a new Subtitle 17 in Title 14 of the Commercial Law Article requiring a written statement to a consumer upon receipt of a "completed application for credit" that informs the consumer of the action taken on the application. *See* CL §14-1702. If the action is adverse, the consumer is entitled to receive additional information. *See* CL §14-1703. Subtitle 17 applies to all "lenders" or credit grantors" defined, in pertinent part, as follows:

"'Lender' or 'credit grantor' means:

(1) Any lender or credit grantor regulated under Title 12 of this article . . . ."

CL §14-1701(d).

It is a cardinal rule of statutory interpretation that the primary source of legislative intent is the language of the statute itself, with the words used being given their ordinary and popularly understood meaning, absent a manifest contrary legislative intent. A corollary to this rule states that a statute must be construed without resorting to subtle or forced interpretations for the purpose of extending or limiting its operation. *In re Arnold M.*, 298 Md. 515 (1984). It is with these principles that your inquiry can be resolved.

Black's Law Dictionary defines "regulate" as meaning "to fix, establish or control; to adjust by rule, method or established mode". *Black's Law Dictionary* 1156 (5th ed. 1979). Coupled with the express reference to Title 12 of the Commercial Law Article in the definitional section, the legislative intent is clear and unambiguous—Subtitle 17 applies to any person extending credit under the various subtitles contained in Title 12 of the Commercial Law Article. Accordingly, given the ordinary meaning of "regulate" and the reference to a "lending" article (and not the Financial Institutions Article, a "licensing" article), we must conclude that a broad application was intended by the enactment. Restricting its application to licensed lenders would, therefore, appear to be contrary to legislative intent.

Subtitle 17 contains additional indices of an intent to provide an expansive coverage. The terms "lender" and "credit grantor" are the commonly defined terms of art used in various lending subtitles in Title 12 of the Commercial Law Article. Furthermore, the "purpose" clause of the statute begins with no indication that the act is limited to "certain" lenders:

> "For the purpose of requiring a lender or credit grantor to provide a consumer with certain information . . . and generally relating to the denial of credit to consumers by lenders or credit grantors."

Finally, if the scope of Subtitle 17 were to be limited simply to licensed lenders, the General Assembly could have easily effected this result by substituting "licensed to lend" for "regulated" or referencing the Financial Institutions Article instead of the Commercial Law Article.

In reaching this conclusion, we are mindful of the potential application of this subtitle to virtually all persons extending credit.[4] Express requirements in the subtitle, however, restrict its application from applying to unwarranted situations. CL §14-1702 requires a certain formality in the process of seeking credit before the rights afforded under the subtitle attach. There must be a "completed application for credit" before the lender is required to comply with the statute.[5] Everyday informal "applications" for credit (i.e., "Can you lend me $5 until payday?" or "Will you take a second mortgage?") are clearly beyond the purview of Subtitle 17. Where

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[4]As a practical matter, it would appear that this subtitle will normally be applicable only to persons engaged in the business of lending or granting credit since it is only from such persons that an applicant for credit would have the right to expect a reason if the credit application were denied.

[5]Whether such an application must be in writing before the subtitle applies is not made express in the statute and should be the subject of further administrative clarification. If a lender routinely completes credit applications by telephone, however, prudence would dictate that until resolution to the contrary, compliance with this subtitle would be in the interest of good order.

an application process can be reasonably determined to exist, however, an extender of credit under any subtitle in Title 12 of the Commercial Law Article should comply with the provisions of Subtitle 17 as enacted by Chapter 669.

Your final inquiry raises an issue identified by our office during a bill review for legal sufficiency. It is an issue that deserves further legislative analysis and refinement. You have inquired as follows:

> "Has [Chapter 669] expanded the jurisdiction and authority of the Commissioner of Consumer Credit to conduct investigations, hold hearings and issue sanctions on acts or omissions of individuals who occasionally make loans or extend credit and persons regularly engaged in the business of lending or extending credit and licensed by a Commissioner other than the Commissioner of Consumer Credit?"

This question may be simply answered in the affirmative.

CL §14-1706(a) provides the following:

> "If a written complaint for violation of any provision of this subtitle *or any other law of this state requlating loans or other extensions of credit* is filed with the Commissioner of Consumer Credit, the Commissioner may investigate the complaint and hold a hearing on it in accordance with §11-413 of the Financial Institutions Article." (Emphasis added).

The plain meaning of this provision empowers the Commissioner to investigate and hold hearings not only on violations of Subtitle 17 but also on violations of any lending law of the State. Such a statutory interpretation would include licensees as well as nonlicensees of the Commissioner. This intent to grant the broad scope of the investigatory authority contained in CL §14-1706(a) is confirmed by the necessity of limiting the effect of a cease and desist order on certain financial institutions not licensed by the Commissioner. *See* CL §14-1706(e) exempting banks, savings and loan associations, and credit unions from the effect of a cease and desist order.

We are advised by the Commissioner that every complaint received is investigated. Investigation of recalcitrant lenders may, of course, be more easily carried out if the lender is also a licensee. Where nonlicensees are involved, we understand that the Commissioner has reached administrative accords with the primary financial regulators. The General Assembly may well wish to examine the operation of this regulatory scheme from the perspective of the Commissioner's office as well as the lending industry.

We trust this letter has been responsive to your inquiry.

STEPHEN H. SACHS, *Attorney General*

ROBERT DEV. FRIERSON, *Assistant Attorney General*

JACK SCHWARTZ
Chief Counsel
Opinions and Advice

Editor's Note: The preceding opinion was originally written as a letter of advice. Because of the guidance it offers, it is published here in a slightly revised format.

ELECTIONS

FAIR ELECTION PRACTICES ACT—POLITICAL COMMITTEES—CONTRIBUTIONS—EXPENDITURES—TESTIMONIAL DINNERS.

August 27, 1985

Mrs. Marie M. Garber, Administrator
State Administrative Board of Election Laws

The purpose of this letter is to outline our views on several issues involving the provisions of the Fair Election Practices Act that govern political committees and contributions. This aspect of the Act is especially troublesome, both in concept and practice. As usual, the Act itself provides singularly little guidance; the ground rules in this area are largely derived from the State Board's administrative practice over the years, in light of the Attorney General's Office's "common law".

The Act's lack of specificity and clarity, and the great increase in the number of political committees over the last several years, result in numerous, difficult interpretive questions. The following questions have been raised recently: (1) What obligation does a political committee have to assist its contributors in complying with the contribution limits in Article 33, §26-9(b)? (2) May a political committee make disbursements from its treasury for anything other than political expenditures? (3) Under what circumstances may a political committee transfer funds to a federal campaign committee? (4) What distinguishes a political committee from a non-electoral testimonial committee? (5) May the recipient of proceeds from a testimonial dinner later use them for electoral purposes?

These questions are addressed respectively in Parts II through VI of this letter.

I

Background

Under the Act, a "political committee" is "any combination of two or more persons appointed by a candidate or any other person or formed in any other manner which assists or attempts to, assist in any manner the promotion of the success or defeat of any candidate, candidates, political party, principle or proposition submitted to a vote at any election". Article 33, §1-1(a)(14) of the Maryland Code. A political committee may not function unless it files a statement of organization with the appropriate election board. *See* Article 33, §26-4. The nature of a political committee—and, especially, the difference between a political committee and a mere "committee" or a "partisan organization", two other entities recognized in the Act—is explored at length in 59 *Opinions of the Attorney General* 282, 289-99 (1974).

The Act further complicates matters by recognizing—but not defining—a "political committee which continues in existence from year to year". *See* Article 33, §26-11(c)(1) and (2)(ii). In 63 *Opinions of the Attorney General* 273 (1978), this office gave content to this concept: a "political committee which continues in existence from year to year"—now commonly referred to as a "continuing committee"—is one that from the outset intends to support a candidate or candidates in an indefinite series of future elections. All other "political committees"—commonly referred to as "campaign" or "non-continuing" committees—intend from the outset merely to support a candidate or candidates in a particular year's elections, typically a primary and general. *See* 63 *Opinions of the Attorney General* at 275-77.

II

Obligations of a Continuing Committee Regarding Contribution Limitations

A. *Applicability of Limitations*

It is absolutely clear that donations by an individual or a business entity to a candidate are subject to specified dollar ceilings:

> "It is unlawful for any individual, association, unincorporated association, corporation, or any other entity either directly or indirectly to contribute any money or thing of value greater than $1,000 to any candidate or to contribute money in excess of $100 except by check in any primary, general or special electlon. Total contributions by a contributor under this subsection shall not exceed $2,500 in any primary or general election." Article 33, §26-9(b).

It is equally clear that these contribution limitations do not apply to contributions made by political committees, because "transfers . . . from the treasurer of a committee to the treasurer of another committee" or "from the treasurer of a committee to a candidate's treasurer" are exempt from both the $1,000 and $2,500 limitations. Article 33, §26-9(c)(1)(ii) and (iv).

But do the contribution limitations apply to the contributions of an individual or entity to a political committee, as distinct from contributions made directly to a candidate? The statutory language is rather ambiguous. The $1,000 limit speaks of only those who "contribute any money or thing of value greater than $1,000 *to any candidate*". The $2,500 limitation addresses only "total contributions by a contributor *under this subsection*"—arguably, that is, only contributions "to any candidate."

However, the $1,000 limitation prohibits excessive contributions made "either directly or indirectly". A contribution that is received by a political committee and later transferred to a candidate can readily be regarded as as "indirect" contribution from the original contributor to the candidate via the committee. Hence, such indirect contributions are comprehended "under this subsection" and are therefore subject to the $2,500 limitation, as well.

This latter construction of the statute, although not previously spelled out in any detail, has been the consistent view of both this office and the State Administrative Board of Election Laws. *See, e.g.*, 59 *Opinions of the Attorney General* at 306; 55 *Opinions of the Attorney General* 100, 103 n. 1 (1970).

These limitations are applicable to institutional, as well as individual, contributors to political committees. In particular, an out-of-State political committee—one which has not filed in accordance with Article 33, §26-4(a)—is subject to the limitations, even when it channels funds to a State affiliate. The "transfer" exemption in §26-9(c) is available only to Maryland-based "treasurers", "committees", and "candidates" that are in compliance with the Act.[1]

B. *Duty of Continuing Committee to Supply Information*

As discussed above, the hallmark of a continuing committee is its ongoing existence. Some such committees, in reality, are simply the

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[1] "Any committee", wherever located, is required to report direct or indirect expenditures of $51.00 or more "to aid or oppose the nomination or election of any candidate". Article 33, §26-4(b).

creatures of particular candidates. These continuing committees function much like the traditional campaign committees, except that they are designed to support a candidate throughout his or her political career. For the most part, it is relatively easy for a contributor to such a candidate-related continuing committee to discern the election for which a contribution will be used and, therefore, to reckon the effect of that contribution on compliance with the contribution limitations in Article 33, §26-9(b).

However, many continuing committees are not candidate-related. Rather, these committees seek to advance the interest of some entity (for example, a corporation, labor union, trade association, or environmental group) through the support of numerous candidates. These are the classic political action committees—PACs. A contributor to a PAC has no way of knowing the candidates to whom his or her contribution will ultimately be transferred. Indeed, at the time of the contribution, the PAC itself may have no idea to whom the contribution will go.

Past opinions are somewhat inconsistent about the respective obligations of the committee and the contributor, in light of the contribution limitations. In 58 *Opinions of the Attorney General* 266, 268-69 (1973), this office wrote that political committees are under no obligation to notify contributors of the applicability of the $2,500 limit to their contributions. Moreover, "if the contributor was without knowledge of a transfer which placed him in violation of the limit, prosecution for contributing in excess of the maximum allowed would seem unlikely". 58 *Opinions of the Attorney General* at 269.

However, the later "continuing committee" opinion construed the limitations themselves to impose a duty of inquiry on the part of the contributor, and a corresponding duty on the part of the committee to provide necessary information:

> "While the responsibility for avoiding violations of [the contribution limitations] is clearly the contributor's and not the committee's, the contributor must have some way of knowing in connection with which election he is contributing money. Indeed, it was for this reason that we concluded in an earlier opinion of this office that 'money received at a fund-raising event must be identified at the time the contribution is made as being for one election or another. . . .' 58 *Opinions of the Attorney General* 266, 267 (1973). If a committee is not identified as 'continuing' the contributor can assume that it is organized with one elec-

> tion year (usually one primary and one general election) in mind and limit his contribution accordingly. If a committee is identified as 'continuing' in nature, then a contributor is alerted to the fact that he should determine the particular election for which his contribution is to be used." 63 *Opinions of the Attorney General* 273, 277-78 (1978).

The contributor's duty of inquiry is reasonable with respect to the overall $2,500 limitation. Any contributor ought to be expected to keep track of his or her total contributions and to inquire, as need be, whether any or all of a contribution will be allocated to a past, rather than the forthcoming, election.

But the $1,000 limitation is, in our view, unworkable and unenforceable, as applied to contributions to PACs—continuing committees unrelated to a candidate. In most cases, there is simply no way to link a particular contribution with a later transfer to a candidate. Unless a contributor to a PAC specifically earmarks his or her contribution for a particular candidate, or has some other reason to believe that the contribution will in fact go to only one or a handful of candidates, the $1,000 limitation is inapplicable to PAC contributions.

III

Outlays of Political Committees

The question has been raised whether a political committee—in particular, a PAC—may expend money for purposes other than assisting candidates or covering its own expenses. For example, may a PAC purchase tickets to a testimonial dinner? May it donate money to help underwrite the expenses of a legislative caucus?

In essence, political committees are simply efficient conduits for individual political contributions. That is why the contribution limitations (at least, the $2,500 limitation) are applicable to those who contribute to political committees. Thus, our office has written, a mere "committee" becomes a "political committee" if it (i) supports or opposes an announced candidate and (ii) acts "in some way, either by transferring or contributing funds or by engaging in some activity involving the expenditure of its funds, which is either intended to, or could reasonably be expected to, or in fact does," support or oppose a candidate. 59 *Opinions of the Attorney General* 282, 295 (1974).

In 68 *Opinions of the Attorney General* 252 (1983), we concluded that "funds given for electoral purposes may not be converted to nonelectoral use". The reasoning was straightforward:

> "[T]he Fair Election Practices Act . . . regulates electoral donations stringently and nonelectoral donations not at all. Therefore, a donor is entitled to know what kind of donation he or she is in fact making and to have the general purpose for that donation carried out." 68 *Opinions of the Attorney General* at 266.

At the same time, we recognized that "the Act permits a very wide range of uses for campaign funds". *Id.* Thus, in an earlier advice letter addressing the permissible range of expenditures by a candidate-related continuing committee, we wrote that "any lawful expense . . . which enhances a candidate's election chances and would not be incurred if there were no potential candidacy, is a proper expenditure". Letter from Stephen H. Sachs, Attorney General, to Dennis F. Rasmussen, State Senator, at 3 (April 27, 1983). So, for example, it is surely a proper expenditure for one candidate to contribute to the campaign of another. This act of support may well redound to the ultimate electoral benefit of the first candidate.

Moreover, political committees inevitably expend at least a portion of their receipts for purposes other than electoral expenditures. For example, virtually all political committees must pay bank charges, accounting fees, or the cost of other services to support their ongoing activities. These outlays are not "expenditures" within the meaning of the Act. The Act recognizes the reality of outlays that are not "expenditures": §26-7(a) requires the treasurer's account books to list, among other things, "all expenditures, *disbursements* and promises of payment or disbursements of money or valuable things made by any committee".

We believe that a broad view ought to be adopted as to the permissible range of outlays by a PAC. Indeed, by its very nature a PAC has broader interests than a candidate-related continuing committee. For the PAC, support of candidates is a means to an end—the advancement of the interests of the allied group—not an end in itself. We may fairly infer that contributors to the PAC likewise view their PAC contributions as fostering the PAC's broad purposes, even if those purposes are sporadically advanced through nonelectoral outlays.

Although—or maybe because—the applicability of the Act in this situation is far from clear, we would view with tolerance isolated, politically related outlays by a PAC even if they are at best only indirectly related to elections. So long as these outlays are minimal, compared to transfers or other expenditures that plainly are for electoral purposes, we do not think that a cognizable compliance problem arises. We would become concerned only if the proportion of nonelectoral outlays becomes substantial, because then the intention of contributors to the PAC may be subverted.

B. *Applicability of Contribution Limitation*

In any event, such nonelectoral outlays would have no effect on the applicability of the contribution limitations to contributors to the PAC. In 63 *Opinions of the Attorney General* 263 (1978), this office concluded that a corporation's payment of the ongoing administrative expenses of its independent political committee was not subject to the limitations in §26-9(b). The opinion pointed out that the uses of the payments—"to maintain a payroll deduction option for the corporation's employees, keep separate records of employee contributions and make the reports required by law"—would not be of any "demonstrable benefit or savings to any candidate". 63 *Opinions of the Attorney General* at 270. Moreover, "because the donor has complete control over the administration of the political committee, it is certain that in practice the recipient cannot direct the funds to some other use." 63 *Opinions of the Attorney General* at 271. The opinion summarized as follows:

> "Because of these two elements—the lack of any benefit to a candidate and the total control of the use of the contribution is by the donor—it is our view that this corporation's contribution to its independent continuing political committee for administrative and compliance expenses . . . is not a contribution in connection with any particular primary, general or special election. Accordingly it should not be chargeable against the contribution limitations set forth in Section 26-9(b)." *Id.*

Applying this reasoning to the situation in which contributions are later used by a continuing committee for nonelectoral disbursements, we conclude that the full amount of the contribution is chargeable against the contribution limitations. This is so because at least one of the two elements identified in the opinion—"the total control of the use of the contributions by the donor"—is absent. It is the continuing committee, not the donor, which decides that some portion of its commingled funds can best be spent for nonelectoral purposes. Accordingly, we conclude that the $2,500 contribution limitation in §26-9(b) generally applies to the full amount of contributions to continuing committees, even if the committee subsequently disburses money from its treasury for payment of its expenses or other non-electoral purposes.[2]

IV

Transfers to Federal Committees

The question has arisen whether a political committee—that is, a properly filed entity that collects and expends funds in connection with State elections—may transfer funds to a committee that participates in federal elections. For example, may a State PAC transfer funds to its federal election counterpart?

In our view, it may do so to the extent permitted by the Federal Election Campaign Act. It is not clear whether State law allows this kind of transfer;[3] but, in any event, any arguable prohibition in State law is "fully preempted" by the federal statute and "may not be applied in any way to contributions given in connection with campaigns for federal office". 61 *Opinions of the Attorney General* 363, 369 (1976).

From the perspective of a contributor to the State PAC, the full amount of his or her contribution would be chargeable against the $2,500 limitation in §26-9(b), even if a pro rata portion of the contribution was ultimately transferred to a federal PAC. *See* Part III B above.[4]

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[2]However, if a contributor specifies that his or her contribution is to be used for nonelectoral purposes, and if the committee segregates such funds, the contribution limitation would be inapplicable. *See* 63 *Opinions of the Attoney General* at 271.

[3]Article 33, §26-9(c)(1)(ii) permits unlimited transfers "[f]rom the treasurer of a committee to the treasurer of another committee". A "treasurer" is someone who handles money in connection with "any election", which includes federal elections. *See* Article 33, §1-1(a), (6) and (18). However, the Act clearly requires that all money, from whatever source, is to be handled by treasurers who are filed with a State or local election board. *See* Article 33, §§26-4(a) and 26-6. Treasurers of federal PACs are not so filed.

[4]If a State PAC regularly transfers funds to a federal PAC, the better practice under State law is for the State PAC to solicit and allocate the intended federal contributions separately. Then, if a contributor earmarks all or a portion of a contribution for use in a federal campaign, the contribution limitation in §26-9(b) would be inapplicable to that contribution or portion. Of course, any flow of funds from contributor to State PAC to federal PAC must comply with all of he solicitation and recordkeeping requirements of federal law.

V

Testimonial Dinner Committees

Under the Act, those who organize a testimonial dinner for an incumbent officeholder are not subject to the filing and reporting requirements applicable to partisan organizations and political committees, and subscribers to the testimonial dinner need not count their outlay toward any contribution limitation, *if* the testimonial "is not conducted for the purpose of raising money either to eliminate a prior election campaign deficit or to accumulate a campaign fund for use in a subsequent election effort on the part of the incumbent office-holders". 61 *Opinions of the Attorney General* 407, 413 (1976). *See also, e.g.*, 57 *Opinions of the Attorney General* 185 (1972).

The question arises as to the specific means by which one identifies a "true" testimonial committee. Put another way, how is the purchaser of a ticket to an affair honoring an incumbent to know whether his or her ticket purchase is subject to the contribution limitations?

In our view, the following elements should be considered in determining the nature of a testimonial dinner:

(1) *The identity of the organizers.* If a previously filed partisan organization or political committee is sponsoring the dinner, there is a conclusive presumption that the event is a political fundraiser. Ticket purchases are subject to the contribution limitations.

(2) *The timing of the event.* The fact that a testimonial dinner is held "well in advance of any election and of a candidate's announcing for public office" is some evidence that the event is a true testimonial, not a political fundraiser. *See* 57 *Opinions of the Attorney General* at 186. Conversely, a so-called "testimonial" event held within several months of an election ought to be viewed with heightened skepticism.

(3) *Solicitations and advertisements.* It is evidence that an event is a true testimonial if written solicitations and other advertisements for the affair refer exclusively to the past achievements of the honoree. By contrast, it is evidence that an event is a political fundraiser if these materials refer to future campaigns or political prospects.

(4) *Use of the funds raised.* If the question as to the proper categorization of an event is raised after the event is held, one may look to the use of the proceeds as evidence of the nature of the event itself. That is, the disposition of the proceeds ought

to be consistent with the nonelectoral nature of a true testimonial dinner—e.g., a gift to the honoree. *See* Part VI below.

VI

Use of Proceeds of Testimonial Dinner by Incumbent

In Part V above, we expressed the view that the disposition of the proceeds of an event is evidence of its nature. That is, if those who sponsor the event use its proceeds in a way consistent with the purposes of a testimonial dinner, that use is itself evidence of the true testimonial nature of the event. By contrast, if the funds are used by the organizers for electoral purposes, that use is virtually irrefutable evidence that the event was in fact a political fundraiser, not a true testimonial. But a further question suggests itself: May an incumbent who receives a gift of cash from a "true" testimonial dinner subsequently use that money for his or her electoral purposes?

The problem may be clarified by a hypothetical example. Suppose that a dinner was held in early 1984 to recognize the years of service of John Doe, an incumbent officeholder. All of the indicia mentioned in Part V above suggest that the event was, indeed, a true testimonial. The organizers of the event net $10,000, which they gave to Doe. This gift was wholly unrestricted, and Doe added the $10,000 to his personal bank account. Then, in late 1985, he announces for reelection. In early 1986, he donates $10,000 to his campaign committee.

In our view, this transaction is permissible under the Act. The $10,000 contribution by the candidate to his own campaign does not violate the limitations, because they are inapplicable to the "contributions of a candidate or his spouse to the candidate's own campaign". Article 33, §26-8(a). Moreover, such a subsequent use by a candidate of money received as a bona fide gift from a testimonial dinner does not change the nature of the dinner itself. Hence, neither the sponsors of the dinner nor its attendees can be said to have breached any of the requirements of the Act, because at the time of the dinner the Act was inapplicable.

We recognize that this is a potentially serious loophole in the system of limitations and disclosures sought to be created by the Act. However, we see no solution other than legislative correction.

VII

Conclusion

To summarize, it is my view that:

(1) Political committees, including continuing committees, have an obligation to assist contributors in complying with the contribution limitations of Article 33, §26-9(b). Often the surrounding circumstances will make clear the election to which a contribution will be allocated. If they do not, and upon inquiry, the committee must provide a contributor with information about the election in which his or her contribution is used, so that the contributor can maintain compliance with the $2,500 per election limitation in §26-9(b). However, the $1,000 contribution limitation in §26-9(b) is, as a practical matter, generally unenforceable as applied to contributions to continuing committees unrelated to any candidate.

(2) Isolated nonelectoral outlays by a continuing committee that is unrelated to any candidate do not give rise to a substantial compliance problem under the Act. Any such outlays do not diminish the applicability of the $2,500 limitation to contributors to the committee.

(3) A State political committee may transfer funds to a federal committee, to the extent permitted by federal law.

(4) A testimonial dinner may be distinguished from a political fundraiser by consideration of sponsorship, timing, advertising, and disposition of proceeds.

(5) The recipient of a bona fide nonelectoral gift from a testimonial dinner may subsequently donate a sum equal to that gift to his or her own campaign.

STEPHEN H. SACHS, *Attorney General*

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Opinions and Advice

Editor's Note: The preceding opinion was originally written as a letter of advice. Because the questions addressed recur frequently, it is published here in a slightly revised format.

GAMING

BINGO—P.G. COUNTY—OPERATION OF BINGO GAMES BY PROFIT-MAKING CORPORATION IN CONJUNCTION WITH NONPROFIT ENTITIES NOT PERMITTED BY STATE LAW.

January 15, 1985

The Honorable Frank J. Komenda
Senate of Maryland

You have requested our opinion on the legality under State law of an arrangement by which civic or charitable organizations in Prince George's County would conduct bingo games on premises leased from a profit-making corporation, with all the necessary equipment being supplied by the lessor, and would divide the pooled proceeds after substantial payments to the lessor for rent and expenses.

For the reasons given below, we have concluded that the arrangement you describe would violate the provisions of Article 27, §§255 and 258B of the Maryland Code.[1]

I

Background

A. *The Proposed Transaction*

You indicated that Eastover Leasing, Ltd., a for-profit corporation, has leased a vacant building in Oxon Hill with the intent of subleasing the premises to various non-profit organizations to con-

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[1]The Prince George's County Attorney has advised the Director of Environmental Resources that this arrangement would violate a provision of the local law prohibiting any division of proceeds between the organization sponsoring a bingo game and any other party. Memorandum from Thomas P. Smith, County Attorney, to Eugene T. Lauer, Director of Environmental Resources (November 28, 1984). In view of our conclusion, we find it unnecessary to address the question of whether the State law preempts that county law.

duct bingo games. We have examined two such subleases, with the Crescent Cities Jaycees and the Glassmanor Citizens Association.[2]

Under these subleases, each organization would be entitled to exclusive use of the premises on particular evenings of the week. Each organization is guaranteed $300 from the bingo proceeds on the night it uses the premises. The remainder is to be deposited in a common account, from which $1,150 per night of use is to be paid to Eastover as "basic rent". In addition, each sublessee is to pay a pro rata share of "additional rent"—that is, payment for operating expenses, including "bingo supplies" and "miscellaneous expenses incident to the bingo operation". To the extent that "basic" and "additional" rent cannot be paid from current proceeds, those charges encumber future proceeds. Any excess proceeds are to be distributed monthly to the sublessees on a pro rata basis.[3] Although "basic rent" includes a $125 fee for premises management, each sublease expressly provides that the sublessee is to furnish from its membership the personnel to conduct the bingo games.

B. *Governing Statutes*

Article 27, §§237 and 241, have been understood to generally prohibit playing any kind of game for money. *Brown v. State,* 210 Md. 301, 307 (1956). Moreover, State law specifically prohibits leasing any premises for the purpose of gambling. Article 27, §239.

However, in 18 counties of the State, including Prince George's County, various non-profit organizations are permitted to hold carnivals, bazaars, or raffles, including bingo games, "for the *exclusive* benefit of any such . . . organization", so long as "no individual or group of individuals benefits financially from the holding of any bazaar, carnival, or raffle or receives or is paid any of the proceeds . . . for personal use or benefit". Article 27, §255(b). In addition, in Prince George's County, groups of citizens, companies, associations, and corporations organized within the county to promote civic, char-

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[2] You also indicated that Eastover has entered into an agreement with the Maryland State Jaycees whereby the State organization would in some manner act as an intermediary nonprofit sponsor. However, the two subleases we have examined contain no reference to the State Jaycees.

[3] It is not clear whether "pro rata" means equally according to the number of sublessees—as it apparently does for the sharing of operating expenses—or according to some other basis for division, such as the number of nights the sublessee uses the premises or the proportion of a sublessee's proceeds to the total proceeds.

itable, and similar objects, "and not organized for the private profit or gain of any member", may conduct "benefit performances", including bingo games, the net proceeds of which must inure to the group or organization for its civic or similar purpose. Article 27, §258B.

Under Article 27, §255(b)(3), the event must be "managed by the members of such group, organization or corporation personally through its members". Similarly, Article 27, §258B provides that any "benefit performance" must be "managed and operated only by members of such group or organization personally"; this section also requires that the group or organization obtain a permit from the Department of Inspections and Permits for Prince George's County.

Prince George's County was added to the so-called "carnival exception" of Article 27, §255, by Chapter 438, Laws of Maryland 1973. The Prince George's County bingo exception of Article 27, §258B was enacted in the same year, by Chapter 342, Laws of Maryland 1973. Presumably, the General Assembly was aware that it was enacting two, somewhat varying, laws that would permit bingo to be played for money in Prince George's County under certain circumstances. In a similar situation, involving Charles County, this office concluded that both the so-called carnival exception and a specific bingo exception were effective, the first governing occasional fund-raising events and the second governing recurring bingo games. 61 *Opinions of the Attorney General* 315, 319 (1976). *See also* 54 *Opinions of the Attorney General* 161, 162 (1969). We think that the same is essentially true here. The question, then, is whether the arrangement outlined in the subleases is permissible under either §255 or §258B of Article 27.

II

Analysis

Article 27, §246, provides that "[t]he courts shall construe the [statutes] relating to gambling and betting liberally, so as to prevent the mischiefs intended to be provided against". And the Court of Appeals has held that this section applies to all statutes enacted to prevent gambling. *Gaither v. Cate*, 156 Md. 254, 258-59 (1929). Hence, exemptions from the anti-gambling statutes, such as those in Article 27, §§255 and 258B, must be narrowly construed.

In our view, under the arrangement at issue here, proceeds of the bingo games do not inure to the sponsoring organizations in the manner required by either §255 or §258B of Article 27. Instead, a substantial part of the proceeds is shared with Eastover Leasing as "basic rent", in addition to the reimbursement of operating expenses that is identified as "additional rent". Moreover, to the extent that the pro rata distribution of the remainder of the proceeds might not be based on the proportion that one sublessee's proceeds bears to the total proceeds of all of the sublessees, the arrangement would result in a sharing of proceeds among sponsoring organizations.

We believe that this sharing of proceeds with Eastover violates the prohibition against any individual's or group's receiving any of the proceeds of a fund-raising event "for personal use or benefit" (Article 27, §255) or "for . . . private gain" (Article 27, §258B). We also believe that the statutes would be violated to the extent that proceeds generated from a bingo game under the sponsorship of one organization were shared with other organizations, for the bingo game then would not be for the benefit of the sponsoring organization.

To be sure, these statutory restrictions on the use of proceeds do not necessarily mean that a nonprofit organization may not purchase supplies or prizes for its bingo games from a disinterested third party or, if necessary, lease from such a third party a place in which to hold its games. And certainly, to that extent, the third party may be said to benefit indirectly from the bingo games. However, the clearly evident intent of the section is that the sponsoring organization be the primary, and sole direct, beneficiary of the bingo games. At a minimum, any proceeds not inuring to the sponsoring organization may only be used, in our view, to pay reasonable and necessary expenses of conducting the games. Put another way, any profit to a third party must solely derive from the reasonable and necessary expenses that the nonprofit organization incurs in operating its games. The arrangement at issue here, however, appears to go far beyond that—and, indeed, effectively makes Eastover, rather than the "sponsoring" organizations, the primary beneficiary of the contemplated bingo games.

Under the subleases we have examined, each sublessee is guaranteed $300 for each night it uses the premises. But, in return, each is obligated to pay Eastover, from the bingo proceeds, nearly four times that amount in "basic rent". Eastover is to furnish, for reimbursement from the proceeds, all utilities, insurance, security, janitorial and maintenance services, and bingo supplies—everything necessary to an ongoing bingo operation except, perhaps, the personnel who would be on hand during the games.

All in all, Eastover is much more than a simple, disinterested renter of space. It is, in effect, the initiator of the bingo activity: It seeks out organizations to serve as "sponsors"; it provides the necessary bingo supplies and incidental services; and, most importantly, it has a direct financial interest in the profitability of the activity. Such involvement strongly suggests that Eastover would be the *de facto* manager and organizer of the bingo activity. In any event, the bingo games would not be "managed and operated *only* by members of [the sponsoring] group or organization personally", as required by Article 27, §258B.

In the final analysis, Article 27, §§255 and 258B were intended to allow charitable, civic, and similar nonprofit organizations to operate games of chance as fund-raising activities. They were not intended to allow a profit-making entity such as Eastover to initiate and organize bingo games—indeed, to seek out nonprofit "sponsors" that would permit it to conduct bingo operations. Under the subleasing arrangement here, Eastover has in effect hired nonprofit organizations, for a guaranteed $300 and a possibility of more, to sponsor its (Eastover's) bingo operation. This is not the kind of activity protected by Article 27, §255 or §258B.[4]

III

Conclusion

In summary, it is our opinion that the contemplated arrangement between Eastover Leasing and various nonprofit organizations in

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[4]The materials you supplied us indicate that the "basic rent" Eastover will charge its sublessees is intended to generate a total annual rent of more than three times the amount of rent that Eastover pays the building's owner. We believe our conclusion is especially true if, as these figures suggest, the rate of rental charged to sublessees exceeds the fair rental value of the property. Moreover, the subleases we have examined provide that "Sublessee's liability for rent, additional rent, and associated expenses under the terms and conditions of this lease are limited and can be collected only from the balance of Bingo proceeds". In our view, the conditional nature of the organizations' obligations further indicate that the bingo activity here is not of the type protected by Article 27, §§255 and 258B. *Cf.* 67 *Opinions of the Attorney General* 125, 129 (1982) (conditional sale of real property to charity for raffle is prohibited by Article 27, §255 if seller will receive anything more than fair market value of the property).

Prince George's County for the conduct of bingo activities is impermissible under either §255 or §258B of Article 27.[5]

STEPHEN H. SACHS, *Attorney General*

RICHARD E. ISRAEL, *Assistant Attorney General*

AVERY AISENSTARK
Chief Counsel
Opinions and Advice

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[5]We understand that the General Assembly may be considering legislation to generally revise Article 27, §255. In this context, it might also consider the related provisions of Article 27, §258B as well.

GENERAL ASSEMBLY

GOVERNOR—CONSTITUTIONAL LAW—VETO PROCEDURES—BILLS VETOED DURING SPECIAL SESSION TO BE RETURNED TO HOUSE OF ORIGIN AT NEXT SESSION, WHETHER SPECIAL OR REGULAR.

May 24, 1985

The Honorable Harry Hughes
Governor

We understand that during the current special session of the General Assembly, you expect to veto certain bills from the 1985 regular session. You have asked whether you are required to return these vetoed bills to the House of origin during the current special session.

For the reasons stated below, we conclude that you are not required to return these bills to the House of origin during the current special session, but that you must do so at the next session, whether that is another special session this year or the regular session of 1986.

I

Veto Procedures

Article II, §17 of the Maryland Constitution provides that before a bill becomes a law it must be presented to the Governor. Article II, §17 also reserves to the Governor a veto over these bills, which the General Assembly may override by a three-fifths vote in each House. Bills must be presented to the Governor within 20 days of adjournment. Article III, §30. Bills presented within this period become law without the signature of the Governor unless they are vetoed. Article II, §17.

Except when a new General Assembly has been elected and sworn in, "[a]ny Bill so vetoed by the Governor shall be returned to the House in which it originated, immediately after said House shall have organized at the next regular or special session of the General Assembly." Article II, §17. This requirement was originally added to the Constitution in 1950. Chapter 714, Laws of Maryland 1949 (ratified Nov. 7, 1950). It was revised to its present form in 1974.

Chapter 883, Laws of Maryland 1974 (ratified Nov. 5, 1974) . The Court of Appeals has characterized this requirement as "mandatory and a constitutional duty." *Maryland-National Capital Park and Planning Commission v. Randall*, 209 Md. 18, 24 (1956).

In interpreting this requirement, this office has concluded that, although the vetoed bills can be special ordered by the House of origin, they must be returned to that House immediately after its organization. 57 *Opinions of the Attorney General* 101, 104 (1972). Although the opinion noted that there was no documented history of the 1950 amendment to §17, the evident intent was to give the General Assembly ample time to consider the vetoed bills and the Governor's objections. 57 *Opinions of the Attorney General* at 103. This conclusion is reinforced by the 1974 amendment to §17, which has the effect of requiring that bills presented and vetoed in the last six days of a session be returned to the House of origin at the beginning of the next session rather than during the then-current session. *See* Chapter 883, Laws of Maryland 1974.

Clearly, if the General Assembly has already convened in a special session and the two Houses have organized themselves, bills from the preceding regular session that are vetoed during the special session cannot be returned "immediately after the organization" of the House of origin. Because a special session can only last 30 days [Article III, §15], a return of vetoed bills while such a session is in progress could defeat the purpose of giving the General Assembly sufficient time to consider the vetoed bills. Moreover, the requirement in §17 that vetoed bills be returned to the House of origin at the "next session" clearly refers to the session that first organizes after the veto of the bills, rather than a session then in progress.

II

Conclusion

In summary, it is our opinion that you are not required to return any bills from the 1985 regular session vetoed during the current special session to the House of origin during the current session. Rather, you are required to return any such bills to the House of origin at the beginning of the next ensuing session of the General Assembly, whether that is another special session or the 1986 regular session.

STEPHEN H. SACHS, *Attorney General*

RICHARD E. ISRAEL, *Assistant Attorney General*

AVERY AISENSTARK
Chief Counsel
Opinions and Advice

Editor's Note: The preceding opinion was originally written as a letter of advice. Because the question addressed is potentially recurring, the letter is published here is a slightly revised format.

GENERAL ASSEMBLY—CONSTITUTIONAL LAW—VACANCY—SUCCESSOR TO RESIGNED MEMBER WHO CHANGED POLITICAL PARTIES TO BE NAMED BY CENTRAL COMMITTEE OF POLITICAL PARTY WITH WHICH MEMBER WAS AFFILIATED AT ELECTION.

December 31, 1985

The Honorable Gary Alexander
Maryland House of Delegates

You have requested our opinion about the procedures to be followed in the event that a member of the General Assembly who has changed party affiliation were to resign from office. Specifically, you ask whether the central committee of the political party with which the member was affiliated at the time of his or her election would submit the name of the successor to the Governor, or whether that responsibility lies with the central committee of the political party with which the member was affiliated at the time of resignation. Although the particular example cited in your letter involves a Delegate elected as a Democrat who changed his party affiliation to Republican, the analysis is the same no matter what the particular party identifications may be.

For the reasons stated below, we conclude that the central committee of the political party with which the vacating member was affiliated at the time of his or her election is authorized by Article III, §13(a) of the Maryland Constitution to submit the name of the successor to the Governor, who is obliged to appoint that person to the vacancy. Thus, in your example, the Democratic Central Committee for Prince George's County would submit to the Governor the name of the person who would fill the vacancy should a Delegate, who was elected as a Democrat but has changed party affiliation to Republican, resign from the House of Delegates.

I

Discussion

Article III, §13(a) of the Maryland Constitution provides, in pertinent part, as follows:

> "*In the case of* death, disqualification, *resignation*, refusal to act, expulsion, or removal from the county or city for which he shall have been elected, *of* any person who shall have been chosen as a *Delegate or Senator, . . . the Governor shall appoint a person to fill such vacancy* from a person *whose name shall be submitted to him* in writing, within 30 days after the occurrence of the vacancy, *by the Central Committee of the political party with which the Delegate or Senator, so vacating, had been affiliated* in the County or District from which he or she was elected, *provided that the appointee shall be of the same political party as the person whose office is to be filled*; and it shall be the duty of the governor to make said appointment within 15 days after the submission thereof to him."

Various interpretative issues regarding Article III, §13(a) have been addressed by this office in the past. *See, e.g.*, 62 *Opinions of the Attorney General* 241 (1977); 62 *Opinions of the Attorney General* 442 (1977); 60 *Opinions of the Attorney General* 306 (1975). However, the particular issue that you raise has never been addressed in an opinion.

Nevertheless, a recent letter of advice addressed an analogous issue: When a county commissioner who has changed party affiliation resigns, which central committee submits the successor's name to the Governor under Article 25, §16 of the Maryland Code? This letter of advice, which is attached, concluded that the central committee of the political party with which the vacating commissioner was affiliated at the time of his election is authorized by Article 25, §16 to submit the name to the Governor. Letter of Advice from Jack Schwartz, Assistant Attorney General, to Carol S. Evans, Deputy Administrator, State Administrative Board of Election Laws (September 6, 1984).

In discussing Article 25, §16, the letter of advice pointed out that the statutory language in question paralleled that of Article III, §13(a). The pertinent language in both provisions is ambiguous. Thus, the letter sought to "identify the construction that 'harmonize[s] with the general scheme of the statute and assist[s] in carrying out the legislative purpose'. *Smith v. Higinbothom*, 187 Md. 115, 125 (1946)." The letter then summarized the underlying purpose as follows:

> "In general, laws relating to elective office ought to be construed so that the will of the electorate is carried out. *See* generally, *e.g.*, *Wilkinson v. McGill*, 192 Md. 387, 393

(1949) (determinative principle in resolving election contest based on errors of election officials is to uphold 'the will of the people freely expressed at the ballot box'). Indeed, as one court observed in construing the statute that gave political parties the power to fill vacancies, 'i[t] is not the political party but the People that have the real interest in the vacant office, and the method of selection should reflect their choice as well as possible'. *People ex rel. Rudman v. Rini*, 356 N.E.2d 4, 7 (Ill. 1976).

The will of the people is, of course, reflected in the election of county commissioners who present themselves to the voters under the banner of one of the political parties. We can safely assume that a candidate's party affiliation does play a role in voters' decisionmaking. Hence, it is reasonable to regard the mechanism for filling a vacancy set out in Article 25, §16 as an effort to give at least an indirect voice in the selection of the commissioner's successor to the electorate—through the political party officials elected in the same primary in which the vacating commissioner was nominated.

. . .

In my view, the ambiguity presented by Article 25, §16 when it is applied in this novel situation ought to be resolved by regarding the vacating commissioner's political party *at the time of his election* as 'the political party with which the county commissioner, so vacating, has been affiliated'. This construction is consonant with the presumption of continuous party affiliation evidently underlying the General Assembly's choice of language. That is, resolving the ambiguity, we should give as much effect as possible to the General Assembly's underlying presumption by applying the law as if the vacating commissioner were still affiliated with 'the political party with which the . . . commissioner . . . *has been* affiliated'. Moreover, this construction assists in carrying out what is apparently the overall purpose of the appointment process in Article 25, §16—to vest the decision in those who are perceived as best able to carry forward the political judgment of the voters." (Emphasis in original.)

II

Conclusion

We agree with the reasoning in this letter of advice, and we conclude that it is equally applicable to the procedures for filling a General Assembly vacancy set out in Article III, §13(a) of the Constitution. Thus, it is our opinion that, when a vacancy occurs, the central committee of the political party with which the vacating member was affiliated at his or her election is authorized to submit the name of a successor to the Governor, even if the vacating member has changed political party affiliation since the election.

STEPHEN H. SACHS, *Attorney General*

JACK SCHWARTZ, *Chief Counsel*
Opinions and Advice

Editor's Note: Since the issuance of this opinion, Article III, §13(a) of the Constitution has been amended to make explicit that the successor to a vacating member of the General Assembly "shall be of the same political party . . . as was that of the Delegate or Senator, whose office is to be filled, at the time of the last election or appointment of the vacating Delegate or Senator. . . ." Chapter 649, Laws of Maryland 1986 (ratified November 4, 1986).

APPENDIX

September 6, 1984

Ms. Carol S. Evans
Deputy Administrator
State Administrative Board
of Election Laws
Post Office Box 231
Annapolis, Maryland 21404

Dear Carol:

This responds to your request for my advice of counsel concerning the proper interpretation of Article 25, §16 of the Maryland Code. You report the following situation: In Cecil County, a vacancy will shortly exist in an office of county commissioner. The commissioner who will vacate the office apparently intends to change his party affiliation before he does so. That is, he will become affiliated with a political party other than the one with which he was affiliated at the time of his election to the office.

Article 25, §16 provides the following procedure for the filling of a vacancy in the office of county commissioner:

> "In case any office of county commissioner shall become vacant in any county by death, resignation or otherwise, the Governor, if such vacancy shall occur during the session of the Senate, shall, by and with the advice and consent of the Senate, appoint, and if such vacancy shall occur during the recess of the Senate, he shall appoint a proper person or proper persons to fill such vacancy or vacancies, and the nomination of the person or persons thus appointed during such recess, or of some other person in his or their place, shall be made to the Senate within thirty days after the next meeting of the legislature. *The governor shall nominate or appoint the person to fill such vacancy whose name shall be submitted to him in writing by the central committee of the political party with which the county commissioner, so vacating, has been affiliated in the particular county, provided that the nominee or appointee shall be of the same political party as the person whose office is to be filled;* and it shall be the duty of the Governor to make said nomination or appointment within fifteen days after the submission thereof to him. In the event there is no central committee in the county in which the vacancy occurs, the Governor shall appoint to fill the vacancy a person who has all the qualifications required for the office of county commissioner in the particular county."

You ask whether "the central committee of the political party with which the county commissioner, so vacating, has been affiliated in the particular county" is the central committee of the party with which the commissioner was affiliated at the time of his election; or, on the other hand, whether it is the central committee of the party with which the commissioner is affiliated at the time of his resignation. In my view, it is the former.

I can find no precedent that directly bears on this problem. The pertinent language was added to Article 25 in 1951 [Chapter 18, Laws of Maryland 1951], but it has not been construed in any case or opinion. The virtually identical provision in Article III, §13(a) of the Maryland Constitution—applicable to General Assembly vacancies, and seemingly the model for the statutory provision for county commissioner vacancies—has likewise never, to my knowledge, been applied in the context of a change of parties by the vacating member.

Nor is your question clearly answered by the text of the provision. The language is ambiguous: The phrase "the political party with which the . . . commissioner . . . *has been* affiliated" apparently speaks to past affiliation—i.e., the party with which the commissioner "has been" affiliated from the time of his election. But the phrase "the . . . appointee shall be of the same political party as the person whose office is to be filled" suggests that affiliation at the time of the vacancy is critical. In this situation, one must try to identify the construction that "harmonize[s] with the general scheme of the statute and assist[s] in carrying out the legislative purpose." *Smith v. Higinbothom*, 187 Md. 115, 125 (1946).

In general, laws relating to elective office ought to be construed so that the will of the electorate is carried out. *See generally*, *e.g.*, *Wilkinson v. McGill*, 192 Md. 387, 393 (1949) (determinative principle in resolving election contest based on errors of election officials is to uphold "the will of the people freely expressed at the ballot box"). Indeed, as one court observed in construing a statute that gave political parties the power to fill vacancies, "[i]t is not the political party but the People that have the real interest in the vacant office, and the method of selection should reflect their choice as well as possible". *People ex rel. Rudman v. Rini*, 356 N.E.2d 4, 7 (Ill. 1976).[1]

The will of the people is, of course, reflected in the election of county commissioners who present themselves to the voters under the banner of one of the political parties. We can safely assume that a candidate's party affiliation does play a role in voters' decision-making. Hence, it is reasonable to regard the mechanism for filling a vacancy set out in Article 25, §16 as an effort to give at least an indirect voice in the selection of the commissioner's successor to the electorate—through the political party officials elected in the same primary in which the vacating commissioner was nominated.

[1]In *Rini*, an Illinois statute authorized "the political party of which the [vacated] incumbent was a candidate at the time of his election" to appoint a member of that party to the vacancy. 356 N.E.2d at 5. The Illinois Supreme Court held that the statute was an unconstitutional delegation of state sovereignty to a private group. 356 N.E.2d at 7. But, given the presumption of constitutionality that attaches to statutes, and given possibly significant differences between Illinois and Maryland law, I do not believe it appropriate to question the constitutionality of Article 25, §16.

The history of the provision affords at least some support for this reading. Until the 1951 amendment, the power to fill county commissioner vacancies was vested entirely in the Governor (subject only to Senate confirmation). The Governor was authorized simply to "appoint a proper person." Thus, a Governor of a political party different from that of the vacating commissioner was free to appoint a successor who was of the Governor's party, notwithstanding the expressed choice of the county electorate.

If this possibility were thought to be a problem, the obvious solution would have been statutory language requiring the Governor to appoint a successor from the vacating commissioner's own party. And, indeed, the General Assembly added such language: "provided that the nominee or appointee shall be of the same political party as the person whose office is to be filled."

But the General Assembly went further, by effectively transferring the appointment authority from the Governor to the central committee of the vacating commissioner's party. *Cf.* 62 *Opinions of the Attorney General* 241 (1977) (under analogous procedure in Article III, §13(a) of the Maryland Constitution, Governor "*must* appoint" to the vacancy a person submitted by the central committee). Presumably, the General Assembly believed that these locally elected party officials were better able to discern and reflect the views of the electorate than the governor.[2]

There is no indication in the history of Article 25, §16 (or of Article III, §13(a)) that the General Assembly contemplated the highly unusual problem of an incumbent who, prior to vacating office, changes political parties. To the contrary, the reference to "*the* political party with which the county commissioner, so vacating, *has been* affiliated" suggests the General Assembly's presumption—well-grounded in experience—that an elected official remains affiliated with but one party during his or her entire tenure.

In my view, the ambiguity presented by Article 25, §16 when it is applied in this novel situation ought to be resolved by regarding the vacating commissioner's political party *at the time of his election*

[2]The best way to determine the will of the voters would be by special election, but that is a very costly process. Article III, §13 of the Maryland Constitution formerly provided for special elections to fill General Assembly vacancies. The expense thereby incurred presumably led to the amendment that effectively vests appointment power in the party central committees. Chapter 584, Laws of Maryland 1935 (ratified November 3, 1936). In short, the appointment process in Article III, §13(a)—and in Article 25 §16—represents a kind of compromise as to direct political responsiveness between elections, on the one hand, and appointment by the Governor, on the other.

as "the political party with which the county commissioner, so vacating, has been affiliated". This construction is consonant with the presumption of continuous party affiliation evidently underlying the General Assembly's choice of language. That is, in resolving the ambiguity, we should give as much effect as possible to the General Assembly's underlying presumption by applying the law as if the vacating commissioner were still affiliated with "the political party with which the . . . commissioner . . . *has been* affiliated". Moreover, this construction assists in carrying out what is apparently the overall purpose of the appointment process in Article 25, §16—to vest the decision in those who are perceived as best able to carry forward the political judgment of the voters.

I hope that this letter of advice, although not an Opinion of the Attorney General, is fully responsive to your inquiry.

Please let me know if I may be of further assistance.

Very truly yours,

Jack Schwartz
Assistant Attorney General

HANDICAPPED

DEAF PERSONS—JURY SERVICE—REHABILITATION ACT—PROVISION OF INTERPRETING SERVICES DURING CRIMINAL PROCESS.

April 2, 1985

Sheila Mentkowski and Robert J. Mather
Maryland Commission on the Hearing Impaired

As members of the Maryland Commission on the Hearing Impaired, you have asked our office whether hearing impaired persons in the State of Maryland have certain legal rights. Specifically, you asked four questions dealing with the rights of a hearing impaired person as a defendant, witness, juror or victim in Maryland's criminal justice system. The following is our analysis of these four questions.

I

> "Whether Article 27, §623A of the Maryland Annotated Code, which requires a court to appoint a qualified interpreter for a deaf defendant in 'any criminal proceeding in any court' also extends to pre-sentence hearings[.]"

As you point out, Article 27, §623A requires that an interpreter be provided to certain hearing impaired individuals in any criminal proceeding in any court to assist the defendant throughout the proceedings. It is our conclusion that this language is broad enough to require that an interpreter be provided to a hearing impaired individual involved in a pre-sentence hearing.

Our conclusion is supported by Maryland case law and the Maryland Rules. The Court of Special Appeals has held that the sentencing process is a stage of the trial. *Smith v. State*, 11 Md. App. 317, 273 A.2d 626 (1971). The Maryland Rules suggest that this stage of the trial is a "proceeding," within the meaning of §623A. Maryland Rule 1-202(r) defines "proceeding" as "any part of an action." "Action" is then defined as "all the steps by which a party seeks to enforce any right in a court or all the steps of a criminal prosecution." Maryland Rule 1-202(a). A pre-sentence hearing is a step of a criminal prosecution. It is therefore a part of an action or a "proceeding" under §623A.

II

> "Whether §8-207(b)(3) of the [Courts Article of the] Maryland Annotated Code, which provides for the disqualification of a person as a juror if he/she is unable to speak the English language or comprehend spoken English, disqualifies a potential[,] hearing impaired juror who requests an interpreter to assist in facilitating the communications process during the jury deliberations[.]"

The question of whether §8-207(b)(3), which requires that a juror be able to speak the English language and comprehend "spoken English," disqualifies a hearing impaired person who requests an interpreter is a very complex and difficult one. This provisions's legislative history does not offer a clear answer. Athough administrative practice and certain principles of statutory construction support the conclusion that §8-207(b)(3) does not disqualify a hearing impaired person who requests an interpreter, the point is sufficiently in doubt that legislative clarification is highly desirable.

Clearly, it is within the power of the General Assembly to decide whether deaf persons should serve as jurors. The Supreme Court has acknowledged the power of the states to prescribe relevant qualifications for jurors "so long as the classifications have relation to the efficiency of the jurors and are equally administered." *Brown v. Allen*, 344 U.S. 443, 473 (1953). While the General Assembly has this power, it is unclear how the power has been exercised on the issue of jury service by deaf persons. The analysis that follows indicates why legislative clarification is needed.

Since this statute's history was not helpful in determining whether the General Assembly intended to disqualify deaf persons as jurors, we looked next at administrative practice. Unless clearly erroneous, long-standing and consistent administrative practice is entitled to considerable deference in determining the proper construction of a statute under which an agency operates. *See, e.g., Maryland Commission on Human Relations v Bethlehem Steel Corporation*, 295 Md. 586, 592 (1983); *Jackson Marine Sales v. State Department of Assessments*, 32 Md.App. 213, 217 (1976), *cert. denied*, 278 Md. 725 (1976).

A telephone survey of the jury commissioners in six Maryland counties reveals that deaf persons have not been disqualified as jurors under §8-207(b)(3).[1] In Montgomery County, deaf persons have served on juries since about 1979. Approximately 40 have been in the jury pool and 8 have actually served on juries. The Jury Commissioner says there have been no problems associated with service by deaf jurors and that they have served extremely well. The jury commissioners in each of the other counties said that they would not disqualify a deaf person who wishes to serve but that none have asked to do so.

Although administrative interpretation of a statute is not binding upon courts, they do consider and, depending upon the circumstances, give greater or lesser weight to the interpretation of a statute by an agency charged with its implementation. *Dept. of State Planning v. Mayor and Council of City of Hagerstown*, 288 Md. 9, 425 A.2d 296 (1980); *Comptroller of Treasury v. John C. Louis Co., Inc.*, 285 Md. 257, 404 A.2d 1045 (1979). The expertise and experience of the jury commissioners and the consistency of their interpretation are due considerable weight. The administrative practice of the jury commissioners over a period of at least five years supports an interpretation of the statute that allows deaf persons to serve as jurors.[2]

Another principle of statutory construction indicates that if a particular section is ambiguous, the statute should be examined as a whole and construed so that all of its parts are given effect and harmonized. *Scott v. State*, 297 Md. 235, 465 A.2d 1126 (1983). The meaning of the words "spoken English" in §8-207(b)(3) is ambiguous. Analyzing §8-207 as a whole, each section does seem to target a specific group for exclusion. For example, §8-207(b)(2) appears to exclude those who are illiterate; §8-207(b)(3), those who are foreign speaking; and §8-207(b)(4), those who have a physical or mental impairment. It may be reading too much subtlety into the General Assembly's use of the words "spoken English" to conclude that they intended to disqualify deaf persons by (b)(3) rather than by (b)(4), which clearly and specifically excludes the physically impaired who

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[1]Baltimore City, Montgomery County, Prince George's County, Howard County, Garrett County, and Dorchester County.

[2]The fact that deaf persons are serving on juries in Maryland has received public attention. The *Washington Post* in June, 1982, published an article about jury service by a hearing impaired woman who used an oral interpreter in a Montgomery County court.

cannot satisfactorily serve. However, the sections of §8-207 are not mutually exclusive and the General Assembly may have intended that deaf persons be disqualified by either or both sections.[3]

In order to determine the meaning of ambiguous words, it may also be helpful to examine related sections in the same subtitle. Another section of the juror selection subtitle mandates that a qualification form inquire of each potential juror "if he is able to read, write, speak and understand the English language." Section 8-202(e)(vii). Although this section was enacted at the same time as §8-207 and has been amended, the crucial word "spoken" is not used in front of "English language." Therefore, a deaf person would not be disqualified in the initial selection of potential jurors, but would be automatically disqualified later by the jury judge under §8-207(b)(3) if this provision were read as a bar to service by deaf persons. As the court said in a case that analyzed New York's juror qualification statute, to include a person in the jury pool but to automatically exclude him at *voir dire*, is "to do in the vestibule what could not be done outside the front door." *People v. Guzman*, 478 N.Y.S. 2d 455, 465 (1984).

Although these principles of statutory construction indicate that the General Assembly did not intend to exclude deaf persons by the use of the words "spoken English" in §8-207(b)(3), they are not an adequate foundation on which to base a conclusive answer. Another way to interpret statutes and determine whether they apply to a given set of facts is to look at the underlying purpose of the statute. One purpose of the §8-207(b)(3) disqualification may be to exclude foreign speaking persons because they lack the necessary understanding of the community, its values and standards to adequately serve on a jury. However, a second purpose may be to exclude anyone, foreign or deaf, who requires the assistance of an interpreter, because of concerns about a 13th person in the jury room, the possible disruption of the orderly operation of the court, and the problem of the hearing impaired juror adequately analyzing evidence. *Eckstein v. Kirby*, 452 F.Supp. 1235 (E.D. Ark. 1978). We simply do not know whether these concerns underlie §8-207(b)(3), but the words used—"comprehend spoken English"—do serve as a safeguard against these potential problems.

Yet, we should not exaggerate the extent of the difficulties that

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[3]Even if the words "spoken English" are construed to exclude a deaf person who requires an interpreter, they would not exclude a deaf person who reads lips and thus comprehends "spoken English."

attend the seating of a deaf juror. Practical experience in other states indicates that an interpreter would not disrupt the order of the court and that a deaf juror may analyze evidence as well as a juror without a hearing impairment.[4] A recent decision by a New York trial court indicates that at least nine jurisdictions in the United States allow deaf persons to serve as jurors. The Court also notes that they have served with distinction and have been found to be an unexpected asset to the deliberative process. *Guzman*, 478 N.Y.S.2d at 460 nn. 17 and 18.

Some courts have suggested that intrusions by a 13th person in the jury room threaten the secrecy of deliberations and create the possibility that the jury's decision will be influenced by that person. *Eckstein*, 452 F.Supp. at 1244.[5] However, practical experience in Maryland and the nine states that allow interpreters in the jury room has revealed none of these anticipated problems.

The interpreter is not a participant but is a communications facilitator. The jurors and the interpreter can be made aware by the court of the purely mechanical function of the interpreter. *Guzman* suggests that instructions to the interpreter and the jury would sufficiently address the problems of improper influence. *Guzman*, 478 N.Y.S.2d at 466 n. 49. The interpreter should be instructed that his or her only function in the jury room is to facilitate communications, not to counsel, advise, or interject personal opinions

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[4]*See* Note, *Jury Selection: The Courts, The Constitution, and The Deaf*, 11 Pac. L. J., 967, 968 n. 5 (1980) (documenting cases in which deaf persons have successfully served as jurors); Note, *Due Process: Deaf and Blind Jurors*, 17 New Eng. L. Rev. 119 (1981).

[5]The Court of Appeals for the Fourth Circuit has said that any intrusion into jury deliberations is reversible error. *United States v. Virginia Electric Corp.*, 335 F.2d 868 (4th Cir. 1964). However, no case has addressed the question of whether an interpreter would be seen as an intrusion. Cases that have addressed the problem of a 13th person as an intruder have concerned persons such as a judge, alternate juror, bailiff, who are cloaked with official authority and whose presence or opinions might carry great weight with the jury. Furthermore, the only Maryland case that deals directly with a 13th person in the jury room indicates that a showing of prejudice is required before finding the intrusion to be reversible error. In this case, a bailiff answered the question of a jury foreman during jury deliberations. The Court of Special Appeals indicated that the revelation of this remark shifted the burden to the State to "exorcise the spectre of prejudice . . ." *Oliver v. State of Maryland*, 25 Md. App. 647, 650, 334 A.2d 572, 574 (1975).

or personally participate in any way.[6] The jury should be instructed that if the interpreter communicates with the jurors in any way other than as directed by the court, the jury should cease deliberations immediately and inform the court.

Interpreters are also prevented by the Interpreter's Code of Ethics from revealing any assignment-related information. Registry of Interpreters for the Deaf, Code of Ethics, 61 (1980). If the General Assembly feels this code and court instructions are not sufficient to ensure the secrecy of deliberations, it could address the issue by statute—as it has done for stenographers at Grand Jury proceedings who are required to take an oath of secrecy. §2-503 of the Courts Article.

Concerns about the accuracy of an interpreter's transmission have also been raised. However, the issue of accuracy is equally important when any non-English speaking witness or defendant testifies through an interpreter. The jury, the judge, the attorneys, the court reporter, and all future appellate courts are dependent upon the record made by that interpreter. If we do not trust the skills of that person, then we have no real trial. There is no reason we should have less trust in an interpreter in jury deliberations than we do in other phases of the trial. To ensure quality and accuracy, court administrators should define qualifications and impose standards for interpreters.

As well as looking to principles of statutory construction and administrative practice in Maryland, we have reviewed statutes in other states that disqualify deaf persons as jurors. We have found no other statute that uses the words "spoken English." Cases from other states that have upheld the disqualification of deaf persons as jurors have done so on the basis of other statutory sections than an English language section. For example, the court in *Eckstein* upheld the disqualification of a deaf juror based on a section of an Arkansas statute that specifically disqualifies substantially hearing impaired persons. Another section of the statute also disqualifies persons unable to speak or understand the English language, but the court did not interpret or base its decision on that section. *Eckstein*, 452 F.Supp. at 1244. Other courts have disqualified the deaf on the

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[6]A similar practice was followed in a Montgomery County Circuit Court case in which a deaf juror served. Judge Rosalyn Bell swore the interpreter to make accurate interpretations and not to interject his own ideas about the case. *Scaggs v. Brown*, No. 53016 (Cir. Ct. of Montgomery County, 1982). This practice has been followed by courts in other states.

ground that they did not meet a statutory requirement that they be in possession of their "natural faculties". *Levinson v. Crews*, 282 N.Y.S.2d 83 (App. Div. 1967), *aff'd*, 289 N.Y.S.2d 619 (N.Y. 1968), *remittitur amended*, 290 N.Y.S.2d 924 (1968), *appeal dismissed*, 393 U.S. 13 (1968).[7]

Although courts have not disqualified deaf persons as jurors for failure to meet the English language requirement, §8-207(b)(3) may disqualify a deaf person who knows and communicates only through American Sign Language ("ASL"). The court in *Guzman* allowed a deaf person who communicated through signed English to serve as a juror, but held that a person who knows only ASL does not meet New York's English language requirement and could not serve. ASL is a separate language from English, with its own grammar and syntax. An interpreter using ASL is therefore like any foreign language interpreter. However, signed English, lipreading, fingerspelling, or a combination of these would meet the English language requirement. Signed English is not a separate language; rather, it is English in a different form. The interpreter is thus not translating or interpreting, but merely transmitting exact words in English from the speaker through the interpreter to the listener.

Although §8-207(b)(3) appears to disqualify a deaf person who uses only ASL, the General Assembly clearly may allow them to serve by clarifying the statute. There are significant differences between a citizen who is deaf and a citizen who is foreign speaking. The deaf citizen is much more likely to know the community, its values and standards. Furthermore, many deaf persons who communicate through ASL work in complex and highly technical fields—as doctors, lawyers, scientists, professors. They work and participate in the community in a way that a foreign speaking person, who is unable to speak or comprehend English, cannot function.

Although deaf persons are not presently being disqualified under §8-207(b)(3), and we see no reason for a change in that practice, it is unclear what the General Assembly intended concerning their service as jurors in Maryland. For the reasons discussed above, legislative clarification of §8-207 would be most desirable.

One other law relevant to the issue you have raised is the Federal Rehabilitation Act of 1973. Section 504 of the Act provides that no otherwise qualified handicapped individual shall solely, by reason

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[7]The New York legislature amended this language in their statute effective September, 1983, so that deaf persons are no longer disqualified.

of that handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination, under any program or activity receiving federal financial assistance. 29 U.S.C. §794. The Department of Justice ("DOJ") regulations implementing §504 require tht recipients of federal financial assistance from the Department of Justice and each program receiving or benefiting from such assistance and employing 15 or more persons provide appropriate auxiliary aids to qualified handicapped persons with impaired sensory, manual or speaking skills. The regulation specifies a qualified interpreter as one of the aids that must be provided. 28 C.F.R. 42.503(f).

The Department of Justice has supported the conclusion that §504 and its regulations require the provision of an interpreter to an otherwise qualified juror. In an amicus curiae brief filed with the Ninth Circuit Court of Appeals, DOJ urged the Court to uphold the federal district court's grant of summary judgment to a deaf person who was seeking an injunction against a county for continuing to refuse to pay for an interpreter so that he could serve as a juror. In its brief, DOJ argued that once chosen to serve as a juror, a deaf person is entitled to interpreter services under Section 504 and DOJ regulations. 28 C.F.R. 42.503(f).[8]

The application of §504 does not affect a state's power to establish qualifications for service on a jury and would not prevent a state from disqualifying deaf persons. However, if deaf persons are permitted to serve by state statute, then §504 and Department of Justice regulations require that reasonable accommodations be made for them.

III

> "Whether under any law a qualified interpreter is required in a criminal investigation conducted by a state or local enforcement agency involving a deaf person, whether as a victim, witness, or suspect[.]"

While Maryland law does provide for interpreters at public hearings (Article 30, §2), at employee grievance proceedings (Article 30,

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[8]The case was settled by the parties before argument. A copy of the amicus brief filed on September 9, 1982, is on file in the Attorney General's Office.

§2A), and for a party or witness during a trial (§9-114 of the Courts Article), Maryland has no statute requiring that an interpreter be provided to assist a hearing impaired victim or witness during a criminal investigation. However, in practice, it would seem highly unlikely that an interpreter will not be provided to a victim or witness. Without one, the investigation will result in very little information.

The question of whether an interpreter must be provided to assist a hearing impaired suspect during a criminal investigation is more complex. There is no statutory law requiring the provision of an interpreter. As discussed in answer to your first question, Article 27, §623A provides for an interpreter "in any criminal proceeding in any court." However, an investigation is not a proceeding "in court" and would not be covered by this statute.

If a hearing impaired suspect is arrested and in custody, that person would have the same constitutional due process protections as any other person. Specifically, before questioning a defendant who is in custody, the government must warn that person of the right to counsel guaranteed by the Sixth Amendment and the right against self-incrimination guaranteed by the Fifth Amendment. *Miranda v. State of Arizona*, 384 U.S. 436 (1966). Without some effective means of communicating with a hearing impaired person, the govermnent cannot fulfill these obligations. To be sure, an interpreter may not be the only effective means of communicating the *Miranda* warnings. A written communication might be sufficient. However, in practical terms, if the government wishes to question a deaf defendant, providing an interpreter will be the most effective way to gather the information it wishes.

A defendant in custody in Maryland has even greater rights than those granted by *Miranda*. Under the Maryland Rules, a defendant in custody must be taken before a judicial officer "without unnecessary delay and in no event later than 24 hours after arrest." Maryland Rule 4-212(f). The officer must, under Maryland Rule 4-213,

> 1) inform the defendant of each offense with which the defendant is charged;
>
> 2) advise the defendant of the right of counsel; and
>
> 3) determine the defendant's eligibility for pre-trial release.

The judicial officer must have an adequate way to communicate this statutorily required information to a hearing impaired defendant. One of the cost effective and practical methods would be through an interpreter if the person is totally without hearing. Varying degrees of hearing impairment might be addressed by different methods.

In summary, there is no statute or law that grants a hearing impaired person the right to an interpreter during a criminal investigation. However, a hearing impaired defendant who is in custody has the same rights under federal and Maryland law as any other person in custody. In order to protect these rights, the government must communicate effectively with that person.

IV

> "What state law covers the situation where a deaf or hearing impaired person may be under arrest and the law enforcement officer is attempting to provide that person with his/her *Miranda* warning rights? It does not appear that Article 27, §623A of the Maryland Code applies to this situation. We are unable to locate any law within the Maryland Code that would require that a qualified interpreter be provided at this time."

We agree with your assessment that there is no state statutory law that requires an interpreter to be provided during the *Miranda* warnings. Article 27, §623A requires an interpreter "in any criminal proceeding in any court." *Miranda* rights would not be given in a court. However, the due process requirements of the Fifth and Fourteenth Amendments of the U.S. Constitution would require that a law enforcement officer use some method that is effective in communicating with a hearing impaired person when giving the *Miranda* warnings. *Miranda* requires that a suspect intelligently and knowingly waive the right to counsel. A hearing impaired person cannot knowingly and intelligently waive this right unless the right is effectively communicated.

We hope that his analysis will be of help to you in your work on the Maryland Commission on the Hearing Impaired.

STEPHEN H. SACHS, *Attorney General*

ELLEN A. CALLEGARY, *Assistant Attorney General*

REBECCA M. HORNBECK, *Assistant Attorney General*

Editor's Note: The preceding opinion was originally written as a letter of advice. Because of the importance of the issues addressed, it is reprinted here in a slightly revised format.

HEALTH OCCUPATIONS

NURSING HOME ADMINISTRATORS—LICENSING REQUIREMENTS—RESIDENCY—THE BOARD OF EXAMINERS OF NURSING HOME ADMINISTRATORS LACKS THE STATUTORY AUTHORITY TO REFUSE AN APPLICATION FOR EXAMINATION SOLEY ON THE BASIS THAT THE APPLICANT IS NOT A RESIDENT OF MARYLAND.

December 13, 1985

Ms. Elizabeth R. Baird, Chairperson
Board of Examiners of Nursing Home Administrators

The Board of Examiners of Nursing Home Administrators has requested our opinion concerning the Board's authority to deny the request of an out-of-State resident to sit for the Board's licensing examination. For the reasons stated below, we conclude that the Board lacks the statutory authority to refuse an application for examination solely on the basis that the applicant is not a resident of Maryland.

I

Discussion

We begin with the fundamental premise that "[a]dministrative agencies . . . are arms of the legislature and derive all their authority from the legislative branch." *Annapolis v. Annapolis Waterfront Co.*, 284 Md. 383, 394 (1979). Hence, the actions of an administrative agency must be consistent with the statute that grants it the authority to act.

Under §8-305(a) of the Health Occupations Article ("HO" Article, "[a]n applicant [for licensing as a nursing home administrator] who otherwise qualifies for a license *is entitled to be examined* as provided in this section." This subsection is captioned "Right to examination."

The General Revisor's Note explains the purpose of this and parallel provisions in the Health Occupations Article:

"In the 'Examinations' section of each title of this article,

> except Title 1, there is included a standard subsection captioned 'Right to examination'. That subsection is included to provide expressly that an applicant who otherwise qualifies is entitled to the opportunity to take any required examination. Stated from the other perspective, the subsection states that a health occupation board may not arbitrarily deny an otherwise qualified applicant an opportunity to take the examination."

An applicant for licensing as a nursing home administrator "shall be an individual who meets the requirements" of HO §8-302:

> "(b) The applicant shall be of good moral character.
>
> (c) The applicant shall be at least 18 years old.
>
> (d) The applicant shall meet the education, training, and experience standards set by the Board.
>
> (e) Except as otherwise provided in this title, the applicant shall pass an examination given by the Board under this subtitle."

Residency is not a qualification.

Therefore, any applicant who is of good moral character, is at least 18 years old, and meets the education, training, and experience standards set by the Board "is entitled to" take the examination, whether or not the applicant resides in this State. The Board may not impose a qualification that goes beyond the statute and that is inconsistent with the right to an examination expressly created by the statute.

This construction does not preclude the Board from imposing deadlines and other requirements for the submission of proof that an applicant fully meets the education, training, and experience requirements set by the Board. *See* COMAR 10.33.01.07A and B. However, any such requirements must be reasonable and uniform for all applicants.

II

Conclusion

In summary, it is our opinion that the Board of Examiners of Nursing Home Administrators lacks the statutory authority to refuse an application for examination solely on the basis that the applicant is not a resident of Maryland. In light of this conclusion, we need not consider the extent to which such a refusal raises other legal problems.

STEPHEN H. SACHS, *Attorney General*

ALICE D. IKE, *Assistant Attorney General*

JACK SCHWARTZ
Chief Counsel
Opinions and Advice

"LIVING WILLS"

WITNESS QUALIFICATIONS—PERSONAL KNOWLEDGE REQUIRED—SCOPE OF DISQUALIFICATION FOR FINANCIAL INTEREST.

November 27, 1985

The Honorable John F. Slade, III
Maryland House of Delegates

You have requested our opinion about the qualification of witnesses to a person's declaration regarding life-sustaining procedures—commonly known as a "living will". Specifically, you ask: (1) whether the person who is executing the living will (the "declarant") must be personally known to the witnesses; (2) whether a member or employee of a law firm who is designated as personal representative of the declarant's estate may be a witness; and (3) whether an attorney who has already been retained to represent the declarant's estate, but who is not designated as personal representative, may be a witness.

For the reasons stated below, we conclude as follows:

1. A person executing a living will is required to do so in the presence of at least two qualified witnesses who can attest that the declarant is personally known to them.

2. Anyone, whether or not an attorney, who has knowledge of having been designated as the personal representative of the declarant's estate may not be a witness to the declarant's living will. If a person is disqualified for this reason, no partner of the person or employee of the person's firm may be a witness.

3. An attorney who is in the unusual position of having been retained to represent the declarant's estate prior to the declarant's death may not be a witness. If an attorney is disqualified for this reason, no partner of the attorney or employee of the attorney's law firm may be a witness. Further, we advise that an attorney who has a reasonable expectation of representing the declarant's estate not serve as a witness.

I

The Living Will Statute

In its 1985 Regular Session, the General Assembly authorized the creation and the carrying out of "living wills"—written declarations directing that certain life-sustaining procedures be withheld or withdrawn. Chapter 620, Laws of Maryland 1985 (codified at §§5-601 through 5-614 of the Health-General Article ("HG" Article)). The effect of a living will is plainly stated in the model declaration set out in HG §5-602(c)(1):

> " 'If at any time I should have an incurable injury, disease, or illness certified to be a terminal condition by two (2) physicians who have personally examined me, one (1) of whom shall be my attending physician, and the physicians have determined that my death is imminent and will occur whether or not life-sustaining procedures are utilized and where the application of such procedures would serve only to artificially prolong the dying process, I direct that such procedures be withheld or withdrawn, and that I be permitted to die naturally with only the administration of medication, the administration of food and water, and the performance of any medical procedure that is necessary to provide comfort care or alleviate pain.' "[1]

Although a living will "may include additional provisions on this or other subjects" [HG §5-602(c)(2)], nevertheless it "shall be substantially in the . . . form" of the model declaration in HG §5-602(c)(1) and may not be "inconsistent with other provisions" of the statute.

In authorizing living wills, the General Assembly recognized the importance of individual self-determination and dignity in death. At the same time, the General Assembly intended no implication whatever that the statute permits mercy killing. Thus, the preamble to the bill states that: "It is the fundamental right of competent adults, based on the autonomy and sanctity of the individual, to control decisions relating to the rendering of their medical care and treatment." But the preamble also states that: "Nothing in this Act is intended to condone, authorize, or approve mercy killing or to permit any affirmative or deliberate act or omission to end life." As described in the legislative history, "[t]his bill provides an effective way for a person to express their desire not to receive life-sustaining care, while at the same time providing safeguards to prevent withholding procedures against a person's wishes." Report of the House

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[1]The key terms in a living will are defined in the statute. *See* HG §5-601(e) ("life-sustaining procedure"); HG §5-601(g) ("terminal condition"). The duties of an attending physician regarding the carrying out of a living will are stated in HG §5-604.

Environmental Matters Committee on House Bill 453, at 1 (1985) ("House Report").

The balancing of these concerns is reflected in several provisions, including the "safeguards" about witnesses discussed in Part II below. While HG §5-602 permits a declarant to instruct that life-sustaining procedures not be used "to artificially prolong the dying process," HG §5-611 allows persons to execute a declaration with the opposite objective—"directing the initiation or continuation of life-sustaining procedures." HG §5-610 cautions that the provisions of the statute "[d]o not create a presumption concerning the intention of an individual . . . who has not executed a declaration," and they do not authorize "any affirmative or deliberate act or omission to end life other than to permit the withholding or withdrawing of life-sustaining procedures from a declarant in a terminal condition."

Furthermore, the drafters of the statute clearly intended that those executing a living will be able to change their minds and revoke it with relative ease. HG §5-603 allows a declarant to revoke a living will through all of the customary methods for will revocation, with one unusual addition—revocation by a mere "expression to that effect, after the declarant knows of the disease, illness, or injury involved in any question regarding the existence of a terminal condition." *Compare* §4-105 of the Estates and Trusts Article ("ET" Article) (revocation of will) *with* HG §5-603 (revocation of living will). Finally, the statute makes it a misdemeanor for anyone to forge either a revocation or a declaration or to conceal a revocation. HG §5-614.

In sum, the living will statute reflects the General Assembly's overall intent that each person's decision about the dying process be given effect and that these decisions be made in a competent and voluntary manner, "sheltered from any improper influence or coercion." House Report at 2.

II

Witness Qualifications

HG §5-602(a) contains the following procedural requirements for the execution of a living will:

> "Any individual qualified to make a will under §4-101 of the Estates and Trusts Article may execute a declaration,

as provided in paragraph [c] of this section,[2] directing the withholding or withdrawal of life-sustaining procedures under this subtitle. The declaration shall be:

(1) Voluntary;

(2) Dated and in writing;

(3) Signed by the declarant or, if at the declarant's expressed direction and in the declarant's presence, by another individual on behalf of the declarant;

(4) Executed in the presence of and attested by at least 2 witnesses each of whom, at the time of execution, is at least 18 years old and is not:

(i) An individual who signed the declaration at the direction and on behalf of the declarant under paragraph (3) of this subsection;

(ii) Related to the declarant by blood or marriage within a degree listed under §2-202 of the Family Law Article;

(iii) Either a creditor of the declarant or knowingly entitled to any portion of the estate of the declarant under any existing testamentary instrument of the declarant or knowingly entitled to any other financial interest deriving from the declarant; or

(iv) Financially or otherwise responsible for the declarant's medical care or an employee of any such person."

In addition, HG §5-602(c)(1) requires that a living will "shall be substantially in the . . . form" of the model set out verbatim in the statute. The model includes the following statement, to be signed by witnesses to the declaration:

" 'Under penalty of perjury, we state that this declaration was signed by ____ in the presence of the undersigned who, at ____ request, in ____ presence, and in the presence of each other . . . declare: The declarant is per-

[2]As enacted, this clause refers to "paragraph (*b*) of this section." This is an evident error. The model form of living will was initially set out in paragraph (b) of proposed HG §5-602. *See* House Bill 453. The current paragraph (b), concerning notice to the physician of the existence of the declaration, was added by amendment, and the model declaration became paragraph (c). The final version of the bill simply failed to take account of this re-lettering.

> sonally known to me, and I believe the declarant to be of sound mind. I did not sign the declarant's signature to this declaration. Based upon information and belief, I am not related to the declarant by blood or marriage, a creditor of the declarant, entitled to any portion of the estate of the declarant under any existing testamentary instrument of the declarant, financially or otherwise responsible for the declarant's medical care, or an employee of any such person or institution.' "

There are some differences between the qualifications of witnesses specified in HG §5-602(a)(4) and those to which the witnesses attest in the model declaration set out in HG §5-602(c)(1). Specifically, the model declaration requires the witness to attest that " '[t]he declarant is personally known to me, and I believe the declarant to be sound of mind' "; HG §5-602(a)(4) does not state such a requirement. In addition, the model declaration requires the witness to attest that he or she is not " 'an employee of any . . . person or institution' " that is itself disqualified from being a witness; HG §5-602(a)(4) does not contain that disqualification of employees.[3] Conversely, HG §5-602(a)(4)(iii) provides that a person who is knowingly entitled either to a portion of the declarant's estate under "any existing testamentary instrument" or to "any other financial interest deriving from the declarant" may not be a witness; the model declaration includes only the reference to entitlement under "any existing testamentary instrument."[4]

However, while the two provisions differ, they do not conflict. The model declaration in HG §5-602(c)(1) is not inconsistent with the listing of witness qualifications in HG §5-602(a)(4). Rather, the model declaration in effect provides two additional witness qualifications—that the declarant be "personally known" to the witness and that employees of those who are disqualified are also disqual-

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[3]HG §5-602(a)(4)(iv) disqualifies the employees of a person who is "[f]inancially or otherwise responsible for the declarant's medical care." *See* note 7 below. There is no such express disqualification of employees in HG §5-602(a)(4)(ii) or (iii).

[4]One additional minor difference is that HG §5-602(a)(4)(ii) bars as a witness anyone who is "[r]elated to the declarant by blood or marriage within a degree listed under §2-202 of the Family Law Article"; the model declaration prohibits a witness who is "'related to the declarant by blood or marriage,'" without further specification of the degrees of relationship. The mere absence of such specification in the model declaration does not, in our view, imply any intent to bar witnesses whose relationship to the declarant is more attenuated than that specified in §2-202 of the Family Law Article.

ified—while HG §5-602(a)(4)(iii) expands upon the model declaration's disqualification of witnesses for financial interest.

Because these provisions are complementary rather than contradictory, there is little difficulty in construing them. To the extent reasonably possible, separate statutory provisions should be read together in order to effectuate the legislative intent and to give full effect to all of the provisions. *E.g.*, *State v. Fabritz*, 276 Md. 416, 421-22 (1975); *Shub v. Simpson*, 196 Md. 177, 191 (1950).

As discussed in Part I above, the intent of the statute is to "provid[e] people the opportunity to make their desires know[n], while ensuring that they have executed the declaration with appropriate thought, and sheltered from any improper influence or coercion." House Report at 2. The statute "establish[es] a detailed process, with safeguards, by which a person may elect not to have their life artificially extended." Report of Senate Judicial Proceedings Committee on House Bill 453, at 2 ("Senate Report"). The witness qualification requirements in HG §5-602(a)(4) and the model declaration in HG §5-602(c)(1) should be construed together toward this objective. Hence, all "safeguards" in both sections should be given effect. In this way, the integrity of the declarant's decisionmaking will be protected to the fullest.

Applied to your first question, this construction means that the declarant must be known by each witness. The requirement in the model declaration that the declarant be "personally known" to the witness ensures that the witness can credibly attest that the declarant was competent when he or she executed the living will. *Cf. Kuenne v. Kuenne*, 219 Md. 101, 107 (1959) ("an attesting witness should inform himself as to the capacity of a testator to a will before he undertakes to witness it"). The element of competence goes hand in hand with the General Assembly's overall concern that a living will be executed in a considered and voluntary manner.[5]

In response to your second question, we conclude that any personal representative of the declarant's estate, including a member or employee of a law firm who is designated as personal representative, may not be a witness. By disqualifying witnesses based on their knowing entitlement either "under any existing testamentary instrument of the declarant" or "to any other financial interest deriving from the declarant," HG §5-602(a)(4)(iii) furthers the overall

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[5]The declarant must attest that he or she is "'of sound mind'" and that the declaration is made "'willfully and voluntarily.'" HG §5-602(c)(1).

goal of guarding against undue influence and pressure.[6] The intent is that witnesses be "disinterested." House Report at 1; Senate Report at 1.[7] Although "entitlement under [the declarant's] testamentary instrument" apparently refers only to a bequest, a person who is named as a personal representative in a will and who knows this would certainly be knowingly entitled to a "financial interest deriving from the declarant," in the form of compensation paid by the declarant's estate. *See* ET §7-601. Thus, that person is disqualified as a witness, as is any partner of the person or employee of the person's firm.

The same analysis applies to your third question. In the unusual event that the declarant had already retained an attorney to represent his or her estate, disqualification for "financial interest" would follow. *See* ET §7-602. Ordinarily, of course, an attorney would not be retained to represent an estate until the death of the declarant. However, if an attorney has a reasonable expectation of being retained to represent the estate, the attorney should refrain from serving as a witness to the declaration.

In short, anyone who knows that he or she has a "financial interest deriving from the declarant" may not be a witness. More generally, anyone having reasonable grounds to anticipate a specific financial benefit resulting from the declarant's death should not be a witness to a living will, to avoid potentially troublesome questions concerning the legality both of the living will and of the actions of those who abide by it.[8]

III

Conclusion

In summary, it is our opinion that:

1. A person executing a living will is required to do so in the

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[6]No comparable statutory language bars a beneficiary or executor of a will from being a witness. ET §4-102. *See Leitch v. Leitch*, 114 Md. 336 (1911); *Estep v. Morris*, 38 Md. 417 (1873).

[7]The same goal underlies the disqualification of any person who is "[f]inancially or otherwise responsible for the declarant's medical care or an employee of any such person." HG §5-602(a)(4)(iv). Thus, for example, if the declarant is executing a living will after he or she is hospitalized, no employee of the hospital may serve as a witness.

[8]However, the model witness declaration in HG §5-602(c)(1) includes the words "'[b]ased upon information and belief'" preceding the recital of disqualifying factors. Thus, an erroneous attestation made in good faith would not necesarily affect the validity of a living will.

presence of at least two qualified witnesses who can attest that the declarant is "personally known" to them.

2. Anyone, whether or not an attorney, who has knowledge of having been designated as personal representative of the declarant's estate may not be a witness to the declarant's living will. If a person is disqualified for this reason, no partner of the person or employee of the person's firm may be a witness.

3. An attorney who is in the unusual position of having been retained to represent the declarant's estate prior to the declarant's death may not be a witness. If an attorney is disqualified for this reason, no partner of the attorney or employee of the attorney's law firm may be a witness. Further, we also advise that an attorney who has a reasonable expectation of representing the declarant's estate not serve as a witness.

STEPHEN H. SACHS, *Attorney General*

RICHARD E. ISRAEL, *Assistant Attorney General*

JACK SCHWARTZ
Chief Counsel
Opinions and Advice

Editor's Note: Since the issuance of this opinion, the General Assembly adopted clarifying amendments to one element of witness disqualification discussed in the opinion, HG §5-602(a)(4)(iii), and to the model form of living will. Chapters 831 and 832, Laws of Maryland 1986.

LOCAL GOVERNMENT

MUNICIPAL CORPORATIONS—CONDEMNATION—EXTRATERRITORIAL PROPERTY—ENVIRONMENTAL HEALTH—WATER AND SANITARY SYSTEMS—MUNICIPALITY HAS AUTHORITY TO CONDEMN LAND OUTSIDE ITS BOUNDARIES FOR A SEWAGE TREATMENT FACILITY.

May 20, 1985

The Honorable Phillip R. Miller
Mayor, Town of Manchester

Mr. Richard B. Sellars, Jr.
Director, Water Management Administration
Office of Environmental Programs

You have requested our opinion on whether the Town of Manchester has authority to condemn land outside its boundaries for a sewage treatment facility. Further, you ask whether the Town has authority to enter onto that land before condemnation to determine its suitability for the proposed facility.

For the reasons given below, it is our opinion that the Town of Manchester does have authority to take those actions.

I

Background

Manchester wishes to improve its sewerage system, which does not meet present State water-quality requirements for its treatment plant, and the Town has received a grant of federal funds that will enable it to do so. Under the facility plan adopted by the Town, on the basis of which the grant was made, the improvements must provide for land-based spray irrigation sewage disposal, to reduce effluent discharge into the Prettyboy and Loch Raven reservoirs.

However, the land needed for a spray irrigation facility lies outside the Town's boundaries. Town officials expressed uncertainty as to the Town's authority to acquire land outside its boundaries by condemnation. In 1982, the Town was advised that it does have such authority. *See* Memorandum from Marc K. Cohen, Assistant Attorney General, to David Tibbets, Environmental Specialist (October 21, 1982). Nonetheless, the Town has expressed continued uncertainty and has been reluctant to institute proceedings to acquire the needed land. In our view, that hesitancy is unnecessary.

II

Analysis

A. *Power to Condemn*

To be sure, municipal corporations have only limited powers: those expressly granted to them, implied in their express powers, or essential to the accomplishment of their purposes. *McRobie v. Town of Westernport*, 260 Md. 464, 466 (1971). Thus, a municipal corporation generally cannot condemn property outside its boundaries. However, the power to condemn such extraterritorial property may be delegated to the municipality by the state legislature. *See generally* 11 McQuillin, *Municipal Corporations* §32.66 (3d ed. 1983). And that is just what the General Assembly has done with respect to property needed in connection with municipal sewerage systems.

Under §9-705(5) of the Health-Environmental Article ("HE" Article), municipal authorities have express power to "acquire by purchase . . . or if the owner objects, by condemnation, any property *inside or outside the municipality*" when the property is needed in the exercise of any other power "with regard to any part of any system". In this case, the proposed spray irrigation facility clearly would be "part of" Manchester's sewerage system. Indeed, the land itself would be an integral part of the system, for the facility would spray treated liquid sewage onto the land to be filtered through the soil and, ultimately, discharged into the groundwater. Thus, acquisition of the land is needed to exercise the Town's power under HE §9-705(2) to extend or, as in this case, alter its existing sewerage system.

Nor, in our view, would the result be different if the proposed improvement to Manchester's sewerage system were regarded as the construction of a new system. Although HE §9-705(1) authorizes municipal authorities to "[c]onstruct a system *in a municipality*", the accompanying condemnation power is explicitly granted without any such a restriction as to location. Rather, under HE §9-705(5), municipal authorities are expressly empowered to condemn property "outside the municipality" when the property is needed for any part of a sewerage system to be constructed in the municipality.

Notably, the power to condemn extraterritorial property was originally granted, in substantially the same terms as those of the present provision, in the same enactment that first authorized municipalities to establish utility systems. *See* Chapter 641, Laws of Maryland 1927 (subsequently codified as former Article 43, §§409 through 427). That enactment provided, in pertinent part:

> "Said Municipal authorities, wherever they deem it necessary[,] may take or acquire any land . . . or other property, *either within or outside of the municipality* . . . for the construction, establishment, extension, alteration, maintenance, or operation of any part or appurtenance of [any] system, this to be done by the purchase . . . or [,] upon the failure to agree, by the condemnation of the [property]". Chapter 641, Laws of Maryland 1927, §348-B (former Article 43, §410).

The intent of this broadly phrased grant of express power clearly was to confer on municipalities plenary condemnation authority, to enable them to fully meet their citizens' needs for adequate, safe, and effective sewerage and other utility systems.

Grants of extraterritorial power are not unique. Under Article 25, §224(a), for example, counties and municipal corporations are authorized to "acquire or lease any water, land, buildings or other improvements thereon, *within or beyond the corporate limits* of the county or municipal corporation" for parks and recreational uses. That provision, unlike HE §9-705(5), is not itself an original grant of condemnation power. Nonetheless, it does authorize a municipal corporation that otherwise has condemnation power to exercise its power outside, as well as inside, the municipal boundaries.

Clearly, then, the General Assembly has recognized that, for some important public uses, acquisition of extraterritorial property is fully warranted. *See, e.g.*, Article II, §(2)(b) of the Charter of Baltimore City, as enacted by Chapter 6, Laws of Maryland 1984 (authorizing Baltimore City to condemn certain sports franchises, including all incidental real property, "wheresoever the same may be located in the State of Maryland"). *Cf. Birge v. Town of Easton*, 274 Md. 635, 642-43 (1975) (municipality's authority to acquire interest in out-of-state power generating plant held to be implied in express power to operate electric utility); *Wilson v. County Comm'rs of Allegany County*, 273 Md. 30, 57-58 (1974) (bond issue to finance out-of-state construction of pollution control facilities pursuant to Article 41,

§§266A and 266B held valid). Such as the case here, with regard to municipal sewerage systems.

B. *Entry Onto Property*

You have also inquired whether the Town of Manchester has authority to enter onto property outside its boundaries to evaluate the land's suitability for a spray irrigation field. That evaluation is necessary to determine whether the Town should proceed to acquire the property for its sewerage system. Accordingly, the right of entry might be regarded as having been granted, by necessary implication, as part of the express grant of extraterritorial condemnation power. However, there is no need for the Town to rely on such an implied power, for it has been given express power to enter onto the property.

HE §9-706, which governs municipalities' condemnations for sewerage and other systems, provides that "the proceedings shall be in accordance with . . . Title 12 of the Real Property Article". Under §12-111(a) of the Real Property Article ("RP" Article), civil engineers and other agents of "any body politic or corporate having the power of eminent domain[,] after every real and bona fide effort to notify the owner or occupant in writing[,] may [e]nter on any private land to . . . obtain information relating to the acquisition or future public use of the property". Further, if the owner or occupant refuses to allow the entry, the "body politic or corporate"—in this case, the Town of Manchester—may obtain a court order directing that the entry be allowed. RP §12-111(b).

The courts have recognized that this right of entry "is a 'key element' in the exercise of the power of eminent domain", for the information so obtained "is necessary for determining whether 'that particular piece of property' should be 'taken'". *King v. Mayor & Council of Rockville*, 52 Md. App. 113, 122, *cert. denied*, 294 Md. 442 (1982). Put another way, the right of entry is necessarily coextensive with the power of condemnation—that is, property subject to condemnation by the Town pursuant to HE §9-705 is also, pursuant to HE §9-706 and RP §12-111(a), subject to the Town's right of entry for the purpose of determining whether that property should be condemned.

In our view, HE §9-715, which grants a general right of entry "on any private property or into any building that is within the jurisdiction of the municipality", supplements but does not supersede the basic right of entry for condemnation purposes. HE §9-

715 is designed to permit entry for general purposes—for example, to inspect or repair a sewer line. Entry for survey or evaluation prior to instituting condemnation proceedings, however, is governed by the statute that specifically addresses that matter—RP §12-111—rather than the general provisions of HE §9-715.

III

Conclusion

In summary, it is our opinion that the Town of Manchester has express statutory authority to condemn property outside its boundaries, pursuant to HE §9-705(5), and to enter onto such property to evaluate it, pursuant to HE §9-706 and RP §12-111.

STEPHEN H. SACHS, *Attorney General*

C. J. MESSERSCHMIDT, *Staff Attorney*

AVERY AISENSTARK,
Chief Counsel
Opinions and Advice

PERSONNEL

COMPENSATION—DISCHARGE PROCEDURES—STATE PERSONNEL REGULATIONS AND ADMINISTRATIVE PROCEDURES NEED NOT BE CHANGED TO COMPLY WITH RECENT SUPREME COURT DECISIONS.

October 2, 1985

The Honorable Timothy F. Maloney
Maryland House of Delegates

You have requested our opinion on the impact on existing State personnel statutes, regulations, and administrative policies of two recent Supreme Court cases, *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), and *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). With respect to the decision in *Loudermill*, you indicate that you are particularly concerned about the effect, if any, that the decision may have on suspensions or terminations of permanent part-time, unclassified, and probationary employees.

In our opinion, neither case requires any significant departure from current State practices.[1] However, in light of the decision in *Garcia*, we believe that it would be advisable to amend Article 88B, §23B(c) and Article 100, §76(a)(3) and (d)(1) of the Maryland Code to conform to the federal Fair Labor Standards Act (the "FLSA").

I

Compensation of Employees After *Garcia*

A. *Applicability of the Fair Labor Standards Act to State Employees*

The FLSA, 29 U.S.C. §§201 through 219, establishes minimum

[1]This opinion addresses only practices relating to those employees who are covered by State personnel laws and Department of Personnel regulations and policies. It does not address whether local governments or State agencies outside the jurisdiction of the Department of Personnel are in compliance with the requirements of these cases.

hourly wages for employees and requires payment at "overtime" rates for hours worked in excess of 40 hours during a workweek. In 1974, Congress amended the FLSA to extend its provisions to most employees of the states and their political subdivisions. However, in *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Supreme Court held that the Tenth Amendment to the United States Constitution acts as an affirmative bar to Congress's otherwise broad power to regulate "traditional governmental functions" under the Commerce Clause. 426 U.S. at 842-43.[2] Accordingly, the Court concluded that "insofar as the challenged [1974] amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, §8, cl. 3". 426 U.S. at 852. Hence, the FLSA did not apply to state employees engaged in "traditional governmental functions".

Early this year, the Supreme Court overruled that decision. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). Essentially, the Court adopted the reasoning of the dissent in *National League of Cities*: that "restraints upon exercise by Congress of its plenary commerce power lie in the political process and not in the judicial process". 426 U.S. at 857 (Brennan, J., dissenting). *See Garcia*, 469 U.S. at 556. Although the Court in *Garcia* did not rule out the possibility that there may be affirmative limits on federal action affecting the states under the Commerce Clause, the Court nonetheless declined to speculate as to what those limits might be. *I*d. More specifically, the Court concluded that "Congress' action in affording [mass transit] employees the protections of the wage and hour provisions of the FLSA contravened no affirmative limit on Congress' power under the Commerce Clause". 469 U.S. at 555-56. As a result, states and their political subdivisions are now subject to the FLSA.

B. *FLSA Requirements*

The FLSA requires that employers generally pay their employees at least $3.35 an hour. 29 U.S.C. §206(a)(1). In addition, each em-

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[2]The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people". The Commerce Clause, Article I §8, clause 3, empowers Congress to "regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes".

ployee generally must be paid at least one and one-half times the normal rate for any time worked in excess of 40 hours in a workweek. 29 U.S.C. §207(a)(1).[3] Compensatory time off may not be substituted for required overtime pay, even if an employee would prefer compensatory time off. 29 C.F.R. §778.316.

The Act excepts from those requirements persons employed in "a bona fide executive, administrative, or professional capacity". 29 U.S.C. §213(a)(1). Furthermore, elected officials and their appointees, staff, and immediate advisors are excluded from the FLSA altogether. 29 U.S.C. §203(e)(2)(C). As a general rule, however, the Act is to be construed liberally in favor of coverage. *Donovan v. Sabine Irrigation Co., Inc.*, 695 F.2d 190 (5th Cir. 1983).

C. *State Compliance*

1. *Minimum wage*

Under Article 64A, §27(a) of the Maryland Code, the Secretary of Personnel is required to prepare a recommended pay plan for all classes of positions in the classified and the unclassified service. If approved by the Governor and funded in the budget, the pay plan takes effect at the time the next budget takes effect. Nothing in State law sets a minimum wage for State employees; nonetheless, no State employee is currently paid less than the federal minimum wage.[4]

2. *Overtime*

Article 100, §76(a) generally requires that each State employee be paid extra compensation for hours worked "in excess of the normal workweek for his department, bureau, board, commission, or

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[3]Special provisions govern overtime compensation of particular categories of employees whose work necessitates irregular or varying work schedules. *See, e.g.*, 29 U.S.C. §207(k) (law enforcement and fire protection personnel).

[4]The State Wage and Hour Law, codified at Article 100, §§81 through 93A, establishes minimum hourly wages for employees generally. *See* Article 100, §83. However, the State Wage and Hour Law is inapplicable to employees of the State, whose wages and hours are governed by the more specific provisions of Article 100, §§76 through 77A.

agency". There are, however, certain exceptions to that requirement. Article 100, §76(b) authorizes the Secretary of Personnel to designate "bona fide administrative, executive, and professional employees" who will receive compensatory time off rather than overtime pay. This exception is clearly modeled on the FLSA exception in 29 U.S.C. §213(a)(1). Accordingly, it presents no problem, as long as it is administered in conformance with the federal regulations governing that FLSA exemption, which are codified in 29 C.F.R. §§541.0 through 541.602. We understand that the administration of Article 100, §76(b) presently does conform to those federal regulations.

State law enforcement personnel are also excepted from the general overtime provisions, by Article 100, §76(c), but are compensated for overtime under Article 100, §76(d). And, regulations adopted by the Department of Personnel provide that contractual employees are to be paid overtime "if appropriate . . . according to applicable statutes and regulations". COMAR 06.01.01.09I(1). We understand that these exceptions, like that embodied in Article 100, §76(b), are being administered in conformance with federal law. Thus, Maryland is presently paying at least some overtime compensation to all State employees for whom the FLSA requires it.

However, it appears that the Maryland statutory formulas for calculating overtime might not provide extra compensation for all the *hours* for which the FLSA requires it. Both Article 100, §76(a)(3) and Article 88B, §23B(c) allow overtime for certain employees to be computed on the basis of a two-week, 80-hour work period.[5] Hence, those provisions would not necessarily require that an employee who works less than 40 hours in one week and more than 40 in the next be paid overtime, while the FLSA clearly requires that such an employee be paid overtime for the hours over 40 worked in the second week. Similarly, §76(d)(1)(i) provides that Natural Resources Police officers are to be paid overtime "only for authorized hours of work in excess of their normal 8-hour daily work day".[6] That provision would not require that a person who works eight hours a day for six days in a week be paid overtime, while

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[5]Article 100, §76(a)(3), which applies to departments or units that do not operate on a 5-day work schedule, was enacted by Chapter 233, Laws of Maryland 1985. Article 100, §26B(c), which applies to employees of the Maryland State Police who work a 10-hour workday, was amended by Chapter 531, Laws of Maryland 1985.

[6]That provision was added by Chapter 679, Laws of Maryland 1985.

the FLSA would require overtime compensation for the full sixth day.

Thus, each of these provisions fails to *require* overtime compensation for some of the time that, under the FLSA, must be compensated at one and one-half times the normal rate. However, none affirmatively *forbids* payment of overtime compensation under circumstances in which the FLSA requires it. Because of this absence of express conflict, our review of the bills proposing these provisions concluded that they could be administered so as not to violate the FLSA—and that they must be so administered. Bill Review Letter (S.B. 345 and H.B. 1129) from Stephen H. Sachs, Attorney General, to Harry Hughes, Governor (May 20, 1985). At the same time, we suggested that the provisions be amended to conform to the FLSA. A copy of our letter is attached.

D. *Summary*

It is our opinion that this State's current personnel practices comply with the FLSA, in that all employees are paid at least minimum wage and all employees who must be paid "time and a half" for overtime receive such compensation. However, the formulas governing the calculation of overtime hours should be amended to conform to the federal act, to prevent any possibility of their being administered in a way that would violate the FLSA.[7]

II

Discharge of Employees After *Loudermill*

A. *Due Process Requirements*

In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532

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[7]It is not clear whether the decision in *Garcia* will be applied retroactively. In determining whether a decision should be so applied, courts typically consider three factors: (1) whether the decision established a new principle of law, either by deciding an issue of first impression whose resolution was not clearly foreshadowed by earlier cases or—as in this case—by overruling clear past precedent on which litigants may have relied; (2) whether retrospective operation will further or retard the operation of the holding in question; and (3) whether retroactive application could produce substantial inequitable results in individual cases. *Northern Pipeline Constr. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982); *Chevron Oil Company v. Hudson*, 404 U.S. 97, 106-107 (1971). In our view, all three factors strongly favor non-retroactive application of the decision in *Garcia.* And the United States Department of Labor has recently announced that it will regard the decision as taking effect, prospectively, as of April 15, 1985.

(1985), the Supreme Court reaffirmed prior decisions holding that state law may confer on public employees a property right, entitled to due process protection, in continued employment. 470 U.S. at 538. However, the Court went on to clarify that the property interest so conferred is not conditioned on or defined by the legislature's choice of procedures for its deprivation. 470 U.S. at 540-41. Rather, the procedural safeguards that govern deprivation of such a property interest are mandated by the Due Process Clause of the Fourteenth Amendment. 470 U.S. at 541. Thus, the legislature does not have a completely free hand in establishing the procedures for terminating employees. In particular, when an employee with a property right in continued employment is terminated, post-termination review procedures alone will not pass constitutional muster. Instead, due process requires that, *before* termination, the employee be given oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present, in person or in writing, reasons why the proposed action should not be taken. 470 U.S. at 546.

B. *Classified Employees*

To determine whether the *Loudermill* decision requires pretermination hearings for particular groups of State employees, it is first necessary to determine whether those employees have a property interest in their employment. In *Loudermill*, the Supreme Court found that the respondents possessed property rights in their continued employment because they were "classified civil service employees" who could not, under state law, be dismissed except for cause. 470 U.S. at 538-39.

Similarly, Article 64A, §33(b)(2)(i) of the Maryland Code provides that "[n]o employee who has completed his probation may be permanently removed from the classified service except for cause". Thus, classified employees clearly have a property right in their employment. And the term "classified employees" includes permanent part-time employees.[8]

Under Article 64A, §33(b)(2)(i), a classified employee may only

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[8]"Permanent part-time employees" are those working "not less than 50% nor more than 80% of the normal work week". Article 64A, §51(a)(2). Employees who work more than 80% of the "normal work week", but less than fulltime, are treaed as unclassified employees. The adequacy of termination procedures applicable to unclassified employees is discussed below, in the text accompanying notes 11 and 12.

be discharged "upon *written* charges and *after* an opportunity to be heard in his own defense". *Cf. Loudermill*, 470 U.S. at 546 (notice of charges may be oral or written). The charges must state the cause for removal and the specific acts that constitute such cause and must inform the employee of his or her right to appeal the charges within 10 days. COMAR 06.01.01.48A.[9] If an employee is to be suspended without pay pending removal, the charges must be filed within two weeks of the suspension. COMAR 06.01.01.48B.

Moreover, in the case of a suspension, the employee is entitled to an early hearing on the suspension itself. COMAR 06.01.01.57. Thus, before any significant loss of pay, the suspended employee receives a hearing, and before final separation from State service, the employee receives another, full hearing. Finally, the hearing provided is more formal than that which *Loudermill* would seem to require. *Compare* COMAR 06.01.03.04 (either party may request full evidentiary hearing) *with Loudermill*, 470 U.S. at 545 (full evidentiary hearing need not be provided). Thus, in our view, the procedures now provided for the termination of classified employees—including permanent part-time employees—clearly meet the due process requirements enunciated in *Loudermill.*

C. *Other Employees*

For different reasons, we believe the current procedures for termination of contractual, probationary, and unclassified employees are also valid under the Supreme Court's decision in *Loudermill.*

1. *Contractual employees*

Contractual employees are employed for fixed periods, set by the terms of their contracts. Unquestionably, they have no property interest in their employment other than the interest created by the terms and conditions of their contracts. *See* Article 64A, §§15A and 51B. Thus, they have no constitutional entitlement to a hearing prior to the employer's decision not to renew the contract. *See Board of Regents v. Roth*, 408 U.S. 564, 578 (1972) (teacher hired on year-

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[9]Particular circumstances that constitute sufficient cause—as, for example, "[t]hat the employee is incompetent or inefficient in the performance of his duty"—are enumerated in COMAR 06.01.01.47. However, that list is not exclusive. *See* COMAR 06.01.01.48A.

to-year basis had no property interest in employment strong enough to require hearing on employer's decision not to rehire him).[10]

2. *Probationary employees*

All new employees in the classified service must serve a probationary period. COMAR 06.01.01.37A. During that period, the probationary employee may be rejected at any time, merely upon a written statement of the reasons for the rejection. Article 64A, §33(b)(1); COMAR 06.01.0137F. The sufficiency of the reasons for rejection is not subject to challenge. COMAR 06.01.01.59. Thus, probationary employees may be dismissed for any nondiscriminatory reason. *Small v. Secretary of Personnel*, 267 Md. 532, 535 (1973). Consequently, probationary employees cannot be said to have a property interest in continued employment sufficient to necessitate pretermination hearings. *See Loudermill*, 470 U.S. at 541 (legislature need not create property interest in public employment).

Current regulations require a written statement of reasons for the rejection of a probationary employee and, ordinarily, two weeks' notice to the employee of the rejection. COMAR 06.01.01.37F. In addition, the employee has a right to appeal the rejection and to be given a hearing on that appeal. COMAR 06.01.01.37F and 06.01.01.59. The appeal and hearing procedures provided for probationary employees are generally more limited than those for classified employees. For example, under COMAR 06.01.01.59A, a new probationary employee may appeal his or her rejection only on the grounds that procedural requirements were not followed or that the rejection was for discriminatory or other unconstitutional reasons, while COMAR 06.01.01.61A imposes no limit on the grounds of a classified employee's appeal of the alleged cause for his or her removal. Nonetheless, in our opinion, these safeguards are adequate to protect the interest of probationary employees in their employment, in view of the limited nature of that interest. *See* 60 *Opinions of the Attorney General* 545, 548 (1975).

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[10]Employment contracts frequently provide for the contingency of termination before the end of the contractual term, at the will of the employing agency. A terminated contractual employee may, of course, pursue such common law or statutory causes of action as are available—if, for example, the employee believes that the discharge decision was discriminatory. But, we are aware of no case holding that an at-will contractual employee who does not have tenure rights must be afforded a pretermination hearing.

3. *Unclassified employees*

Most unclassified employees serve at the pleasure of their superiors. *Patterson v. Ramsey*, 413 F.Supp. 523 (D. Md. 1976).[11] Accordingly, they may be removed without cause and, like probationary employees, have no such property interest in continued employment as necessitates pretermination hearings. 61 *Opinions of the Attorney General* 219, 227-28 (1976). Under current Department of Personnel regulations, unclassified employees have essentially the same rights as probationary employees to be given written notice of their termination—including the reason, "if any", therefor—and to appeal the legality of the termination. COMAR 06.01.01.60 and 06.01.01.62. Therefore, we believe that current procedures, although more limited than those for classified employees, afford unclassified employees, as well as probationary employees, "all the process that is due". *Loudermill*, 470 U.S. at 547.[12]

III

Conclusion

In summary, it is our opinion that neither *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) nor *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) requires any change in present Maryland personnel regulations or administrative procedures. At the same time, however, we believe that it would be advisable to amend the statutory provisions on overtime compensation for State employees, to ensure their continued administration in conformity with the federal Fair Labor Standards Act.

STEPHEN H. SACHS, *Attorney General*

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[11] *See, e.g.*, §6-105(a)(2) of the State Government Article: "Staff appointed under this subsection serves at the pleasure of the Attorney General." *But see* SG §2-1207(g), which provides that professional employees of the Department of Fiscal Services may be removed only for cause after notice and hearing. The Department has its own personnel procedures and, to our knowledge, is the only agency whose "unclassified employees" have statutorily conferred tenure rights. We will address those procedures in a forthcoming opinion.

[12] Nothing in the Court's opinion in *Loudermill* suggests that affording these groups of employees limited due process protection in itself creates a property right in continued employment. To the contrary, the Court carefully noted that "[t]he categories of substance and procedure are distinct". 470 U.S. at 541.

ROBERT A. ZARNOCH, *Assistant Attorney General*
KATHRYN ROWE, *Staff Attorney*

JACK SCHWARTZ
Chief Counsel
Opinions and Advice

May 20, 1985

The Honorable Harry Hughes
Governor of Maryland

Dear Governor Hughes:

We have reviewed and hereby approve for constitutionality and legal sufficiency Senate Bill 345, which relates to overtime payments for the Maryland State Police, and House Bill 1129, which relates to overtime compensation for the Natural Resources Police. While we approve the bills there is one point we wish to bring to your attention.

The recent decision of the Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S.Ct. 1005 (1985) overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976) thus making most State employees, including law enforcement personnel, subject to the Fair Labor Standards Act (FLSA), 29 USC §201 *et seq.* Among the provisions newly applicable to State employees is 29 USC §207 which requires that an employee who works more than 40 hours in a week be paid for the hours over 40 at at least one and one-half times the regular rate.

Both bills involved here could be read to permit an employee to work over 40 hours in a week without receiving overtime pay as required by §207. Under Senate Bill 345 a civilian employee could work five 10-hour days in one week and three the next, without exceeding the 80-hour limit for two weeks. Under House Bill 1129, which calculates overtime by the day only, an employee could work six 8-hour days in a week and not receive overtime pay.

In our view, however, both bills may be administered so as to comply with the FLSA. Therefore, while we suggest that these provisions be amended next session to conform the law to the FLSA federal Act, we approve the bills for signing. And, if the bills are signed, they *must* be so administered.

Very truly yours,

STEPHEN H. SACHS, *Attorney General*

PESTICIDE REGULATION

POLITICAL SUBDIVISIONS—PREEMPTION/CONFLICT—THE AUTHORITY OF POLITICAL SUBDIVISIONS TO REGULATE PESTICIDES HAS BEEN PREEMPTED BY FEDERAL LAW.

October 28, 1985

The Honorable Jerry H. Hyatt
Maryland House of Delegates

You have requested our opinion concerning the legality of a proposed Montgomery County ordinance, introduced as Bill No. 26-85, that would require lawn care businesses and pesticide dealers to provide information to customers concerning pesticide health risks. Specifically, you have asked if the County's authority to enact this ordinance is preempted by either State or federal law.

For the reasons given below, it is our opinion that Montgomery County's authority to enact Bill No. 26-85 or comparable pesticide regulation is preempted by federal law.

I

The Proposed Ordinance

Bill No. 26-85 is intended to warn the public of the dangers of pesticides before and after they are applied to a lawn.[1] In order to

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[1]The Legislative Request Report on Bill No. 26-85 describes its "goals and objectives" as follows:

> "The purpose of [Bill No. 26-85] is to promote the public health and safety by providing for the public notice of the use of pesticides, thereby providing the public the opportunity of avoiding contact with these pesticides. It is also intended to provide the customers or custom applicators with appropriate information concerning the health and safety of these applications."

Under certain circumstances, significant health risks are associated with exposure to pesticides. The following are trade names and risk data for a few of the chemicals commonly used by Maryland lawn care services: Dursban, an insecticide, may be fatal if swallowed or absorbed through the skin; 2,4-D, a herbicide, is harmful if swallowed or inhaled and should not come into contact with eyes, skin or clothing; and Daconil, a fungicide, may produce allergic reaction, redness of the eyes and mild bronchial irritation. The Maryland Department of Agriculture reported that 18,466 lbs. of Dursban, 8,738 lbs. of 2,4-D and 3,905 lbs. of Daconil were applied in Montgomery County in 1982. *Pesticide Usage in 1982* at 7 (1982).

accomplish this goal, the bill would amend the Montgomery County Code to require that a lawn service applying pesticides ("custom applicator") give new customers a list containing the following information before a pesticide is actually used on a lawn:

> "(A) the trade name of each pesticide that might be used;
>
> (B) the generic name of each pesticide that might be used; and
>
> (C) specific customer safety precautions for each pesticide that might be used[.]" Proposed §33B-2(b)(1).[2]

Proposed §33B-2(d) requires that the custom applicator also provide the following written information:

> "(1) government agency phone numbers to call to:
>
> (A) make a consumer complaint;
>
> (B) receive technical information on pesticides; and
>
> (C) get assistance in case of a medical emergency;
>
> (2) a list of general safety precautions a customer should take when a lawn is treated with a pesticide;
>
> (3) a statement that a custom applicator must:
>
> (A) be licensed by the Maryland Department of Agriculture, and
>
> (B) follow safety precautions; and
>
> (4) a statement that the customer has the right to require the custom applicator to notify the customer before each treatment of the lawn of the customer with a pesticide."

Moreover, the bill requires a custom applicator to post a warning sign immediately after the pesticide application. Proposed §33B-3.

Although the bill principally regulates lawn care businesses, proposed §33B-4 reaches all retail sellers of "a pesticide or material that contains a pesticide." It requires them to make County-ap-

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[2]Bill No. 26-85 defines "pesticide" broadly to include fungicides, defoliants, and like substances. §33B-1(6). Federal and State law definitions are comparably broad. *See* 7 U.S.C. §136(u) and §5-201(j) of the Agriculture Article.

proved warning signs and other printed material available to buyers.[3]

Finally, proposed §33B-6 provides that a violation of the bill's provisions is a misdemeanor and subjects the violator to a possible prison term and a fine.

II

County Authority to Regulate Pesticides

Absent a prohibition by State or federal law, Montgomery County generally has authority to regulate the sale and use of pesticides. As a charter county, it may exercise the express powers granted to it by the General Assembly. Article XI-A, §2 of the Maryland Constitution. Thus, the County may exercise ". . . a wide array of legislative and administrative powers over local affairs" and ". . . legislate for the benefit of the health, safety and general welfare of the local community." *Ritchmount Partnership v. Board of Supervisors of Elections for Anne Arundel County*, 238 Md. 48, 57 (1978).

The Express Powers Act grants the County broad authority to regulate "conditions detrimental to health" and to provide for the "health and welfare" of the County. Article 25A, §5(J) and 5(S) of the Maryland Code. County regulation concerning the safe use of pesticides is plainly within these grants of authority.

Moreover, the County's enactment of Bill No. 26-85 would not

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[3]Proposed §33B-4 appears to reach persons unintended by the drafter. Although the Legislative Request Report indicates that consumer information need be supplied only by pesticide vendors for lawn care, the bill's language is broad enough to reach any person who sells products containing a pesticide. This means that sellers of dog and cat flea collars, pressure-treated wood, bactericide disinfectants, fungus-resistant paint and swimming pool chemicals would be subject to the requirements of the ordinance.

conflict with, or be preempted by, State law.[4] Although State law regulates some aspects of pesticide application, it neither addresses the matters covered by Bill No. 26-85 nor ousts local jurisdictions of authority to act in this field.[5]

However, for the reasons set forth in Part III below, enactment of Bill No. 26-85 is precluded by federal law.

III

Federal Preemption

A. *Introduction*

When acting within its constitutional authority, Congress un-

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[4]Article XI-A, §3 of the Maryland Constitution limits the authority of charter counties to enact local laws as follows:

> "All such local laws enacted by . . . the Council of the Counties as hereinbefore provided, shall be subject to the same rules of interpretation as those now applicable to the Public Local Laws of this State, except that *in case of any conflict between* said *local law* and any *Public General Law* now or hereafter enacted *the Public General Law shall control.*"

Article 25A, §5(J) also provides that charter county legislation on health and related subjects must be consistent with State law:

> "Nothing in this article or section contained shall be construed to affect in any manner any of the powers and duties of the Secretary of Health and Mental Hygiene or *any public general laws of the State relating to the subject of health.*"

[5]Maryland law regulating pesticides is codified at §§5-101 through 5-114 (Maryland Pesticide Registration and Labeling Law) and §§5-201 through 5-211 (Pesticide Applicator's Law) of the Agriculture Article. As with the Montgomery County ordinance, the safe use of pesticides is the objective of the State law. For instance, §5-209 of the Agriculture Article requires all commercial applications of any pesticides to be done under the direct supervision of a person certified by the State Department of Agriculture.

Implementing regulations, codified in COMAR 15.05.01.02 through 15.05.01.22, generally provide for the use and sale of pesticides, the licensing and testing of persons who apply pesticides, standards for handling and storage, and the grounds for license revocation. However, there are no State regulations requiring lawn care businesses to post warning signs or to compel pesticide dealers to give customers safety information; hence, there is no conflict between Bill No. 26-85 and State law.

In our opinion, existing State law also does not preempt the County's authority to regulate pesticides, because State law neither contains express preemption language nor so comprehensively regulates in this area that a court would be compelled to find preemption by implication. *See generally* 69 *Opinions of the Attorney General* 183, 190-201 (1984) (reviewing case law on conflict and preemption).

questionably may preempt state and local laws. U.S. Constitution, Article VI, Clause 2. The United States Supreme Court has held that state law is preempted by federal law if: (1) federal law so states in express terms; (2) federal legislation in a given area is so pervasive that it is reasonable to conclude that Congress intended to "occupy the field" and thereby preclude state legislation on the same subject; or (3) the state law actually conflicts with or frustrates the full purpose or operation of federal law. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984); *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 204 (1983). Federal law preempts when local ordinances or regulations collide with or obstruct federal objectives. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973); *Don't Tear It Down, Inc. v. Pennsylvania Avenue Development Corp.*, 642 F.2d 527 (D.C. Cir. 1980). However, a court will not find that the exercise of traditional state or local police powers is preempted "unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

B. *Federal regulation of pesticides*

The Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §136 *et seq.* ("FIFRA"), comprehensively regulates both the interstate and intra-state sale and use of pesticides. *See National Agricultural Chemicals Ass'n. v. Rominger*, 500 F. Supp. 465, 468 (E.D. Cal. 1980).[6]

FIFRA's overall purpose is to protect man and the environment from pesticide contamination. S. Rep. No. 838, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code & Cong. & Adm. News 3995. More specifically, the law establishes a nationwide system for training and certifying pesticide applicators in the safe use and hazards of pesticides (§136b); requires the registration of pesticides and classifies them according to "general" or "restricted" use (§136a); limits pesticide use to purposes permitted by law (§136j(a)(F)); and makes it unlawful to apply a pesticide contrary to label instructions

[6]Historically, the federal government's role in pesticide regulation has expanded from merely supplementing state regulatory authority under the Federal Inspection Act of 1910 to comprehensively regulating pesticides in interstate commerce under FIFRA. S. Rep. No. 838, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 3999.

(§136j(a)(G)). The Environmental Protection Agency enforces FIFRA and has adopted detailed regulatory requirements to promote the safe use of pesticides.[7]

The preemption question in this case is whether the language of FIFRA reflects a congressional intent to deny political subdivisions of a state the authority to regulate pesticides. In our view, Congress so intended.

C. *FIFRA's preemption provision*

1. *Statutory language*

The section of FIFRA headed "Authority of State", 7 U.S.C. §136v, provides in pertinent part that:

> "(a) A *State* may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
>
> (b) Such *State* shall not impose or continue in effect any requirement for labeling or packaging in addition to or different from those required under this subchapter.
>
> (c) (1) A *State* may provide registration for additional uses of federally registered pesticides formulated for distribution

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[7]EPA regulations further FIFRA's aim to comprehensively regulate all aspects of the sale and use of pesticides. *See, e.g.*, 40 C.F.R. §162.5 (requirement that all pesticides be registered with EPA); 40 C.F.R. §152 (authorization for states to register pesticides); 40 C.F.R. §155 (suspension of state registration authority); 40 C.F.R. §165 (requirements for storage and disposal of pesticides and pesticide containers); 40 C.F.R. §166 (exemption of federal and state agencies for the use of pesticides in an emergency); 40 C.F.R. §167 (registration of pesticide manufacturing); 40 C.F.R. §170 (protection standards for agricultural workers); and 40 C.F.R. §173.8 (rescission of a state's enforcement authority).

With regard to information disclosure, Bill No. 26-85 is far more stringent than any federal requirement. However, EPA-approved pesticide labels do serve the same purpose as Bill No. 26-85—they warn of pesticide health hazards and set a standard for safe pesticide use. Furthermore, we note that several EPA labels require warning signs to be posted after a pesticide application. For example, the label for Union Carbide's Temik requires that signs be placed near treatment areas for four weeks after use. Likewise, the label for methyl bromide requires that signs be posted while a building is being fumigated.

> and use within that State to meet special local needs in accord with the purposes of this subchapter and if registration for such use has not previously been denied, disapproved, or canceled by the Administrator. Such registration shall be deemed registration under [7 U.S.C. §136a] for all purposes of this subchapter, but shall authorize distribution and use only within such State." (Emphasis added.)

The definition of "State" in FIFRA does not refer to political subdivisions:

> "The term 'State' means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa." 7 U.S.C. §136(aa).

Significantly, FIFRA contains several provisions that do refer expressly to political subdivisions, as distinct from states. *See* 7 U.S.C. §136f(b) (officers and employees of EPA "or of any State or political subdivision" entitled to inspect records); 7 U.S.C. §136r(b) (EPA to develop monitoring plan "in cooperation with other Federal, State or local agencies"); 7 U.S.C. §136t(b) (EPA to cooperate with "any appropriate agency of any State or any political subdivision thereof"). Thus, when Congress intended that local governments play a role in FIFRA's regulatory scheme, it specifically said so.

Moreover, other provisions identify "State" responsibilities that could not feasibly be undertaken at the local level. For example, 7 U.S.C. §136b grants authority to "any State", after the EPA Administrator and the governor of such state consult, to designate a state agency to conduct a statewide program for certifying pesticide applicators. Section 136w-1 provides that a "State" shall have primary responsibility for enforcing pesticide use violations, and §136w-2 provides that the EPA administrator may rescind a state's authority over pesticide use violations.

2. *Legislative history*

FIFRA's legislative history further confirms our view that Congress intended to preempt all regulation below the state level.

When the bill ultimately enacted as FIFRA passed the House, it contained no language authorizing local regulation. Indeed, such a proposal had been defeated in House committee:

> "The Committee [on Agriculture] rejected a proposal

which would have permitted political subdivisions to further regulate pesticides on the grounds that the 50 States and the Federal Government should provide an adequate number of regulatory jurisdictions." H.R. Rep. No. 511, 92d Cong., 1st Sess. at 16 (1971).

In the Senate, the bill was referred to two committees, the Agriculture and Forestry Committee and the Commerce Committee. Both committees expressly addressed the question of whether local governments should have a role in FIFRA's regulatory scheme.

First, the Agriculture Committee commented favorably on what it viewed as the House's decision to bar local regulation:

> "The Senate [Agriculture and Forestry] Committee considered the decision of the House Committee to deprive political subdivisions of States and other local authorities of any authority or jurisdiction over pesticides and concurs with the decision of the House of Representatives. Clearly, the fifty States and the Federal Government provide sufficient jurisdictions to properly regulate pesticides. Moreover, few, if any, local authorities whether towns, counties, villages, or municipalities have the financial wherewithal to provide necessary expert regulation comparable with that provided by the State and Federal Governments. On this basis and on the basis that permitting such regulation would be an extreme burden on interstate commerce, *it is the intent that* [*7 U.S.C. §136v*] *by not providing any authority to political subdivisions and other local authorities of or in the States, should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides.*" S. Rep. No. 92-838, 92d Cong. 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 3993, 4008. (Emphasis added).

The Commerce Committee disagreed, and proposed an amendment to "giv[e] local governments the authority to regulate the sale or use of a pesticide beyond the requirements imposed by State and Federal authorities." It commented on its proposed amendment as follows:

> "Many local governments now regulate pesticides to meet their own specific needs which they are often better able to perceive than are State and Federal regulators. The amendment of the Committee on Commerce is intended to continue the authority of such local governments and allow

> them to protect their environment to a greater degree than would EPA." S. Rep. No. 92-970, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Adm. News 4111.

But the Agriculture Committee then reiterated its opposition to local regulation:

> "This Commerce Committee amendment would permit local governments in addition to the Federal and State governments to regulate the sale or use of a pesticide. The Committee on Agriculture and Forestry felt that regulation by the Federal Government and the 50 States should be sufficient and should preempt the field." 1972 U.S. Code Cong. & Ad. News at 4026. *See also* 1972 U.S. Code Cong. & Ad. News at 4066.

A compromise bill was then marked up and sent to the Senate floor. This bill did not contain the local government amendment favored by the Commerce Committee. Rather, the Commerce Committee amendment was specifically identified for the record as "not included in the substitute [bill]." 118 Cong. Rec. 32258 (1972) (emphasis added). The substitute bill passed the Senate unanimously. 118 Cong. Rec. 32263 (1972).

Because both the House and the Senate versions of the bill contained no provision allowing local governments to regulate pesticides, local regulation was not mentioned in the conference report. 118 Cong. Rec. 35543-46, 33924 (1972). Thus, given both the express statements of the House and Senate Agriculture Committees depriving local governments of pesticide regulatory authority and the rejection of an amendment that would have granted that authority, we conclude that Congress intended to preclude local regulation in this area. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 515-16 n.12 (1981) (rejection of a committee amendment evidence that Congress did not intend to include its subject matter in the law).

3. *Administrative construction*

When EPA adopted nationwide standards for the certification of pesticide applicators, the agency stated its view that political subdivisions do not have pesticide regulatory authority: "It is not the intention of [FIFRA] or these regulations to authorize political subdivisions below the State level to further regulate pesticides." 40 Fed. Reg. 11697, 11700 (1975).

Agency interpretations of the laws they administer are to be given great deference. *Udall v. Tallman,* 380 U.S. 1, 16-17 (1965).

4. *Subsequent construction of FIFRA*

The conclusion that FIFRA preempts local regulation finds support in other jurisdictions. *See Town of Wendell v. Bellotti,* No. 15119 (Mass. Superior Ct., March 19, 1984), *vacated on other grounds,* 476 N.E.2d 585 (Mass. 1985) (FIFRA was intended to constitute a federal-state plan for the comprehensive regulation of pesticides; local regulation would thwart the statutory purpose); 40 *Opinions of the Attorney General* (Ore.) (No. 7924, July 11, 1980)(Senate Commerce Committee amendment authorizing local regulation was not included in final bill; thus, no such regulation is permitted).

One California case reads FIFRA's legislative history differently. In *People ex rel. Deukmejian v. County of Mendocino,* 683 P.2d 1150 (Cal. 1984), the California Supreme Court concluded that, since the Act as passed did not include a clear expression of congressional intent to prohibit local regulation, such regulation was permissible. However, this view of FIFRA's preemption provision is "based on an untenable reading of the legislative record." 683 P.2d at 1164 (Kaus, J., dissenting). In particular, the *Mendocino County* decision brushes aside the fact that, *as enacted,* FIFRA's preemption section reflects the intent of the House and Senate Agriculture Committees:

> "[I]t is the intent that [7 U.S.C. §136v], by not providing any authority to political subdivisions and other local authorities of or in the States, should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides." S. Rep. No. 838, 92d Cong. 2d Sess (1972).

D. *Summary*

Congress intended to create a federal and state, not a federal-state-local, system of regulating pesticides. The language of the provision in FIFRA allocating regulatory authority, and the legislative history of that provision, reflect the congressional view that state resources were superior to those of the localities and that local regulation by each county, town, and village throughout the country would create an intolerable burden on interstate commerce. Hence, Bill No. 26-85 is preempted by federal law.[8]

VI

Conclusion

In conclusion, it is our opinion that Montgomery County may not adopt Bill No. 26-85, or any comparable legislation regarding pesticides, because the County's authority to regulate in this area is preempted by federal law.[9]

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[8]In addition, Congress has fully occupied the field of pesticide labeling and forbids even the states from imposing additional or different packaging or labeling requirements from those required under FIFRA. 7 U.S.C. §136v(b). (40 C.F.R. §162.10 establishes labeling requirements for pesticides.) Even if Montgomery County were not otherwise preempted from regulating pesticides, the approved notice signs and other written materials that pesticide sellers must make available to buyers under §33B-4 of the proposed ordinance might be held to fall within FIFRA's definition of "labeling":

> "The term 'labeling' means all labels *and all other written, printed, or graphic matter—*
>
> (A) *accompanying the pesticide* or *device at any time*; or
>
> (B) to which reference is made on the label or *in literature accompanying the pesticide* or *device,* except to current official publications of the Environmental Protection Agency, the United States Departments of Agriculture and Interior, the Department of Health and Human Services, State experiment stations, State agricultural colleges, and other similar Federal or State institutions or agencies authorized by law to conduct research in the fied of pesticides." 7 U.S.C. §136(p)(2).

See Kordel v. United States, 335 U.S. 345, 348 (1948) (written information distributed to consumers by vendors of drugs held within the similar definition of "labeling" in Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §321(m)).

[9]Currently, the only local government that regulates pesticides in Maryland is the town of Manchester, Carroll County, Maryland. Section 62-11 of the Manchester Code provides that:

> "It shall be unlawful to apply a pesticide, herbicide or fungicide within the town limits of Manchester without receiving permission therefor from the Mayor and Council thirty (30) days in advance of application. Notice of date of application shall be posted in areas to be sprayed ten (10) days in advance of actual application. Notices of application shall be posted less than one hundred (100) yards apart. Any person applying a pesticide on any area of ten thousand (10,000) square feet or less shall be exempt from the provisions of this section."

Our conclusion that federal law preempts county authority to regulate pesticides applies as well to municipalities.

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JACK SCHWARTZ
Chief Counsel
Opinions and Advice

Editor's Note: This opinion's conclusion has since been affirmed by the federal courts. *Maryland Pest Control Ass'n v. Montgomery County*, Civil Action No. JFM-86-1688 (D.Md. Sep. 29, 1986), *aff'd*, No. 86-3639 (4th Cir. June 16, 1987).

Since the issuance of the opinion, the General Assembly has enacted legislation requiring pesticide applicators to provide certain information to customers and to post signs after applying pesticides to lawns or landscape plants. Chapter 302, Laws of Maryland 1987.

PUBLIC ETHICS

FINANCIAL DISCLOSURE—"PUBLIC OFFICIAL"—PERSONNEL—STANDARD SALARY SCHEDULE—DEPARTMENT'S REVISION OF SCHEDULE DOES NOT SUBSTANTIVELY AFFECT CLASSES OF PERSONS SUBJECT TO FINANCIAL DISCLOSURE REQUIREMENTS.

July 3, 1985

Mr. John E. O'Donnell
Executive Director
State Ethics Commission

You have requested our opinion on whether the recent action of the Department of Personnel in renumbering the grades of the Standard Salary Schedule affects the applicability of the financial disclosure requirements of the Maryland Public Ethics Law, Article 40A of the Maryland Code.

For the reasons given below, we have concluded that the action of the Department of Personnel does not effect a change in substance. Rather, the provisions of the Public Ethics Law that require financial disclosure by certain persons classified or compensated at "grade level 18 or above" should be read as referring to the designated counterpart of those grades—that is, as referring to new "grade level 16 or above".

I

Background

Under Article 40A, §4-101, "public officials" must file annual financial disclosure statements.[1] Article 40A, §1-201(aa) defines "public official" as one who, among other things, is classified or compensated at a specified level:

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[1]Article 40A, §4-101 applies to all "officials", a term defined by §1-201(w) as encompassing both "public officials" and "State officials". "State officials" are those judges and elected officials specifically enumerated in §1-201(gg).

> "(1) Any individual in an executive agency who:
>
> (i) Is a classified employee at grade level 18 or above, or . . . receives a rate of compensation equal thereto . . .
>
> (2) Any individual in the legislative branch, other than a State official, who receives a rate of compensation equal to or above grade level 18 . . .
>
> (3) Any individual in the judicial branch . . . who:
>
> (i) Is classified or compensated at State grade level 18 or above . . . ."

Although the definition contains additional criteria that must be applied to determine whether a particular individual is included within any of the three categories of "public official", it is nonetheless clear that, for each of these categories, the threshold criterion is classification or compensation at or above "grade level 18".

Recently, the Department of Personnel announced a renumbering of the grades of the Standard Salary Schedule, effective July 1, 1985. As a result of that action, present grade level 18 has been renumbered as grade level 16. In our view, that action is a purely administrative adjustment in the nature of a technical correction, without substantive effect.

II

Analysis

Article 64A, §16(a) requires the Secretary of Personnel to "establish classes and classify therein all positions in the classified service" and empowers the Secretary to "combine, alter or abolish existing classes". Article 64A, §27(a) requires the Secretary to prepare a pay plan for all classes, or grades, of positions and provides that every State employee "shall be paid at one of the rates set forth in the pay plan for the grade or class of positions in which he is employed". Those position grades and their salaries comprise the Standard Salary Schedule.

For some years now, the Standard Salary Schedule has ranged from Grade 3, the lowest grade in current use, through Grade 23, the highest. Recognizing the anomaly of referring to the first grade level as Grade 3, the Department of Personnel has modified the schedule so that, effective July 1, 1985, it will range from Grade 1 through Grade 21.

As explained in the Department's announcement of the renumbering: "The grades of the Standard Salary Schedule are being renumbered *so that the first grade will again be designated as Grade 1*". Memorandum to Personnel Directors from Anne Hearn, Director, Division of Salary Administration and Position Classification (April 8, 1985) (emphasis added). Moreover, as the announcement also specifically emphasized, this redesignation would not affect salaries. Similarly, of course, the redesignation has no effect on any individual's powers, duties, or responsibilities. Thus, the Department's only intent was only to clarify the Standard Salary Schedule by eliminating an anomaly in its numerical designation of compensation grades.

A superficial reading of the provisions of Article 40A, §1-201(aa) might, however, suggest a substantive effect in the context of the Public Ethics Law. That is, if the references in those provisions to "grade level 18" were read as referring to the *redesignated* Grade 18, the financial disclosure requirements would be rendered newly inapplicable to an entire class of employees previously covered—i.e., those classified or compensated at former Grades 18 and 19 (redesignated Grades 16 and 17). In our view, such a reading would not comport with the intent of the General Assembly.

The legislative findings and statement of policy set out in Article 40A, §1-102 clearly manifest the General Assembly's strong desire to ensure "that the impartiality and independent judgment of public officials and officers will be maintained". Article 40A, §1-102(a). The financial disclosure provisions of the Public Ethics Law, in particular, are intended to guard against improper influence. *See* Article 40A, §1-102(c). Unquestionably, it would be inconsistent with that intent to treat a simple administrative correction in nomenclature as substantively effecting a narrowing of the applicability of the financial disclosure requirement.[2]

Nor is there any other reason to believe that the General Assembly intended the provisions of Article 40A, §1-201(aa) to be read with rigid literalness. To the contrary, Article 40A, §1-102(d) explicitly states a legislative intention that the Public Ethics Law generally be liberally construed to accomplish its purpose.

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[2] *Cf.* Bill Review Letter (House Bill 1621) from Stephen H. Sachs, Attorney General, to Harry Hughes, Governor (May 7, 1985) (amendment of salary-setting statute to conform to revision of county's classified salary schedule does not effect substantive change in authorized salary).

III

Conclusion

In summary, it is our opinion that the renumbering of the classification and compensation grade levels in the Standard Salary Schedule will not affect the applicability of the Public Ethics Law's financial disclosure requirement. Hence, in determining whether that requirement applies to a particular person, the State Ethics Commission (and all affected individuals) should read the statutory references to "grade level 18 or above" as referring to the redesignated counterpart of those grades—that is, as referring to new "grade level 16 or above".

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PUBLIC OFFICERS

ALCOHOLIC BEVERAGES—SALARIES—REMOVAL POWER—ART III, §35 BARS IN-TERM PAY INCREASES TO INCUMBENTS WHO SWITCH POSITIONS AT LIQUOR BOARD.

May 24, 1985

The Honorable Harry Hughes
Governor

We have reviewed House Bill 653 for constitutionality and legal sufficiency. We have concluded that, although the bill may be signed into law, (i) one portion of it may not be given immediate effect because of the provisions of Article III, §35 of the Maryland Constitution; and (ii) another provision may not constitutionally be given effect at all.

I

Summary of Bill

Effective July 1, 1985, House Bill 653 would repeal the laws concerning the alcoholic beverages license commissioner and inspector in Frederick County and create a new 3-member Board of License Commissioners in Frederick County. The bill would also recreate two inspector provisions.

Under existing law, the license commissioner and inspector are appointed for four year terms. The present terms expire in 1987. Currently, the commissioner receives $3,600 per year (§155(l)) and the inspector receives $ 14,500 per year (§149(b)). The bill would maintain the same salary for two of the members of the board, but would provide for $5,000 annually for the chairperson, who is to be elected by the board. The annual salary of the two inspectors would be increased to $17,000. Pursuant to Sections 3 and 4 of the bill, the Governor must appoint the incumbent commissioner and inspector to the newly created positions.

II

Application of Article III, §35

The license commissioner and the inspector are both public officers. *See Duncan v. Koustenis*, 260 Md. 98, 105 (1970); *Nesbitt v.*

Fallon, 203 Md. 534 (1954); 61 *Opinions of the Attorney General* 151, 153-54 (1979); 58 *Opinions of the Attorney General* 3, 9 (1973). Therefore, because each of them serve a four year term, they are barred by Article III , §35 from receiving a pay increase during the term.

An issue similar to the one raised by House Bill 653 arose in 1976 when certain members of the Workmen's Compensation Commission resigned from office and were reappointed by the Governor to fill the resulting "vacancies". The then-Attorney General concluded that this arrangement was not prohibited by Article III, §35. 61 *Opinions of the Attorney General* 229 (1976).

However, a lawsuit was filed challenging the pay hikes and, on October 6, 1977, the Circuit Court for Anne Arundel County ruled that Article III, §35 applied to the reappointed members and therefore the officers in question were not entitled to increased compensation. *Jacques v. Mandel*, Equity No. 23, 525. We believe that the *Jacques* decision reached the correct result and now reject the contrary view of the constitutionality of appointment shuffling to avoid the strictures of Article III, §35 articulated in 61 *Opinions of the Attorney General* 229.

Thus, we believe that Article III, §35 prevents the incumbent commissioner (should he be named chairman) and the incumbent inspector from accepting the increased compensation provided for in House Bill 653 until May 1, 1987. To conclude otherwise would only condone possible circumvention of the purpose of Article III, §35—that is, to prevent a public officer from using his office to pressure the General Assembly to grant increased compensation and to preclude the General Assembly from coercing a public officer by offering him increased compensation or threatening a decrease in pay. *See Comptroller v. Klein*, 215 Md. 427, 436 (1958). This prophylactic tenor of Article III, §35 must be given effect even here, where there is no reason for suspecting the General Assembly or the officers in question of inappropriate motives.

Because the bill can be administered in a constitutional fashion—*viz*, by local officials delaying payment of any increase until the time the incumbents' current term will, but for this bill, have expired—there is no impediment under Article III, §35 to signing the bill.

III

Removal Power

In addition, we note that the bill attempts to condition the Governor's power to remove an alcoholic beverage inspector upon the advice and consent of the Senate or, if there is no resident Senator, the members of the Frederick County Delegation of the General Assembly. Article 2B, §149 (D)(4). However, it is long settled that the Governor's removal power may not be so conditioned or delegated. Article III, §15 of the Constitution; 23 *Opinions of the Attorney General* 254 (1938). Accordingly, should the occasion for removal ever arise, this provision of the bill may not constitutionally be given effect. Thus, the power to remove will remain entirely with the Governor.

STEPHEN H. SACHS, *Attorney General*

LINDA H. LAMONE, *Assistant Attorney General*

AVERY AISENSTARK
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Opinions and Advice

Editor's Note: On May 25, 1985, House Bill 653 was signed into law as Chapter 764, Laws of Maryland 1985, effective July 1, 1985. The preceding opinion was originally written as a bill review letter. However, in order to record the overruling of 61 *Opinions of the Attorney General* 229 (1976), the letter is published here in a slightly revised format.

SAVINGS AND LOAN ASSOCIATIONS

STATE REGULATORY AUTHORITY—CONSTITUTIONAL LAW—CONTRACT CLAUSE—DUE PROCESS—DELEGATION OF AUTHORITY—TITLING OF BOND BILL—PLEDGE OF STATE CREDIT—EMERGENCY LEGISLATION AFFECTING SAVINGS AND LOAN ASSOCIATIONS IS CONSTITUTIONAL AND AUTHORIZES ADMINISTRATIVE ACTIONS TAKEN BY STATE OFFICIALS.

October 15, 1985

The Honorable Thomas P. O'Reilly
Senate of Maryland

You have requested our opinion on a series of questions pertaining to the constitutionality and interpretation of three emergency acts affecting savings and loan associations that were enacted at the May, 1985 Special Session of the General Assembly. Those acts are Chapter 4, Laws of Maryland 1985 (First Special Session), which authorizes the creation of up to $100 million in State debt, the proceeds of which may be used in whole or in part for the purchase of the "net worth certificates" of savings and loan associations seeking to qualify for federal insurance; Chapter 5, Laws of Maryland 1985 (First Special Session), which specifies the terms and conditions for the issuance of net worth certificates; and Chapter 6, Laws of Maryland 1985 (First Special Session), which repeals the statute establishing the Maryland Savings-Share Insurance Corporation ("MSSIC") and provides for the creation of a successor State corporation, the State of Maryland Deposit Insurance Fund Corporation (the "Fund"), to insure certain accounts in savings and loan associations.

In connection with these acts, you have asked a number of specific questions. With regard to the provisions relating to savings and loan associations' net worth certificates, you ask:

1. Does the Board of Public Works have exclusive authority to set the terms and conditions for the issuance of net worth certificates?
2. Does the Board's authority with respect to net worth certificates conflict with that of the Fund Director?
3. Does Chapter 5, Laws of Maryland 1985 (First Special Session), which authorizes a savings and loan association to issue

net worth certificates "[n]otwithstanding . . . any provision . . . of [its] charter or bylaws", thereby unconstitutionally impair the obligation of contracts existing between the savings and loan association and its stockholders or depositors?

4. Would procedural or substantive due process be denied or a contractual obligation unconstitutionally impaired if the Secretary of Licensing and Regulation exercised the managerial powers over savings and loan associations provided in new §9-224(a)(7) of the Financial Institutions Article ("FI" Article)?

5. Does FI §9-224(a)(7) unconstitutionally delegate legislative power, particularly with respect to the Secretary's authority to suspend the exercise of his powers under that provision?

Additionally, you ask the following questions regarding various other enactments:

6. Did the repeal of the statute creating MSSIC and the replacement of that body by the Fund unconstitutionally impair the obligation of a contract?

7. Is the Fund unlawfully denying immediate access by savings and loan associations to all or a portion of their capital contributions to MSSIC?

8. Does the title of Chapter 4, Laws of Maryland 1985 (First Special Session) violate Article III, §29 of the Maryland Constitution because it does not expressly state that a property tax is to be levied to pay for the bonds in question?

9. Does FI §10-116, which expresses State policy that monies will be appropriated to the extent necessary to protect depositors insured by the Fund, impermissibly pledge the credit of the State in violation of Article III, §34 of the Maryland Constitution? If the credit of the State has not been pledged, what is the nature of the funding commitment for the insurance of depositor accounts in savings and loan associations?

For the reasons given below, it is our opinion that (i) the various enactments in the May, 1985 Special Session fully conform to the requirements of the State and federal constitutions and (ii) the administrative actions taken pursuant to those enactments have been fully authorized. Therefore, we believe that the legislation has none of the potential legal defects about which you inquired.

Specifically, we conclude that:

1. The Board of Public Works does not have exclusive authority

to set the terms and conditions for the issuance of net worth certificates.

2. The authority of the Board of Public Works does not conflict with that of the Fund Director.
3. The authority for the issuance of net worth certificates does not unconstitutionally impair the obligation of contracts.
4. The exercise of the authority granted the Secretary of Licensing and Regulation in FI §9-224(a)(7) would not be unconstitutional.
5. The grant of authority to the Secretary in FI §9-224(a)(7) does not unconstitutionally delegate legislative power.
6. The repeal of the statute creating MSSIC and the replacement of that body by the Fund do not unconstitutionally impair the obligation of any contract.
7. The Fund may lawfully decline to return, at this time, a portion of savings and loan associations' contributions to MSSIC.
8. The title of Chapter 4, Laws of Maryland 1985 (First Special Session) does not violate Article III, §29 of the Maryland Constitution.
9. The policy stated in FI §10-116 does not impermissibly pledge the credit of the State in violation of Article III, §34 of the Maryland Constitution. FI §10-116 is an affirmative expression of the General Assembly's intention to protect depositors insured by the Fund, similar to the commitment made by the United States Congress with regard to federally insured accounts.

I

Historical Background

In 1961, following a series of scandals involving Maryland savings and loan associations, the General Assembly enacted a comprehensive scheme of regulation of such associations. Chapter 205, Laws of Maryland 1961.[1] In doing so, the General Assembly declared that

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[1]The 1961 legislation forced savings and loan associations to alter their charters, bylaws, and existing contracts to comply with certain features of the new regulatory scheme. Chapter 205, Laws of Maryland 1961 (enacting former Aricle 23, §161D).

the savings and loan business "is affected with a public interest and shall be supervised as a business affecting the economic security and general welfare of the people of this State". Former Article 23, §161A(a). *See also* FI §8-102.

The next year, the General Assembly established the Maryland Savings-Share Insurance Corporation as a nonprofit, nonstock corporation with "perpetual" existence. Chapter 131, Laws of Maryland 1962.[2] "The primary purpose of the corporation [was] to insure the free-share accounts of member savings and loan associations, but it also serve[d] to promote the elasticity and flexibility of the resources of member associations and to aid the liquidity of member associations by providing a central reserve fund". *Maryland Savings-Share Ins. Corp. v. United States*, 308 F.Supp. 761, 763 (D. Md. 1970), *rev'd on other grounds* 400 U.S. 4 (1970). *See also* former FI §10-103 (enacted by Chapter 33, Laws of Maryland 1980).[3]

The membership of MSSIC consisted of savings and loan associations judged qualified by the Director of the Division of Savings and Loan Associations and admitted to membership by the Board of Directors of MSSIC. Former FI §§10-106 and 10-107. Each member was obliged "to make the investments and pay the assessments, premiums, and other charges that are required for participation in" MSSIC. Former FI §10-107(c). Although former FI §10-113(a) provided that "[t]he net earnings of [MSSIC] shall be accumulated and may not be returned to its members", the statute was silent on whether member savings and loan associations could recover other funds, such as their contribution of two percent of their free-share accounts.[4] However, that subject was treated in a MSSIC bylaw.[5]

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[2]Under Article III, §48 of the Maryland Constitution, MSSIC could have been created by special law only if the corporation were created for a "municipal"—that is, public—purpose or if no general law provided for the creation of such a corporation. *See Moberly v. Herboldsheimer*, 276 Md. 211 (1975).

[3]Former FI §10-105(a) provided that "[t]he Corporation shall establish a central insurance fund and through the fund shall insure the savings accounts of members". However, former FI §10-116 stated that MSSIC "may not pledge the faith or credit of this State". *See* Chapter 33, Laws of Maryland 1980.

[4]In *Maryland Savings-Share Ins. Corp. v. United States*, the court noted that "since no provision is made for distribution of accumulated income [of MSSIC], any such accumulated income would presumably escheat to the state upon the dissolution of MSSIC. [Citation omitted.] It is only in that sense that MSSIC can be said to be financially related to the state." 308 F.Supp. at 764.

[5]Former FI §10-111 authorized the MSSIC Board to adopt bylaws. However, it also required that any bylaw be first submitted to and approved by the Director of the Savings and Loan Division, who could disapprove it if he had "reason to believe that: (i) It is contrary to the principles and purpose of this title; or (ii) It does not serve the best interests of the public."

The MSSIC bylaws established two funds: a Capital Deposit Fund (the "insurance fund"), designed to insure the savings accounts of members pursuant to former FI §10-105, and a Central Reserve Fund (the "liquidity fund") intended to provide for the liquidity of member associations in accordance with former FI §10-103(2). The bylaws pertaining to the insurance fund required each member to contribute to the fund a sum equal to two percent of its free-share accounts; in return, each received a certificate of deposit from MSSIC. Bylaws §§3-301 and 3-306. Section 3-503 of MISSIC's bylaws provided in part that "[a]ny member withdrawing from the Corporation . . . shall be entitled to receive from the Corporation payment of the certificate of deposit issued by the Corporation and owned by such member less any debts or obligations owed by such member to the Corporation".

The bylaws pertaining to the liquidity fund required the members of MSSIC to purchase capital notes in accordance with a stated formula. Bylaws §3-901(B)(1). In the event that a savings and loan association terminated its membership in the liquidity fund (by withdrawal or expulsion from MSSIC), those bylaws also provided that "the capital notes shall be surrendered and cancelled and payment shall be made of the investment in said notes plus accrued interest, if any, less any advances, loans or other indebtedness of the member, and the collateral, if any, shall be returned". Bylaws §3-901(B)(6).

Earlier this year, public concern led to massive withdrawals of funds from certain MSSIC-insured savings and loan associations and the "erosion of public confidence in all such institutions". Chapter 11, Laws of Maryland 1985 (First Special Session), Preamble. In response, the General Assembly, meeting in special session, enacted 12 pieces of legislation to alleviate the crisis. The keystones of this legislative package are Chapter 6, which merges MSSIC into a new State corporation, the Fund, and limits the availability of its insurance to savings and loan associations that meet stated qualifications within certain deadlines; Chapter 5, which authorizes savings and loan associations to issue "net worth certificates"; and Chapter 4, which authorizes State purchase of those certificates to assist the associations in meeting the requirements for qualification for federal insurance.

Those three enactments contain the particular provisions that you have asked about. Part II below discusses your questions concerning the issuance and purchase of net worth certificates. Part III below addresses your other questions.

II

Validity of Provisions Relating to Net Worth Certificates

A. *Authority of Board of Public Works and Fund Director*

Chapter 4, Laws of Maryland 1985 (First Special Session), authorizes the Board of Public Works to issue $100 million in State bonds and creates the Savings and Loan Association Capital Stabilization Fund. In anticipation of that bond issue, the Board may further authorize the issuance to any savings and loan association of obligations payable from monies credited to the Fund, "upon such terms and conditions and for such consideration as the Board in its discretion determines may reasonably be expected to effect the purposes of this Act". Chapter 4, §1(5). This provision, as you have noted, might be read as giving the Board exclusive authority to set the "terms and conditions" for the issuance of savings and loan associations' net worth certificates. However, in our view, it does not have that effect.

Chapter 4, §1(5) also provides in part as follows:

> "Monies in the Fund may be applied *in the discretion of the Governor* to purchase net worth certificates of any Maryland chartered savings and loan association if, *in the opinion of the Secretary of Licensing and Regulation*, by so doing the savings and loan association will qualify for insurance of its deposits and accounts by the Federal Savings and Loan Insurance Corporation."

In addition, FI §9-224(a)(1), as enacted by Chapter 5, requires the prior approval of the Secretary of Licensing and Regulation and the Fund Director before any savings and loan associations may issue a net worth certificate. Moreover, FI §9-224(a)(1) goes on to provide that net worth certificates may be issued only "in such amounts and upon such terms and conditions as approved solely by the Fund Director".[6] Thus, we think it clear that neither the Board of Public Works nor the Fund Director has exclusive authority with regard to the issuance of net worth certificates.

The powers conferred on the Board and the Director by the enact-

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[6]*See also* FI §10-110(a)(2)(ii), as enacted by Chapter 6. We do not believe that the General Assembly, by its use of the word "solely" in FI §9-224(a)(1), intended to oust every other governmental entity from a role in the issuance and approval of net worth certificates. Rather, the word "solely" was intended to distinguish the respective roles of the Secretary of Licensing and Regulation and the Fund Director in that process.

ment of Chapters 4 and 5 should be construed as consistent with each other, if at all possible, in order to give full effect to each. *Management Personnel Service v. Sandefur*, 300 Md. 332, 341 (1984). That harmonization is particularly important in light of the fact that both bills were enacted at the same session. *See Mayor and City Council of Baltimore v. German-American Fire Ins. Co.*, 132 Md. 380, 385 (1918) (statutes enacted at same session must be construed together if at all possible, to avoid repeal by implication). *See also Graham v. Goodcell*, 282 U.S. 409, 425 (1931) (presumption against repeal by implication is strongest when acts are passed not only at same session but on same day). In our view, the provisions enacted by Chapters 4 and 5 may readily be construed as consistent with one another: The Board's authority under Chapter 4 relates to the formal requirements for issuance of the bonds or other obligations that may be used to purchase savings and loan associations' net worth certificates, while the Fund Director's authority under Chapter 5 relates to the requirements for savings and loan associations' issuance of their certificates.

Indeed, even if there were an overlap in regulatory authority, that overlap need not give rise to any conflict, inasmuch as such a theoretical problem could in practice be diminished—if not eliminated—by cooperation among the affected agencies. We note that, at present, there is certainly no actual conflict of authority, for none of the agencies or officials charged with responsibilities related to the issuance or purchase of net worth certificates have adopted contradictory requirements.

Accordingly, it is our opinion that the Board of Public Works does not have exclusive authority to set the terms and conditions for savings and loan associations' net worth certificates. Moreover, there is no conflict between the statutory provisions establishing the respective responsibilities of the Board and the Fund Director.

We also note that on June 13, 1985, Governor Hughes issued an executive order establishing a policy on the issuance of net worth certificates, including the terms and conditions of the certificates. Executive Order 01.01.1985.13. In our view, that action was fully authorized by the General Assembly. Under §15B-3(b)(6) of Article 41, as enacted by Chapter 1, Laws of Maryland 1985 (First Special Session), the Governor may exercise any of the powers of the Fund Director.[7]

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[7]Similarly, Article 41, §221(b) provides in relevant part that the Secretary of Licensing and Regulation "shall be directly responsible to the Governor" and "shall be responsible for carrying out the Governor's policies in the areas of licensing and regulation". Thus, at least by implication, the Governor may also exercise the powers of the Secretary.

For the reasons discussed in connection with the Fund Director, we do not regard either the existence of such authority or its exercise as being in conflict with the powers conferred on the Board of Public Works.[8]

B. *Impairment of Contracts Between Associations and Stockholders*

FI §9-224(a)(1), as enacted by Chapter 5, provides that "[n]otwithstanding . . . any provision of the charter or bylaws of any savings and loan association[,] a savings and loan association is authorized to issue . . . net worth certificates". You have asked whether that provision impairs the obligations of contracts in violation of the Contract Clause of Article I, §10 of the United States Constitution.[9] In our view, it does not.

The charter of a private corporation is frequently described as a contract of a threefold nature: (1) a contract between the State and the incorporators; (2) a contract between the corporation and its stockholders; and (3) a contract of the stockholders with each other. 18 Am.Jur.2d *Corporations*, §76 (1985). A bylaw of a private corporation is a self-imposed rule sometimes said to result "from an agreement or contract between the corporation and its members to conduct the corporate business in a particular way." 18 Am.Jur.2d *Corporations*, §161. Nonetheless, a corporation's charter and bylaws are not immune from legislative change—indeed, Article III, §48 of the Maryland Constitution expressly provides that corporate charters "may be altered, from time to time, or be repealed" by the General Assembly. *See also State v. Good Samaritan Hospital*, 299 Md. 310, 321-22 (1984), *appeal dismissed for want of a substantial federal question* 469 U.S. 802 (1984). *Cf.* §1-102(e) of the Corporations and Associations Article (corporate charters are "subject to repeal or modification by public general law of the General Assembly").

Moreover, in our opinion, the authorization in FI §9-224(a)(1) for

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[8]On August 2, 1985, the Board approved the format of the net worth certificates. *See* Item 1, Secretary's Agenda (August 2, 1985). However, this action in no way contradicts either the purpose or terms of the Governor's June 13 Executive Order. Moreover, the Board is not *obligated* to set any additional "terms or conditions" and could defer in this regard to the Fund Director.

[9]The Contract Clause provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts".

savings and loan associations to issue net worth certificates to the Fund does not, in reality, impair the obligation of any contract between such an institution and its shareholders. A savings and loan association is not *required* to issue such obligations, but merely *authorized* to do so. *Cf.* §2-103(7) of the Corporations and Associations Article (authorizing private corporations to "[i]ssue bonds, notes, and other obligations and secure them by mortgage or deed of trust of any or all of its assets").

Further, the historically heavy regulation of savings and loan associations militates strongly against the conclusion that any unconstitutional impairment of contracts arises from the provisions enacted by Chapter 5. *See Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 413 (1983) (changes in state law are not easily held to constitute substantial impairment when parties to contract "are operating in a heavily regulated industry"). In view of that history, savings and loan associations and their shareholders could have no reasonable expectation that their charters and bylaws would not be affected by regulatory statutes like Chapter 5. *See National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway*, 470 U.S. 451, 468-69 (1985) (pervasive prior regulation of railroads indicates Congress did not contractually bind itself to cease regulation).[10]

Even if FI §9-224(a) could be said to severely impair the obligation of contracts between a savings and loan association and its shareholders or members, that does not end the inquiry into the provision's constitutionality. Such an impairment is permissible if it serves "a significant and legitimate public purpose . . . such as the remedying of a broad and general social problem". *Energy Reserves Group*, 459 U.S. at 411-12. The purpose of the First Special Session's enactments is to "restore public confidence in, and the fiscal integrity and financial stability of, the thrift industry throughout Maryland". Chapter 4, Laws of Maryland 1985 (First Special Session), Preamble. Clearly, that significant and legitimate public purpose would be reasonably and necessarily served by authorizing savings and loan associations to issue net worth certificates to the State in return for financial assistance. *See United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 22-23 (1977) (in determining appropriateness of measure impairing private contracts, courts defer to legislative judgment as to measure's necessity and reasonable-

[10]*See also* note 1 above.

ness). Thus, we see no violation of the Contract Clause in the enactment of FI §9-224(a)(1).

C. *Management Powers of Secretary of Licensing and Regulation*

FI §9-224(a)(7), as enacted by Chapter 5, confers upon the Secretary of Licensing and Regulation a broad array of potential powers with respect to the management and operation of savings and loan associations that issue net worth certificates. In particular, that provision authorizes the Secretary to transfer all or substantially all the assets of such a savings and loan association and to consolidate or merge such an association with any other association or corporation.[11] You have asked whether the exercise of those powers would violate State and federal constitutional guarantees of due process or would unconstitutionally impair the obligations of contracts. In our opinion, it would not.

FI §9-224(a)(7) neither requires the Secretary to exercise those powers nor obligates all savings and loan associations to accept the possibility of such control. Only those institutions that choose to issue net worth certificates in return for State financial assistance would face such a possibility.

Even constitutional rights such as due process are subject to contractual waiver. *See Fuentes v. Shevin*, 407 U.S. 67, 95 (1972); *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 186-87 (1972). The knowing acceptance of State financial assistance, through an association's issuance of net worth certificates pursuant to the terms of

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[11] FI §9-224(a)(7) provides in full as follows:

> "During any period in which a savings and loan association has any net worth certificate outstanding, the Secretary of Licensing and Regulation may:
>
> (i) Increase the number of directors of the savings and loan association by any number and appoint directors to fill any newly created directorship;
>
> (ii) Fix the compensation of and remove, without cause, any and all directors, officers, or employees of the savings and loan association and appoint successors to fill any vacancy that exists; and
>
> (iii) Subject to prior approval by the Governor and without obtaining the recommendation of the Board of Directors or the approval of the stockholders or members of the association, sell, transfer, or assign all or substantially all of the assets of the association or merge or consolidate the association with or into any other association or corporation on such terms as the Secretary directs[.]"

FI §9-224, would be precisely such waiver of whatever property rights in the control of the institution would otherwise exist. *Cf. Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981) ("[L]egislation enacted pursuant to the [federal] spending power is much in the nature of a contract: in return for federal funds, the states agree to comply with federally imposed conditions."); *FSLIC v. Edison Savings & Loan Ass'n*, 83 F.Supp. 1007, 1009 (S.D. N.Y. 1949), *aff'd* 177 F.2d 638 (2d Cir. 1949) (savings and loan association, having voluntarily joined federal insurance system, had agreed to statutory conditions of membership).[12] Thus, it would not be constitutionally impermissible for the Secretary to merge or sell a savings and loan association that receives State assistance without affording the institution notice or a prior opportunity to be heard.

Nor, in our view, would any substantive due process right be violated by FI §9-224. The purpose of the provisions enacted by Chapter 5, like that of all the legislation enacted during the First Special Session, is to alleviate an already serious financial crisis that threatened to deteriorate further and thus to ensure the fiscal integrity and financial stability of the thrift industry as a whole. *See* Chapter 4, Preamble. The General Assembly's grant to the Secretary of substantial powers to manage and control institutions that avail themselves of State financial assistance clearly is rationally related to that end. *See Governor v. Exxon Corp.*, 279 Md. 410, 428 (1977), *aff'd* 437 U.S. 117 (1978) ("Especially when reviewing legislation dealing with a serious problem in a new and untried fashion, the courts are under a special duty to respect the legislative judgment as to the proper means of solving the problem.").

In addition, assuming an institution's management rights amount to a contract, nonetheless, no unconstitutional impairment of that contract would result from the Secretary's exercise of management power under FI §9-224(a)(7). The State's prior financial assistance would be just compensation for those rights. *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 19, n. 16 (1977) ("Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid.").

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[12] Nearly 40 years ago, the Supreme Court rejected a procedural due process attack on the consolidation, merger, and liquidation powers of the Federal Home Loan Bank Board, noting that in this area it is "an almost invariable custom to apply supervisory authority in [a] summary manner". *Fahey v. Mallonee*, 332 U.S. 245, 253 (1947).

D. *Delegation of Legislative Power*

The Governor's June 13, 1985, executive order establishing State policy on the issuance of net worth certificates provides, in part, as follows:

> "If an association can demonstrate that certain assurances by the State would remove an obstacle to raising private capital, the Secretary of Licensing and Regulation will consider making a written agreement concerning his authority under newly enacted Section 9-224(a) of the Financial Institutions Article. This could include a moratorium for a period of years on his exercise of his authority under that subsection unless the association, in his judgment:
>
> (1) became impaired or insolvent
>
> (2) violated any law or regulation
>
> (3) concealed assets or records
>
> (4) conducted an unsafe or unsound operation
>
> (5) endangered the State's investment." Executive Order 01.01.1985.13, Attachment A at 3, ¶5.

In our view, implementation of such a moratorium would be consistent with the authority of State officials under the newly enacted legislation. Under FI §9-224(a)(7), the Secretary is authorized, but not required, to exercise extraordinary power of management control over a State-aided savings and loan association. The power to condition the exercise of that authority may also be found in FI §9-224(a)(1), which requires the prior approval of the Secretary for the issuance of net worth certificates and empowers the Fund Director to set "terms and conditions" for their issuance.

However, you have questioned whether this far-reaching discretion amounts to an invalid delegation of legislative power without sufficient guidelines for its exercise. In our opinion, it does not.

In various areas of governmental power, the courts have not required the legislature to set forth specific guidelines for executive action. For example, in *Pressman v. Barnes*, 209 Md. 544, 555 (1956), the Court of Appeals stated:

> "[W]here the discretion to be exercised relates to police regulations for the protection of public morals, health, safety, or general welfare, and it is impracticable to fix standards without destroying the flexibility necessary to enable the

> administrative officials to carry out the legislative will, legislation delegating such discretion without such restrictions may be valid."

In *Governor v. Exxon Corp.*, 279 Md. 410 (1977), *aff'd* 437 U.S. 117 (1978), the Court of Appeals extended that principle to complex economic legislation. Noting that "the complexity of modern economic conditions may make it impossible to tailor specific guidelines for every conceivable situation", the Court of Appeals concluded that "latitude in granting discretion is necessary". 279 Md. at 440. Accordingly, it upheld a broad grant of discretionary authority to the Comptroller to allow exemptions under the gasoline divestiture law.

Similarly, the Supreme Court long ago rejected the contention that Federal Home Loan Bank Board regulations governing savings and loan associations reflect an invalid delegation of power. In *Fahey v. Mallonee*, 332 U.S. 245, 250 (1947), the Court noted that the federal regulations dealt "with the problems of insecurity and mismanagement which are as old as banking enterprise" and added:

> "The remedies which are authorized are not new ones unknown to existing law to be invented by the Board in exercise of a lawless range of power. Banking is one of the longest regulated and most closely supervised of public callings. It is one in which accumulated experience of supervisors, acting for many states under various statutes, has established well-defined practices for the appointment of conservators, receivers and liquidators. Corporate management is a field, too, in which courts have experience and many precedents have crystallized into well-known and generally acceptable standards." *Id.*

In light of these cases, it is our opinion that the provisions enacted by Chapter 5 do not amount to an invalid delegation of legislative power.

III

Validity of Other Enactments

A. *Statutory Merger of MSSIC into the Fund*

The Contract Clause of the United States Constitution has never been held to be an obstacle to the exercise of a state's authority to change the structure of the government itself or of a public entity.

Shapleigh v. San Angelo, 167 U.S. 646, 654 (1897); *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819); *Fidelity Union Trust Co. v. N. J. Highway Authority*, 426 A.2d 488, 500 (N.J. 1981), *appeal dismissed for want of a substantial federal question*, 454 U.S. 804 (1981). In addition, when the General Assembly assigns a "public" task to a private corporation, the corporation "acquire[s] no vested inviolable right to that political power", immune from removal by subsequent legislation. *University of Maryland v. Williams*, 9 G. & J. 365, 391 (1838).

MSSIC was not a corporation chartered under the State's general corporation law. It had no "incorporators" who could challenge the termination of its corporate existence as being an impairment of their contract with the State. *See Board of Regents, University of Maryland v. Trustees of Endowment Fund*, 206 Md. 559, 567-68 (1955) (because corporation's charter is contract between State and incorporators, State may not exercise its reserved power to amend charter in way that would impair that contract by defeating purpose for which corporation was formed). Rather, it was specially chartered with an obvious public purpose—primarily, to insure accounts in savings and loan associations. Certainly, the replacement of MSSIC by the Fund does not in any way operate to defeat that purpose. *Cf.* 206 Md. at 574 (transfer of management and control of University of Maryland Endowment Fund to Board of Regents defeated purpose of limiting Regents' control, for which Trustees had been formed). Indeed, the accomplishment of that purpose is enhanced.

Moreover, the General Assembly repeatedly served notice on all involved with the thrift industry of the regulatory environment in which they must operate:

> "It is the policy of the State that . . . [t]he savings and loan business . . . is so important as a method of promoting home ownership and thrift that *it is in the public interest that*:
>
> (i) Savings and loan associations be supervised as a business affecting the economic security and general welfare of the people of this State; and
>
> (ii) *The* business and *financial stability of savings and loan associations be* promoted and *assured*[.]" FI §8-102.

See also former Article 23, §161A(a).

Thus, in our opinion, the Contract Clause imposes no bar to the General Assembly's terminating MSSIC's existence and replacing it with a State corporation to the end of more effectively carrying out the public purpose for which MSSIC was originally created.[13]

B. *Denial of Access to MSSIC Insurance Fund Contributions*

Provisions enacted by Chapter 6 expressly give the Fund control over distribution of member savings and loan associations' contributions to MSSIC's insurance fund. FI §10-112(b) provides:

> "*Subject to terms and conditions adopted by the Fund Director* and approved by the Board, a member association may withdraw at any time from the Fund and have returned all *or part of* any capital advanced to Maryland Savings-Share Insurance Corporation and all *or part of* any capital deposit required for membership in the Fund."

In addition, FI §10-113(b)(1) provides that, "[s]ubject to the approval of the Board, the Fund Director *may* adopt rules and regulations for the *payment of nonrefundable premiums instead of or in addition to capital deposits* required for membership in the Fund".

You have asked whether the Fund is authorized to deny a savings and loan association access to its contributions to MSSIC.[14] In our view, the Fund Director's discretion to return "all or part of" those funds "[s]ubject to [the Fund Director's] terms and conditions" plainly authorizes a discretionary decision to decline to return a part of those funds.

At present, the Fund Director has not permitted former MSSIC members to gain any form of access to contributions made to the insurance fund.[15] The obvious rationale for the refusal to grant immediate access to the insurance fund contributions is that those funds may be needed to reimburse depositors for losses at some

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[13]This conclusion does not turn on whether MSSIC is best characterized as a public corporation, a quasi-public entity, or a private corporation serving a public purpose. *See A. S. Abell Pub. Co. v. Mezzanote*, 297 Md. 26 (1983); *Moberly v. Herboldsheimer*, 276 Md. 211 (1975). *See also* note 2 above. Hence, we need not and do not decide that issue.

[14]*See* text accompanying notes 4 and 5 in Part I above.

[15]Former MSSIC members have been permitted to credit their investments in the liquidity fund against net worth, albeit not to withdraw their investments at present. They have also received payment of interest on their liquidity fund investments.

Maryland savings and loan associations.[16] You have asked whether that action, and the statute authorizing it, impermissibly impair the obligation of a contract.

The first inquiry is whether savings and loan associations have a contractual right to the return of their contributions upon MSSIC's dissolution. The former law neither directed the entry of a written contract on behalf of the State with respect to associations' contributions nor itself used the language of a contract. Therefore, it is doubtful that the statute itself could be considered a contract requiring return of an association's contributions. *See National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway*, 470 U.S. at 466-67 (1985) (absent provision for execution of contract or creation of contract by statute's terms, court will not construe statute as creating contract).

In addition, the former law was silent as to the right of a member association to the return of its capital contribution to the MSSIC insurance fund. *See* former FI §10-105(a). Thus, even if the former law were a contract, there would be no contract right to the return of the capital contribution, because statutory contracts are construed "most favorably to the State", and, if such a contract "is silent about a power, the power does not exist". *Rogan v. Baltimore & Ohio Railroad*, 188 Md. 44, 55 (1947).

On the other hand, MSSIC bylaws would have given individual members a right to return of their capital deposits upon the member's withdrawal or expulsion from MSSIC. Those bylaws, however, assuredly never contemplated a mass exodus of institutions from MSSIC as a result of a financial crisis and emergency State legislation enacted to meet that crisis. In general, a contract is held to be discharged if its enforcement would completely frustrate its purpose, as a result of a change in circumstances wholly outside the contemplation of the contracting parties. *Montauk Corp. v. Seeds*, 215 Md. 491, 499-500 (1958). Accordingly, if MSSIC's members had a contract right to return of their capital deposits, that right would not now be enforceable.

In any event, we do not view the bylaws as having created a contractual right to return of capital deposits that is protected by Article I, §10 of the U.S. Constitution. MSSIC's bylaws were subject to amendment by its board of directors, with the approval of a

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[16]It is our understanding that the Fund Director's position is that, upon payment of depositors' losses, any monies remaining in the insurance fund will be returned to the member associations.

State official, at any time. Hence, MSSIC could have rescinded its members' right to return of their capital deposits whenever that action became appropriate. *See* former FI §10-111(b) (Director of Division of Savings and Loan Associations authorized to disapprove proposed bylaw only if Director had reason to believe it was inconsistent with principles and purposes of MSSIC statute or did not serve public's best interests). Under those circumstances, MSSIC's member associations had no absolute contractual right to the return of their capital deposits. *See Acme Markets, Inc. v. Dawson Enterprises, Inc.* 253 Md. 76, 86-87 (1969) (contract may validly grant one party exclusive right of cancellation, and exercise of that right violates no contract rights of other party). And, under §4 of Chapter 6, the Fund acquired not only all of MSSIC's assets and liabilities, but also all of its "*rights*, *powers*, duties, obligations, and *functions*". Thus, the Fund has not only the same statutory authority as MSSIC had, but also the same right that MSSIC had to determine whether to continue to permit withdrawal of MSSIC member associations' capital deposits.

Nevertheless, even if the MSSIC bylaws regarding insurance fund contributions were a contract that has been impaired by State action, in our view, the impairment is constitutional. The constitutional prohibition against impairment of contractual obligations is not absolute: Even severe impairments are justified, if they are reasonable and necessary to serve an important public purpose. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1984). *See* Part II B above.

In our opinion, that is the case here. Member associations' deposits in MSSIC's insurance fund were intended by law to insure individual savings accounts. The action of the General Assembly and the Fund Director in preserving the use of those funds to pay for the possible losses of depositors not only serves an important public purpose, but, in our view, comports fully with the original intent of the statute creating MSSIC. *See Maryland Savings-Share Ins. Corp. v. United States*, 308 F.Supp. at 763 (primary purpose of MSSIC was to insure free-share accounts of member associations). For these reasons, we do not believe that the denial to savings and loan associations of immediate access to their MSSIC capital deposits unconstitutionally impairs a contractual obligation.[17]

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[17]The Fund Director's decision not to return MSSIC contributions at this time does not deprive a savings and loan association of property without due process. Legislative acts "adjusting the burden and benefits of economic life" are subject to an even more lenient constitutional analysis under the Due Process Clause than

(continued on p. 197)

C. *Sufficiency of Title of Chapter 4*

The title of Chapter 4 is as follows:

"AN ACT concerning

Creation of a State Debt—Savings and Loan Association Capital Stabilization and Insurance Loan

FOR the purpose of authorizing the creation of a State Debt in the amount of $100,000,000, the proceeds to be used for the purpose of providing monies for the Savings and Loan Association Capital Stabilization Fund created under this Act and the Maryland Deposit Insurance Fund; providing for the creation of the Savings and Loan Association Capital Stabilization Fund, the composition of the Fund, and the management, supervision, and application of the Fund; authorizing the issuance to savings and loan associations of obligations payable from the Fund; authorizing the State to issue and sell bond anticipation notes under certain terms and conditions; providing for the expenditure of the bond anticipation note proceeds; providing for certain reporting by the Secretary of Licensing and Regulation to the Joint Budget and Audit Committee of the General Assembly; providing that this Act is an emergency measure; and providing generally for the issue and sale of bonds evidencing the loan, the creation and use of a certain fund and the issuance of bond anticipation notes by the State."

No express reference is made to the levy of a tax to pay for the bonds in question. You have asked whether the title therefore vi-

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under the Contract Clause. *Pension Benefit Guaranty Corp. v. R. A. Gray Co.*, 467 U.S. 717, 733 (1984); *Maryland State Teachers Ass'n v. Hughes*, 594 F. Supp. 1353, 1372 (D. Md. 1984). And the courts have accorded little protection under the Due Process Clause to savings and loan associations' payments for insurance coverage. *See FSLIC v. Edison Savings & Loan Ass'n*, 83 F.Supp. 1007 (S.D. N.Y 1949), *aff'd* 177 F.2d 638 (2d Cir. 1949); *FSLIC v. Grand Forks Building & Loan Ass'n*, 85 F.Supp. 248 (D. N.D. 1949) (rejecting due process attacks on FSLIC requirement that a savings and loan association pay insurance premiums three years *after* the termination of insurance coverage, noting that the policy preserved the stability of the insurance reserve fund.). *Cf. Allied American Mutual Fire Ins. Co. v. Commissioner*, 219 Md. 607, 616-17 (1959) (rejecting due process challenge to Unsatisfied Claim and Judgment Fund Law's requirements that insurers contribute money and services).

olates Article III, §29 of the Maryland Constitution, which provides that "every Law enacted by the General Assembly shall embrace but one subject, and that shall be described in its title". In our view, the title need not contain an express reference to the tax to be constitutionally sufficient.

Article III, §29 does not require the title of a bill to be an abstract of its contents; and the title need not describe the instrumentalities, means, and procedures by which the subject is to be carried into effect. *Ridgeley v. Mayor of Baltimore*, 119 Md. 567 (1913).

The subject of Chapter 4 is the "creation of State debt". That objective may be carried out only by the imposition of a tax and the appropriation of funds. Article III, §34 of the Maryland Constitution. Indeed, State bond bills commonly do not contain an express title reference to the levy of a tax. *See, e.g.*, Chapter 467, Laws of Maryland 1985 ("Creation of a State Debt—The Education Center of Sheppard Pratt, Inc."); Chapter 475, Laws of Maryland 1985 ("Creation of State Debt—Prince George's Equestrian Center"); and Chapter 506, Laws of Maryland 1985 ("Creation of State Debt—Capital Institute of Technology"). Moreover, the statutorily prescribed format for State bond bills, in §8-117(c) of the State Finance and Procurement Article, does not require a reference to the levy of a tax in the bill's title.

This well-established titling practice finds clear support in case law. In *Bickel v. Nice*, 173 Md. 1 (1937), the Court of Appeals rejected a constitutional attack on the title of a bond bill for the building of a new State office building, even though the title did not expressly mention the levy of a tax.

For these reasons, we conclude that the title of Chapter 4 does not violate Article III, §29 of the Maryland Constitution.

D. *Pledge of State's Credit*

FI §10-116, enacted by Chapter 6, states that "[i]t is the policy of this State that funds will be appropriated to the Fund to the extent necessary to protect holders of savings accounts in member associations". You have asked whether FI §10-116 pledges the credit of the State to savings and loan associations' depositors in violation of Article III, §34 of the Maryland Constitution. If it does not, you then inquire as to the nature of the commitment made by FI §10-116.

In our opinion, the State's credit has not been impermissibly pledged. At the same time, depositors may rely on FI §10-116's affirmative expression of the State's intention to protect them.

Article III, §34 of the Maryland Constitution provides in pertinent part that "the credit of the State shall not in any manner be given, or loaned to, or in aid of any individual[,] association or corporation".[18] However, the Court of Appeals has carefully distinguished between pledges of the State's credit to individuals or businesses and grants of State funds to individuals or businesses—even if the funds are to be raised by State borrowing. Thus, in *Johns Hopkins University v. Williams*, 199 Md. 382, 401 (1952), the Court held that, in issuing bonds to raise funds for the University, the State was "not giving or loaning its credit to, or in aid of, the University—it [was] using its credit with banking institutions to borrow the money, and it [was] giving the University its cash". In a later case, the Court of Appeals explained:

> "In reaching this result, Maryland adopted the rule that the prohibition against the loan or pledge of a state's credit is directed against the guaranty by a state of the debt of another and is not a limitation on the creation of an indebtedness for which a state is primarily liable." *Development Credit Corporation v. McKean*, 248 Md. 572, 576-77 (1968).

Hence, Article III, §34 of the Maryland Constitution does not prohibit the State from making grants or loans to private entities from the proceeds of the State's own borrowing, if the purpose of such a grant or loan is public or semipublic. *Maryland Industrial Development Financing Authority v. Helfrich*, 250 Md. 602, 614-15 (1968); *McKean*, 248 Md. at 576. In *Helfrich*, the Court of Appeals held unconstitutional a statute explicitly pledging the State's faith and credit to insure mortgages secured by industrial projects. 250 Md. at 616. At the same time, the Court noted that "[i]f the State had chosen to borrow the money required, had secured the borrow-

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[18]Although earlier constitutions contained a comma after the word "individual", the framers of the 1867 Constitution, apparently without substantive intent, omitted the comma. *See Johns Hopkins University v. Williams*, 199 Md. 382, 386 (1932). Both the Court of Appeals and commentators have construed the language of Article III, §34 to bar gifts or loans of the State's credit to "individuals" as well as to "associations" and "corporations". *See, e.g., Lerch v. Maryland Port Authority*, 240 Md. 438, 462 (1965); *Report of the Constitutional Convention Commission* at 220 (1967). *Cf.* 65 *Opinions of the Attorney General* 285, 288-90 (1980) (comma inserted in constitutional provision by clerical error should not be given effect that would modify intended meaning of provision).

ing by a pledge of its faith and credit, and had loaned or given the proceeds to the Authority, to be used for a public purpose, [*Johns Hopkins University v. Williams*] would have insulated the transaction from successful assault". 250 Md. at 615. FI §10-116 does no more than express the State's intention to follow just such a permissible course of action.[19]

Moreover, an enactment will not be held to amount to a pledge of the faith and credit of the State unless it provides for wholly unconditional governmental liability for the payment of a debt. Thus, in *Maryland Industrial Development Financing Authority v. Meadow-Croft*, 243 Md. 515, 523 (1966), the Court of Appeals held that a statute purporting to pledge the State's faith and credit was "of no legal force and effect" because limitations on the pledge prevented it from being binding in and of itself.

FI §10-116, by its terms, does not purport to pledge the State's faith and credit. *Compare Meadow-Croft*, 243 Md. at 518 (quoting provision of former Article 41, §226L, that "the faith and credit of the State are hereby pledged") *with* FI §10-116 ("It is the policy of this State that funds will be appropriated".). It does not expressly mandate the inclusion of funds in the budget. *See* 243 Md. at 520-21 (noting that, because statute at issue did not *require* Governor to request funds or General Assembly to appropriate them, provision purporting to pledge State's faith and credit did not actually amount to such pledge). And FI §10-116's expression of intent to make appropriations "to the extent necessary to protect holders of savings accounts" is not the equivalent of such a mandate. *Cf.* 65 *Opinions of the Attorney General* 108, 110 (1980) (where statute establishing program states that funding shall be "as provided" in annual budget, it leaves to discretion of Governor decision of whether, when, and at what level program should be funded). Accordingly, FI §10-116 does not evidence an intent to pledge the faith and credit

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[19]Similarly, Chapter 4 is not at all objectionable under Article III, §34. Chapter 4 authorizes the creation of a State debt to raise funds to aid savings and loan associations in obtaining FSLIC insurance. Thus, it authorizes only the State's use of its credit to raise money that the State may give or loan to associations, not the pledge of the State's credit to those associations. *See Johns Hopkins University v. Williams*, 199 Md. at 401.

Moreover, Chapter 4 not only authorizes the creation of a State debt, but also levies a tax to pay that debt. Hence, it fully conforms to the first sentence of Article III, §34, which prohibits the creation of a debt unless a tax is levied in an amount sufficient to pay the principal and interest of the debt.

of the State to insuring depositors' accounts in savings and loan associations.

Nor does FI §10-116 establish an immutable contractual obligation of the State to depositors. No statutory contract is created by legislation that merely "declares a State policy and directs a subordinate body to carry it into effect". *Dodge v. Board of Education*, 302 U.S. 74, 78 (1937).[20] FI §10-116 explicitly constitutes only a legislative statement of public policy. Thus, it does not create a absolute statutory obligation of the State. In the absence of such an obligation, there is no pledge of the State's faith and credit. *Meadow-Croft*, 243 Md. at 522.

At the same time, FI §10-116 does set forth a responsibility that has been taken on by the State. It is part of the law of Maryland and is an affirmative expression of the General Assembly's intention to appropriate the funds necessary to protect savings and loan association depositors. The commitment is therefore similar to that made by the United States Congress with respect to federally insured depository institutions.[21]

IV

Conclusion

In summary, it is our opinion that the various statutes pertaining to savings and loan associations enacted during the May, 1985 Special Session of the General Assembly violate neither the Contract Clause of the United States Constitution nor any other constitutional provision. Moreover, the administrative actions that have subsequently been taken pursuant to those enactments are fully, and appropriately, authorized by the enactments.

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ROBERT A. ZARNOCH, *Assistant Attorney General*

JACK SCHWARTZ
Chief Counsel
Opinions and Advice

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[20]FI §10-116 also lacks other contractual essentials, such as consideration and mutual assent.

[21]H.R. Con. Res. 290, 97th Cong., 2d Sess. (1982).

TAXATION

FINANCIAL INSTITUTIONS—FRANCHISE TAX ON SAVINGS AND LOAN ASSOCIATIONS—DISTINCTION BETWEEN REGULATORY AND REVENUE RAISING TAXES IRRELEVANT TO VALIDITY OF STATE TAX, AS DISTINCT FROM LOCAL TAX.

February 4, 1985

The Honorable Laurence Levitan
Senate of Maryland

You have requested our opinion on whether the franchise tax imposed on savings and loan associations by Article 81, §128B of the Maryland Code is solely a regulatory measure or, also, a revenue measure. If the franchise tax is solely regulatory, you ask further (1) whether the tax may validly be applied to federally chartered savings and loan associations, and (2) whether the tax's validity is affected by the fact that it generates more revenue than is needed to meet the costs of regulating savings and loan associations.

In addition, you have requested our opinion on whether the franchise tax imposed on the net earnings of savings banks and savings and loan associations by Article 81, §128 of the Maryland Code will continue after January 1, 1986 to be subject to the $100,000 statutory exclusion from the taxable base of the subject institutions.

For the reasons given below, we have concluded as follows:

(1) The distinction between regulatory and revenue raising taxes is irrelevant to a determination under State law of the validity of a tax imposed by the State itself, as distinct from a tax imposed by a political subdivision of the State. Consequently, the validity of the franchise tax imposed by Article 81, §128B is not affected by the tax's application to federally chartered institutions nor by the amount of revenue it generates.

(2) The $100,000 taxable base exclusion established by Article 81, §128 will not be effective for any taxable year ending on or after January 1, 1986.

I

Distinction Between Regulatory and Revenue Raising Taxes

Maryland courts have, of course, drawn certain distinctions between taxes imposed for regulatory purposes and those imposed primarily to raise revenue. Nonetheless, the basic power of the State—as distinct from its political subdivisions—to impose taxes of either description is unquestioned. *Maryland Theatrical Corp. v. Brennan*, 180 Md. 377, 380-81 (1942). Indeed, the State's taxing power exists even in the absence of an express constitutional authorization for it. "[T]he power of taxation is inherent in a sovereign state, because the right to tax underlies its own Constitution, and is not granted by it." *Oursler v. Tawes*, 178 Md. 471, 482 (1940).

In direct contrast, the political subdivisions of the State have only those taxing powers that the State has granted to them, for they derive all of their authority from the State. *See McRobie v. Mayor and Commissioners of Westernport*, 260 Md. 464, 466 (1971) (quoting 1 Dillon, *Municipal Corporations*, §237 (5th ed. 1911)). Consequently, a local measure is invalid if it exceeds the local government's delegated authority. In this regard, one recognized restraint upon a local government's authority to tax for regulatory purposes, as distinct from revenue raising purposes, is the requirement that the amount of revenue generated by such a regulatory tax "be reasonable and have some definite relation to the purpose" of the measure. *Maryland Theatrical Corp. v. Brennan*, 180 Md. 377, 381 (1942).

But it is in regard to the validity of *local* taxes only that this distinction between regulatory and revenue raising measures is important.[1] Thus, for example, the Court of Appeals has considered

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[1]In a Commerce Clause context, a somewhat similar distinction has been drawn by the Supreme Court between general revenue taxes and "user fees" imposed by a state. Because user fees affecting interstate commerce "are purportedly assessed to reimburse the State for costs incurred in providing specific quantifiable services", those fees must not be disproportionate to the service provided. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 622 n. 12 (1981). The franchise tax at issue here, however, is not a user fee; and, as the Supreme Court has held, the states otherwise have considerable latitude in imposing taxes, even when the taxed activity has some connection to interstate commerce. 453 U.S. at 622-23. Thus, in *Commonwealth Edison*, the Court upheld a severance tax against a challenge alleging that the amount of the tax was not fairly related to the services provided by the state. 453 U.S. at 626.

In a recent Maryland case, *American Trucking Associations, Inc. v. Goldstein*, 301 Md. 372 (1984), the appellants challenged the constitutionality of a State license fee. Initially, they contended that the fee was a "regulatory" measure and, because the fee generated more revenue than was needed to carry out its regulatory purpose, it was void under State law; however, in argument before the Court of Appeals, the appellants apparently abandoned that argument, and the Court consequently did not address the State law issue. 301 Md. at 375 n. 4. The Court did, however, address the Commerce Clause issue and, in its decision, upheld the constitutionality of the fee in question.

the nature of the State's franchise tax on savings and loan associations; but it did so to determine the validity of a similar local tax. *American National Building and Loan Association v. Mayor and City Council of Baltimore*, 245 Md. 23 (1965). The Court concluded that "the Savings and Loan Act of 1961 imposing a State franchise tax was regulatory and did not preempt the power of the City to impose a privilege tax for revenue purposes". 245 Md. at 33. Nothing in that conclusion, however, indicates that the Court regarded the nature of the State tax as having a bearing on the validity of the State tax itself.

Indeed, in cases in which the question was before it, the Court of Appeals has indicated that quite the contrary is true. For example, an "Emergency Gross Receipts Tax" imposed on retail merchants by Chapter 188, Laws of Maryland 1935, was challenged largely on the ground that it was excessive in amount. *Jones v. Gordy*, 169 Md. 173, 179-80 (1935). In rejecting that contention, the Court of Appeals noted that the statute was a revenue, not a regulatory, measure. But the Court further pointed out:

> "[A]s the tax is an imposition of the sovereign power of the State directly, there is no question of construing a delegation of power to be limited to a reasonable exercise. . . . 'We are now dealing with a statute passed by the legislature for the benefit of the state, and we are not called upon to draw nice distinctions between the power to license for regulation, and the power to license with a view to revenue, as is sometimes required in construing charters of municipal corporations for the purpose of determining whether or not such corporation had the power to exact certain license fees.'" *Jones v. Gordy*, 169 Md. 173, 180 (1935) (quoting *State v. Applegarth*, 81 Md. 293, 300 (1895)).[2]

See also Brown v. State, 177 Md. 321, 329 (1939) ("It is an Act of

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[2]Notably, while the statute at issue in *Jones v. Gordy* was found to be a revenue measure, the statute upheld in the *Applegarth* case, from which the Court quoted, was found to be a regulatory measure. *See Applegarth*, 81 Md. at 300 ("[W]e might perhaps content ourselves by declaring this law to be valid on the ground that these license fees [imposed on oyster packers] are imposed for the regulation of the oyster business, with which oyster packers are connected.").

Assembly that is being considered, not a municipal ordinance under delegated and limited power.").[3]

To be sure, the distinction between regulatory measures and revenue raising measures is relevant in deciding questions of statutory construction or of the validity of a local enactment. *See, e.g., Maryland Theatrical Corp. v. Brennan*, 180 Md. 377, 381 (1942). It is not, however, of equal moment in the determination of the validity of a State tax.[4]

Consequently, in our view, the validity of the franchise tax imposed by Article 81, §128B is not governed by characterization of its purpose as regulatory or revenue raising.

II

The Tax on Net Earnings

Article 81, §128 provides for a franchise tax on the net earnings of savings banks and savings and loan associations. Under §128(c), that tax formerly was computed as a percentage of the institution's net earnings above $100,000. That is, the first $100,000 of net earnings was excluded from the taxable base for purposes of this tax.

Chapter 358, Laws of Maryland 1983, however, amended §128, altering the computation method for the tax. Under new §128(c-1), that change is made through a phased-in adoption of the definition of "net earnings" contained in Article 81, §128A (franchise tax on financial institutions). Over three years, the tax rate is to be gradually decreased "on the net earnings under this section [§128]", while gradually increased "on the net earnings defined under §128A";

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[3]We recognize that some language in *Brown v. State*, 177 Md. 321, 328-29 (1939), suggests that the Court of Appeals regarded the distinction between regulatory and revenue measures as relevant to its determination of the State license requirement's validity. But the Court's citation in that discussion to both *Jones v. Gordy* and *State v. Applegarth* leads us to believe that it did not intend to reverse its position from that of those earlier decisions.

[4]Moreover, as the *Brennan* opinion makes clear, a statute may be both regulatory and revenue raising in nature. 180 Md. at 382. The tax embodied in Article 81, §128B appears to be capable of such a characterization. Revenue from the tax is directed into the general fund; late payment results not in loss of a license to do business, but in imposition of an interest penalty. Article 81, §128B(e).

ultimately, for any taxable year ending on or after January 1, 1986, the tax is computed solely "on the net earnings defined under §128A".[5]

Article 81, §128A defines "net earnings" as "the net income of a financial institution for its annual accounting period", including interest, dividends, and profit from sales or exchanges of bonds. Article 81, §128A(a)(6). That definition does not allow for any exclusion from a financial institution's taxable base. Thus, for taxable years ending on or after January 1, 1986, the franchise tax imposed by §128 is to be computed, in accordance with §128A, solely on the basis of total net earnings.

Accordingly, in our view, the $100,000 exclusion will no longer be effective for the taxable years ending on or after January 1, 1986. Similarly, during the phase-in period, that part of the tax based on "net earnings under [§128]" would be subject to the exclusion, while that part based on "net earnings defined under §128A" would not be subject to the exclusion.[6]

III

Conclusion

In summary, it is our opinion that:

(1) The distinction between regulatory and revenue raising measures is irrelevant to a determination under State law of the validity of a State, rather than local, tax. Accordingly, the franchise tax imposed by Article 81, §128B is valid, notwithstanding its application to federally chartered institutions or the amount of revenue it generates.

(2) The $100,000 taxable base exclusion established by Article 81, §128(c) is gradually phased out under Article 81, §128(c-1) and will not be effective for any taxable year ending on or after January 1, 1986.

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[5] Chapter 358, Laws of Maryland 1983, used the phrase "net earnings taxable under §128A". The word "defined" was substituted for "taxable" by Chapter 282, Laws of Maryland 1984.

[6] In enacting §128(c-1), the General Assembly did not repeal §128(c). Rather, subsection (c) was amended to retain the former computation method, exclusion, and tax rate, "[e]xcept as provided in subsection (c-1) of this section". We believe the phased-in nature of the change in computation fully accounts for the decision to retain subsection (c).

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Opinions and Advice

TAXATION—SALES TAX—ADMISSIONS AND AMUSEMENT TAX—WAIVER OF PENALTY AND INTEREST CHARGES—COMPTROLLER MAY CONSIDER PRIOR RECORD OF TIMELY FILING AS SUFFICIENT CAUSE FOR WAIVER AND MAY ADOPT AUTOMATIC WAIVER PROGRAM BY REGULATION.

September 23, 1985

Mr. Stephen M. Cordi, Director
Retail Sales Tax Division
Comptroller of the Treasury

You have requested our opinion regarding the Comptroller's authority to waive certain penalty and interest charges on late-filed sales and admissions tax returns.

Article 81, §365(c) of the Maryland Code authorizes a waiver of these charges "for cause shown", in the case of sales tax returns; and Article 81, §407(c) authorizes a waiver for "good cause shown", in the case of admissions tax returns. You have advised that the Division has, for many years, considered a taxpayer's previous record of consistent timely filing as itself evidencing sufficient cause for waiver of interest and penalty. That is, the Division waives, upon request, the penalty and interest charges attributable to one late return within any twelve month period of time, absent other evidence of noncompliance.

Your first question is whether the present practice of considering a consistent record of timely filing as grounds for waiver is in accordance with State law. Your second question is whether implementation of an automatic, computerized waiver of late charges, applying criteria derived from the present case-by-case waiver practice, is permissible.

For the reasons set forth below, we conclude that (1) the present waiver practice is in accordance with State law; and (2) implementation of that practice on an automated basis is permissible, if that implementation follows the procedures for rulemaking in the Administrative Procedure Act.

I

Grounds for Waiver

A. *Statutory Standard*

Under the Retail Sales Tax Act, returns are to be filed "[b]efore the twenty-first day of each calendar month". Article 81, §335 of the Maryland Code.[1] Article 81, §365(c) authorizes the Comptroller "[t]o compromise disputed claims in connection with the tax imposed by [the Retail Sales Tax Act], and for cause shown to remit penalties and interest."

Under the admissions and amusement tax subtitle, returns are to be filed with the Comptroller "[o]n or before the tenth day of each month". Article 81, §405(a).[2] "For good cause shown, the Comptroller may waive the imposition of the penalty and interest" otherwise imposed for late-filed admissions and amusement taxes. Article 81, §407(c). Thus, your first question is whether a previous record of timely filing is sufficient cause—"cause" under §365(c) and "good cause" under §407(c)—for the waiver of late charges.

Preliminarily, we note that the terms "cause" and "good cause" mean the same thing. *Francois v. Alberti Van and Storage Company*, 285 Md. 663, 672 (1979); *Merrimack Park Recreation Association v. County Board of Appeals*, 228 Md. 184, 188 (1962). Thus, although different terms were used in §§365(c) and 407(c), the same legal principles apply to both sections.

B. *Application of Standard*

"[N]o precise definition of 'good cause' has yet been developed to guide the courts." *Carter v. State*, 54 Md. App. 220, 226 (1983), *rev'd on other grounds sub nom. State v. Beard*, 299 Md. 472 (1984) (analyzing the "good cause" requirement for postponement of criminal trials). Nevertheless, a general test of "ordinary prudence" or "reasonable diligence" has been recognized as satisfying the "good cause" standard.

Thus, the Court of Special Appeals quoted with approval the following "clear and logical definition of good cause":

> "'The term "good cause" for not filing a claim for compensation is not defined in the statute, but it has been uniformly held by the courts of this state that the test for its existence is that of *ordinary prudence*, that is, whether

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[1]The Comptroller is authorized by this section "to permit or require such returns to be made for other periods and upon such other dates as he may by regulations specify."

[2]The Comptroller is authorized by this subsection to "permit or require such returns to be made for other periods and upon such other dates as may be specified by regulation."

> the claimant prosecuted his claim with that degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances.'" *Madore v. Baltimore County*, 34 Md. App. 340, 345 (1976) (quoting *Lee v. Houston Fire and Casualty Insurance Co.*, 530 S.W.2d 294, 296 (Tex. 1975)) (emphasis added).

Similarly, the Court of Special Appeals has observed that "cause for postponement under the statute and the rule may be found if the moving party, including the court, has exercised *reasonable diligence* . . . ." *Carter v. State*, 54 Md. App. at 229 (emphasis added). A trial court's determination of "good cause" involves an exercise of discretion that is not to be set aside "except in extreme cases of clear abuse." *Langrall, Muir & Noppinger v. Gladding*, 282 Md. 397, 400 (1978). *See also Francois v. Alberti Van and Storage Company*, 285 Md. at 672.

In our view, the Comptroller has comparably broad discretion to determine whether a taxpayer has shown "ordinary prudence" or "reasonable diligence" and, hence, has met the statutory standard of good cause. Under one view of the waiver provisions, the taxpayer would meet the "good cause shown" standard by his or her demonstrated record of past timely filing. In other words, that taxpayer will have demonstrated "ordinary prudence" or "reasonable diligence" through a pattern of compliance with the applicable law, and the Comptroller may properly treat one instance of untimely filing as not vitiating that diligent track record.

Even if one were to adopt a narrower reading of the waiver provisions—i.e., that the requisite showing of good cause must be made with isolated reference to the one late return, regardless of the taxpayer's filing history—nevertheless we regard the waiver policy as within the Comptroller's discretion. In effect, the Comptroller has applied his expertise in tax administration to presume that demonstrably diligent taxpayers have "good cause" for one late filing. We do not think that the Comptroller is barred from making that kind of determination of "good cause", applicable to a class of taxpayers. The requisite particularized showing is that the taxpayer falls within the class.[3]

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[3]The Comptroller's authority under Article 81, §365(b) "[t]o extend, for cause shown, the time of filing" any sales tax return provides an apt analogy. Suppose that a snowstorm paralyzes Baltimore City. Surely the Comptroller has authority to extend the time of filing across-the-board, for all City residents. Any given taxpayer need only show that he or she is a City resident—i.e., within the class for which "good cause" has been determined. The taxpayer need not show that he or she was personally snowbound.

Obviously, the Comptroller has determined that a previous record of timely filing of returns does constitute cause enough to excuse an isolated instance of untimely filing, without requiring the taxpayer to detail the circumstances giving rise to the late return. We regard this determination as properly within the Comptroller's broad discretion. While it is possible, at least in theory, that the waiver practice could amount to a clear abuse in unusual circumstances, that theoretical possibility alone does not make the practice inconsistent with State law.

Accordingly, we conclude that the Division's practice of waiving, upon request, penalty and interest charges attributable to one late return within any twelve month period of time (absent other evidence of noncompliance) is in accordance with State law.

II

Automatic Application of Waiver Criteria

Your second question—whether an *automatic* waiver is permissible, under the same criteria as have applied to waivers requested on a case-by-case basis—follows from developments in the Division's data processing capability. The Division is now able to identify automatically all taxpayers who would be eligible for waiver under the prior, case-by-case request procedure.

In our view, the applicable principles are the same, and so is the result: An automatic grant of a waiver is not precluded by the statute. "Good cause" having been determined by the Comptroller for the class of taxpayers who have timely filed for the requisite period, the new computer capability simply allows the good cause to be "shown" automatically, instead of after manual search. Article 81, §§365(c) and 407(c) do not prevent implementation of a system that, we are advised, is more efficient and cost effective.[4]

However, a change from case-by-case waivers to automatic waivers does implicate a different set of legal requirements: the rule-making procedures of the Administrative Procedure Act. We believe that the automatic waiver policy is plainly a "regulation", within

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[4]Although determinations of "good cause" are made by the courts on a case-by-case basis, nevertheless previously established criteria may be used as guides for such determinations. *Bethea v. State*, 26 Md. App. 398, 401 (1975).

the meaning of the Act.[5] Hence, its implementation must accord with the requirements in Subtitle 1 of Title 10 of the State Government Article.

III

Conclusion

In summary, it is our opinion that the Comptroller's present practice of considering a previous record of timely filing as cause for waiver of penalty and interest charges on late returns of sales tax and admissions tax is in accordance with State law. Implementation of that practice on an automated basis would also be permissible, if that implementation follows the rulemaking procedures of the Administrative Procedure Act.

STEPHEN H. SACHS, *Attorney General*

GERALD LANGBAUM, *Assistant Attorney General*

LINDA KOERBER BOYD, *Assistant Attorney General*

JACK SCHWARTZ
Chief Counsel
Opinions and Advice

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[5] "'Regulation' means a statement or an amendment or repeal of a statement that:

(i) has general application;

(ii) has future effect;

(iii) is adopted by a unit to:

1. detail or carry out a law that the unit administers;

. . . and

(iv) is any form, including:

1. a guideline;

. . .

4. a statement of interpretation; or

5. a statement of policy." §10-101(e)(1) of the State Government Article. *See generally* 65 *Opinions of the Attorney General* 396, 404-06 (1980).

In view of the Division's change to an automatic waiver procedure, we need not consider whether the criteria heretofore applied to case-by-case waivers were themselves a "regulation".

TESTAMENTARY LAW

WILLS—INCORPORATION BY REFERENCE—THE ENOCH PRATT FREE LIBRARY, WHICH RECEIVED THE DIARIES OF H.L. MENCKEN UNDER HIS WILL, IS NOT PROHIBITED BY DOCUMENTS OUTSIDE THE WILL FROM PUBLISHING THE DIARIES.

October 4, 1985

Dean Michael J. Kelly
University of Maryland School of Law

On behalf of the Board of Trustees of Enoch Pratt Free Library, you have requested our opinion on the Library's right to publish the diaries of H. L. Mencken. Specifically, you ask whether publication is effectively prohibited either by a memorandum from Mencken to his executors or by a receipt given by the Library when the diaries were transferred to it after his death.

For the reasons given below, we conclude that the memorandum and receipt are without legal effect. Hence, in our view, the Library has a legal right to publish the diaries.

I

Background

In 1954, H. L. Mencken executed a "Last Will and Testament", which provided in part:

> "*ITEM THREE*. I give and bequeath to the ENOCH PRATT FREE LIBRARY OF BALTIMORE CITY the following: (1) all my books and pamphlets (including dictionaries) relating to language, and all my notes and other materials gathered in anticipation of a possible Third Supplement to my book, The American Language; (2) all my family papers and souvenirs, and all my books by Menckens other than myself; (3) all my letters from Marylanders; and (4) all my copies of my own books, and all my copies of books by others discussing me or other Menckens, or relating to the Mencken family."

The will also directed that Mencken's residuary estate be held in trust for certain named individuals during their lives. Thereafter, the trustees were directed to distribute the residuary estate to the Enoch Pratt Library and the Johns Hopkins Hospital, giving the Hospital only one quarter. Thus, by the terms of the will, the Library now owns at least a three-quarters share in the literary property in Mencken's diaries—that is, the right to control publication of the diaries.[1]

However, Mencken also wrote a separate memorandum to his executors, in which he expressed in detail his wishes concerning the disposition of his books and papers. Section 70 of the memorandum stated that his diaries "are to go to the Pratt Library on the conditions" set forth in a separate statement placed with the diary volumes.[2] That statement reads:

> "This diary is to be deposited by my Executors on the understanding that it is not to be put at the disposal of readers until twenty-five years after my death, and is then to be open only to students engaged in critical or historical investigation, approved after proper inquiry by the Chief Librarian."

Before delivering H. L. Mencken's diaries and other papers to the Library, Mercantile-Safe Deposit and Trust Company, as his executor, requested a receipt pursuant to that memorandum and statement. The receipt, executed by the then president of the Library, stated that the materials were "received upon the explicit and irrevocable understanding imposed by the Author, that . . . the contents are to be opened for examination only to graduate students or those of a higher grade engaged in serious, critical or historical investigation".

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[1]We do not address the question of whether the publication rights—which are distinct from ownership of the physical volumes themselves—were bequeathed to the Library along with the volumes or were part of the residuary estate. If the publication rights were included with the bequest of the volumes, the Library is the sole owner of those rights. If, however, the publication rights were part of the residuary estate, the Hospital owns a one-quarter share in those rights. But you have not asked, and, accordingly, this Opinion does not address, the question of whether the Hospital has an interest in the diaries.

[2]The portion of the memorandum dealing with the diaries cross-refers another paragraph, which states that certain volumes of material "are to go to the libraries named *only on the conditions set forth on the first page of each*, which must be agreed to in writing before they are dispatched . . . . In case it turns out to be impossible to find libraries willing to take one or more of the sets on the terms provided, it or they are to be destroyed." (Emphasis in original.)

In accordance with the understanding so expressed, the Library has instituted procedures for affording scholars, but not the general public, access to certain of the Mencken papers. However, you have indicated that the Library's Board of Trustees wishes to publish an edited version of the diaries, "largely because of our institutional role of encouraging the dissemination of important materials to a wider public". Letter from Dean Michael J. Kelly to Benjamin L. Brown, City Solicitor (December 26, 1984). In our view, there is no legal barrier to the Board's doing so.

II

Analysis

In construing a will, the primary concern is to ascertain and effectuate the testator's intent. *Wesley Home, Inc. v. Mercantile-Safe Deposit & Trust Co.*, 265 Md. 185, 198 (1972). That intent must, however, ordinarily be gathered "'from the four corners of the will.' . . . Extrinsic evidence should not be admitted to show that the testator meant to say something different from what his language imports. . . . What he meant to say must be gathered from what he did say. . . . The will stands just as he had written it." *Fersinger v. Martin*, 183 Md. 135, 138 (1944).

None of the provisions of H. L. Mencken's "Last Will and Testament" contain restrictions on publication of any of his papers. Therefore, that document on its face grants unrestricted ownership rights in the diaries, including the right to publish them.

Moreover, Mencken's memorandum to his executors does not in itself have the legal effect of a will, because it was not executed with the formalities required for wills. *See Chase v. Stockett*, 72 Md. 235 (1890) (unattested memorandum of instructions to executors cannot operate as a will). Therefore, it cannot, by itself, limit the bequest of the diaries in the will.

The memorandum would have that effect if, under the doctrine of incorporation by reference, it could be treated as part of the will. However, that doctrine is not applicable in this case.

The doctrine of incorporation by reference has long been recognized in Maryland. *In re Hull's Estate*, 164 Md. 39, 45 (1933). Under that doctrine, a document that is not itself valid as a will becomes part of a valid will that refers to and incorporates the document. That is, the doctrine allows the provisions of a separate writing to be given the same effect as they would have if they had been written directly in the will. However, the separate document can be treated as incorporated by reference only if the will both describes it clearly and manifests the testator's intent that it be given the same binding effect as the will.

Neither Item Three—the bequest to the Library—nor the residuary clause of Mencken's will refers in any way to the memorandum to his executors. Therefore, it is simply not possible to conclude that those provisions incorporate the memorandum by reference.

Moreoever, the only two provisions of the will that do appear to refer to the memorandum clearly express an intent that it not be given the binding effect of testamentary provisions. Item Five, a bequest to Mencken's brother and sister of various personal effects, states that he had left "a memorandum suggesting the further disposition of some of these items, but they are free to disregard it as they see fit". Item Nine similarly refers to a memorandum "suggesting the terms of a further disposition of this bequest" and expressly states that the "memorandum is a request only".

Accordingly, in our view, there is no ground on which it may be concluded that Mencken's memorandum is legally effective to prevent publication of his diaries. Had the bequest to the Library stated, for example, that the papers were given "pursuant to the terms of the memorandum regarding their use", we might well have a different case. But that kind of incorporation by reference is not stated in the will, and it may not be inferred.

Nor do we view the Library's receipt for Mencken's papers as a legally binding agreement not to publish the diaries. The Library received no consideration for executing that receipt. Rather, Mencken's executor asked for the receipt as a precondition for delivery to the Library of property beqeathed to it under the will—that is, property which the Library was entitled to receive. That the executor requested the receipt in an attempt to carry out Mencken's wish cannot operate to convert that wish—otherwise legally unenforceable—into a valid limitation on the use of property given to the Library unconditionally by the will.

III

Conclusion

In summary, it is our opinion that neither Mencken's memorandum to his executors nor the Enoch Pratt Free Library's receipt for the papers delivered to it constitutes a legally enforceable prohibition against publication of Mencken's diaries. Mencken, a self-described "congenital disbeliever in laws", once dismissed all lawyers as "obscurantists". But in this case at least, the law is clear and permits no other conclusion.

STEPHEN H. SACHS, *Attorney General*

C. J. MESSERSCHMIDT, *Assistant Attorney General*

JACK SCHWARTZ
Chief Counsel
Opinions and Advice

VEHICLE LAWS

POINT SYSTEM—POINTS TO BE ASSESSED AS OF THE CONVICTION DATE, RATHER THAN THE VIOLATION DATE.

December 31, 1985

Howard B. Merker, Esquire
Deputy State's Attorney for Baltimore County

You have requested our opinion about the assessment of points on an individual's driving record when the Motor Vehicle Administration ("MVA") receives notice that the individual has been convicted of a violation of State or local vehicle laws or regulations. Specifically, the question is whether points are to be assessed as of the date of the conviction or as of the date on which the violation occurred.

For the reasons given below, we conclude that present law requires points to be assessed as of the date of the conviction, rather than as of the date on which the violation occurred. However, we recognize that this conclusion requires a change in a long-standing practice. As a practical matter, extensive computer reprogramming and other administrative changes are necessary. Because the General Assembly will shortly have the opportunity to consider whether an amendment to the statute is warranted, we believe that the MVA may appropriately defer implementation of these changes until the General Assembly acts. Of course, if the General Assembly declines to enact such an amendment during the coming session, the MVA must begin at once to implement these changes.

I

Point System

Section 16-401 of the Transportation Article ("TR" Article) requires the MVA to "maintain a point system for the refusal, suspension, or revocation of drivers' licenses." Under TR §16-402, points are to be assessed "[a]fter the conviction of an individual for a violation of Article 27, §388 or §388A of the Code, or of the vehicle laws or regulations of this State or of any local authority."[1] The number of points to be assessed for each violation is specified in TR §16-402(c)(1) through (26). As the seriousness of the offense increases, so does the number of points. For example, a conviction of exceeding the speed limit by 10 miles an hour or more, without contributing to an accident, requires the MVA to assess two points against the individual, while a conviction of driving while intoxicated requires the MVA to assess 12 points. TR §16-402(a)(2) and (23).[2]

Actual suspension or revocation of a driver's license is an administrative action based on the driver's accumulation of a specified number of such points. Accordingly, the MVA must warn any individual who accumulates three points that suspension or revocation may occur. TR §16-404(a)(1). Further, it must "call in for a conference" any professional driver who accumulates eight points or any other driver who accumulates five points. TR §16-404(a)(2). Ordinarily, the MVA must suspend an individual's license for a stated time upon the individual's accumulation of eight points and must revoke it entirely upon the individual's accumulation of 12 points. TR §16-404(a)(3).[3] However, if the individual is required to drive in the course of employment, ordinarily his or her license may be suspended only upon the accumulation of 16 points and may be revoked only upon the accumulation of 19 points. TR §16-405(b).

A point is not effective for an indefinite period. TR §16-407 provides that a point "may not be retained for more than 2 years after its assessment." Thus, a driver who commits minor violations as to which points take effect on widely separated dates is not subject to sanctions designed to prevent habitually dangerous drivers from continuing to drive.

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[1]Article 27, §388 creates the misdemeanor of "manslaughter by automobile," punishable by up to five years' imprisonment and $1000 fine. Article 27, §388A creates the misdemeanor of "homicide by motor vehicle while intoxicated," punishable by up to three years' imprisonment and $1000 fine.

[2]When an individual is convicted of more than one offense commited at the same time, the MVA may assess points only on the one offense that carries the highest point assessment. TR §16-402(b).

[3]Under TR §16-404(b), suspension or revocation is accomplished by serving the individual with a notice of the intended action and of the individual's right to request an administrative hearing. If the individual does not request a hearing, the suspension or revocation takes effect 10 days after the notice is sent.

II

MVA Policy

For virtually the full 25 years the point system has been in existence, the MVA's practice has been to assess points only after a conviction, but to give effect to the assessment as of the date on which the violation occurred, instead of the date of the conviction. In determining whether an individual has accumulated enough points to trigger administrative action, the MVA views the two years preceding and the two years succeeding the date of the violation and takes action if the total number of points for any two-year period within that four-year span warrants it.

For example, if a driver were convicted in August 1984 of a three-point violation that occurred in July 1983, that person would be assessed three points for the 1983 date. If the individual had previously been convicted in May 1984 and April 1983 of three-point violations that occurred in October 1982 and June 1981, that driver would have been convicted in a little more than a year of violations totaling nine points. However, the points would have been given effect as of dates spanning more than two years. Because points may not be retained more than two years, the June 1981 points could not be added to those assessed for the July 1983 violation, and the driver's license could not be suspended.

Conversely, a driver might be convicted in July 1985, May 1984, and November 1982 of three-point violations that had occurred in June 1983, May 1983, and October 1981. That person would be assessed a total of nine points for violation dates spanning less than two years, although the convictions spanned nearly three years. Accordingly, that driver's license would be suspended after the conviction in 1985.[4]

In this latter example, the suspension notice would be issued after the July 1985 conviction—more than two years after the date of the last violation in June 1983. Because the MVA retains a point for only two years, the individual's driving record on the date of the suspension would indicate no current points. Nonetheless, in the

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[4]In each of these cases, assessing points as of the conviction date would lead to the opposite result. Thus, in the first example, the driver's license would be suspended because the convictions occurred in a little more than a year, from April 1983 to August 1984. In the second example, the license would not be suspended. Under TR §16-407, the points assessed as of the 1982 conviction could not be added to those assessed as of the 1985 conviction.

MVA's view, the suspension would be proper because all nine points were assessed as of dates within two years of each other.

The MVA's policy in this regard rests on its view that, under TR §16-402, a point is to be assessed as of the date of the violation to which it relates, instead of the date of the conviction that triggers its assessment. In the MVA's view, the prohibition against "retaining" a point for more than two years is to be construed as a prohibition against accumulating points based on one violation with points based on a violation committed more than two years later.

III

History

The point system law was created by Chapter 736 of the Laws of Maryland 1959 and became effective on December 31, 1960, as former Article 66 1/2, §114A. Former Article 66 1/2, §114A(a) provided as follows:

> "In addition to, but not in substitution of, any other provisions of this article, the Commissioner of Motor Vehicles, shall after notice to the general public put into effect a point system for the suspension or licenses revocation of motor vehicle operators' and chauffeurs' issued under this article. *Points shall be charged against a licensee after conviction of violation of the motor vehicle laws of this State*, and for the purposes of this subtitle, a forfeiture of collateral shall be considered as a conviction. Initial point values shall be assessed as follows." (Emphasis added).

Former Article 66 1/2, §114A(e) provided that "no points assessed hereunder shall be retained for more than two years after their assessment." On January 10, 1961, the then Commissioner of Motor Vehicles was advised that the charging of points under former Article 66 1/2, 114A(a) "relates back to" the date of violation. Memorandum from Eli Baer, Special Assistant Attorney General, to John R. Jewell, Commissioner of Motor Vehicles (January 10, 1961).

In counsel's view, the requirement that points be charged "after conviction" was intended to serve two purposes: (1) to ensure that sanctions would be imposed only for violations of which the driver has been convicted; and (2) to establish an easily identifiable event as the triggering event for commencement of the required administrative action. However, he concluded that the points should take effect, for the purpose of determining whether a driver had accumulated eight or more points within two years, as of the date of the violation, rather than the conviction.

He reasoned that the General Assembly could not have intended that the date of conviction be the effective date of the points, because delays in criminal proceedings at both trial and appellate levels might postpone the entry of a final conviction long enough to frustrate the purpose of the statute. Therefore, he advised the Commissioner of Motor Vehicles "(1) that before points may be charged against a licensee there shall have been the *fact* of 'conviction' and (2) that as soon as notice of said conviction has been received by your Department it is required that the administrative process immediately go into action to charge 'points' against said licensee on the basis of the conviction. But, . . . the charging of such 'points' relates back to the date of *violation*." (Emphasis in original.) The MVA's current practice is based upon that advice.

Former Article 66 1/2, §114A(a)'s requirement that "[p]oints shall be charged against a licensee after conviction of violation of the motor vehicle laws" remained unchanged until its recodification into TR §16-402(a) by Chapter 14 of the Laws of Maryland 1977. That enactment substituted the phrase "points shall be *assessed*" for the previous phrase "points shall be *charged*."

In both the original enactment of the point system and its current version, the provision relating to the duration of points measures from their assessment. *See* former Article 66 1/2, §114A(e) ("No points assessed hereunder shall be retained for more than two years after their assessment."); TR §16-407 ("A point assessed under this subtitle may not be retained for more than 2 years after its assessment."). Thus, the 1977 recodification's substitution of the term "assessed" for the term "charged" in TR §16-402 was undoubtedly intended to clarify the law by making the language of the provision requiring the assessment of points and that of the provision providing for the duration of points consistent. TR §16-402 states when the points are to be assessed and TR §16-407 states when, after their assessment, the points are to expire.

IV

Legislative Intent

To determine whether the General Assembly intended points to be effective as of the violation date or the conviction date, we must look primarily to the language of the statute itself. *Sites v. State*, 300 Md. 702, 710 (1984). The words of the statute are to be given "their ordinary and popularly understood meaning." *In Re Arnold M.*, 298 Md. 515, 520 (1984). If the statutory provisions are unambiguous, we need not look further in construing the statute. *Maryland-National Capital Park and Planning Commission v. Mayor & Council of Rockville*, 272 Md. 550, 556 (1974).

We are certainly mindful that a long continued and unvarying construction of a statute by an administrative agency is to be given great weight. *National Asphalt Pavement Ass'n v. Prince George's County*, 292 Md. 75, 80 (1981). Nonetheless, the principle is applicable only when the statute's language is ambiguous. An administrative construction of a statute cannot override the statute's plain meaning. *State Dep't of Assessments & Taxation v. Greyhound Computer Corp.*, 271 Md. 575, 589 (1974); *Salisbury Beauty Schools v. State Bd. of Cosmetologists*, 268 Md. 32, 66-67 (1973); *City of Hagerstown v. Long Meadow Shopping Center*, 264 Md. 481, 493 (1972).

In our view, TR §§16-402, 16-404, and 16-407, when read together, are not at all ambiguous concerning whether a point may be made effective as of the date of the violation, rather than the date of the conviction. A point cannot be "assessed" on the date of the violation.

TR §16-402, like its predecessor statute, requires that a point may not be "assessed," (or, under the prior laws, "charged") until after the driver's conviction. The MVA has interpreted that statute to mean only that MVA cannot take action by assessing points until after conviction, thus regarding the statute as silent concerning the effective date of the point. However, TR §16-402 cannot be so read in isolation.

Under TR §16-407, a point "may not be retained for more than 2 years *after its assessment.*" Unquestionably, TR §16-407's establishment of the period during which points are effective also establishes the date on which the points take effect. That date, by the section's plain language, is the date on which the points were assessed.

The date of a driver's conviction is, of course, the date on which it is finally established that the driver has actually violated the motor vehicle laws and, therefore, may be subject to administrative sanctions. Hence, we read TR §16-402 as requiring that the points potentially leading to the imposition of those sanctions take effect on the date of the conviction. By that reading, a driver's exposure to sanctions begins on the date when it is judicially established that the driver should be exposed to sanctions—by no means an absurd result. *Cf. Fairchild Industries v. Maritime Air Service, Ltd.*, 274 Md. 181, 185-86 (1975) (statute should not be construed in such a way as to reach absurd result).[5]

The MVA has indicated some concern that drivers charged with motor vehicle violations may escape licensing sanctions, notwithstanding their convictions, because the length of criminal proceedings may delay one conviction until more than two years after the preceding conviction. This is a legitimate concern and one with which the General Assembly may be sympathetic. However, action by the General Assembly is necessary if the violation date is to be assigned as the effective date of points.[6] Unless the General Assembly amends TR §16-402, the plain meaning of the statute mandates that points be "assessed"—be made effective—as of the date of the conviction.

If the MVA is concerned that a particular licensee may escape

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[5]We do not, however, suggest that the MVA's present interpretation leads to an absurd result. We conclude only that it does not accord with the statutory language.

[6]A number of cases from other jurisdictions bolster our view in this regard. For example, under the Pennsylvania point system, the effective date of a point is the date on which the violation was committed. *See, e.g., Commonwealth, Dep't of Transp., Bureau of Traffic Safety v. Pompeo*, 458 A.2d 327, 328 (Pa. Comwlth. 1983); *Commonwealth, Dep't of Transp., Bureau of Traffic Safety v. Vail*, 440 A.2d. 651, 652 (Pa. Cmwlth. 1982); *Commonwealth, Dep't of Transp., Bureau of Traffic Safety v. Sheets*, 410 A.2d 1295, 1296 (Pa. Cmwlth. 1980). These cases all revolve around a provision of the Pennsylvania point system law, 75 Pa. C.S. §1535(a), that states:

> "(a) A point system, for driver education and control is hereby established which is related to other provisions for use, suspension and revocation of the operating privilege as specified under this title. Every driver licensed in this Commonwealth who is convicted of any of the following offenses shall be assessed points *as of the date of violation*."

In *Baggett v. Peters*, 271 S.E.2d 581, 582 (N.C. App. 1980), the court noted that North Carolina's point system *specifically requires* the Division of Motor Vehicles to assign points as of the date of the commission of the offense, but only after conviction.

In contrast, in *Markham v. Theobald*, 383 P.2d. 791 (Colo. 1963), the court reviewed a statute that provided the agency with the authority to suspend the license of any operator "who has, in accordance with the schedule of points set forth in this section, been *convicted* of traffic violations resulting in the accumulation of twelve points in one year." (Emphasis in original.) From ths language, the court concluded that the legislature intended the controlling date for purposes of point assessment to be the *conviction* date. 383 P.2d at 793. The Colorado statute was amended and now specifically provides that points are to be accumulated from the date of violation. C.R.S. 42-2-123(2)(a).

administrative sanction because of delays in obtaining a final conviction, it may charge the licensee with violating TR §16-206(a). Under that provision, the MVA is authorized to impose sanctions if a licensee "has been convicted of moving violations so often as to indicate an intent to disregard the traffic laws and the safety of other persons on the highways [or is] an unfit, unsafe or habitually reckless or negligent driver." Thus, the MVA is by no means powerless to prevent dangerous drivers from continuing to drive.

V

Conclusion

In sum, it is our opinion that the MVA's current point-assessment practice does not conform with TR §16-402. Instead, points should be assessed as of the date of the driver's conviction of the violation for which the points are being imposed. If the MVA desires to continue assessing points as of the date on which the violation occurred, it must seek legislative amendment of TR §16-402 during the next legislative session. Pending a decision by the General Assembly on such a proposal, the MVA may appropriately defer implementation of changes in its computer system.

STEPHEN H. SACHS, *Attorney General*

EDWARD R. K. HARGADON, *Assistant Attorney General*

JACK SCHWARTZ
Chief Counsel
Opinions and Advice

Editor's Note: In Chapter 88, Laws of Maryland 1986, the General Assembly provided that points are to be assessed as of the date of violation.

SYNOPSES OF OPINIONS
NOT PUBLISHED
IN THIS VOLUME

SYNOPSES OF OPINIONS

BUDGETARY ADMINISTRATION

COMPTROLLER—GOVERNMENT HOUSE—ACCOUNTING PROCEDURES FOR PAYMENT OF BILLS.

The accounting practices currently used in connection with expenditures for the operation and maintenance of Government House, while consonant with the basic purposes of Article 41, §197 and generally adequate to ensure sufficient control over expenditures, nonetheless fail to comply with the technical requirements of that statute.

Opinion No. 85-010 To:
The Honorable Howard A. Denis
March 8, 1985 *Senate of Maryland*

MARYLAND TRANSPORTATION AUTHORITY—"SPECIAL FUNDS"/"MONEYS OF THE STATE".

1) Authority toll revenues that are pledged to pay the principal and interest of revenue bonds are not "moneys of the State" subject to the appropriation process.

2) Authority toll revenues in excess of the amount needed to pay the principal and interest of revenue bonds are not "moneys of the State" subject to the appropriation process to the extent that, under a trust agreement, they are pledged for certain purposes for the benefit of the bondholders.

3) The General Assembly may enact legislation requiring the Authority to present its proposed budget and other financial documents to the General Assembly for review, but such legislation may not conflict with any trust agreement governing the revenues and actions of the Authority.

Opinion No. 85-005 To:
The Honorable Eileen M. Rehrmann
February 13, 1985 *Maryland House of Delegates*

INVESTMENT OF PUBLIC FUNDS—CECIL COUNTY COMMISSIONERS.

The Cecil County Commissioners may invest Counnty funds in any of the investment vehicles enumerated in Article 95, §22—including bonds and other obligations of the United States Government or its agencies—and are not limited to the types of deposits specified in County Code §1-31.

	To:
Opinion No. 85-026	*Mr. H.D. Rittenhouse*
	Administrative Assistant
November 18, 1985	*Cecil County Commissioners*

CRUELTY TO ANIMALS

ENFORCEMENT—HUMANE SOCIETIES—BALTIMORE COUNTY.

In Baltimore County, associations for the prevention of cruelty to animals do not have the authority to enforce the provisions of Article 27, §§63, 67, and 67A of the Maryland Code.

Opinion No. 85-007	To:
	The Honorable Donald K. Hughes
February 15, 1985	*Maryland House of Delegates*

GAMBLING

WICOMICO COUNTY—PERMISSIBLE ACTIVITIES.

1) Chapter 572 of the Laws of Maryland 1985 (Regular Session), now authorizes the issuance of licenses to conduct noncommercial gambling by any means except the use of slot machines or other coin-operated machines; 2) those activities may now be conducted in conjunction with traditional church or charity bazaars; and 3) nothing in State law presently limits either the value of prizes awarded to the participants in those gambling activities or the frequency with which any particular organization may conduct its gambling activities. However, the County may itself impose such restrictions if it chooses.

Opinion No. 85-033
December 19, 1985

To:
The Honorable R. Hunter Nelms
Sheriff for Wicomico County

HEALTH

ENVIRONMENTAL—ASBESTOS—EDUCATION—PUBLIC SCHOOLS—DEPARTMENT OF HEALTH AND MENTAL HYGIENE.

The Department of Health and Mental Hygiene has the authority (1) to require that public school officials take specified action to eliminate a health threat posed by asbestos; (2) to require that public school officials train certain of their employees in proper procedures for asbestos removal; and (3) to inspect public schools and, if necessary, order that school officials correct an asbestos hazard.

Opinion No. 87-017
July 2, 1985

To:
The Honorable Thomas H. Hattery
Maryland House of Delegates

LOCAL GOVERNMENT

CHARLES COUNTY FIRE AND RESCUE TAX—"AUDITED FINANCIAL STATEMENT".

The opinion concurs in the conclusion of the County Attorney for Charles County that "the 'audited financial statement' required by [§128(c) of the Public Local Laws of Charles County] should include all revenues and expenditures of the entity which is required to submit the statement.

Opinion No. 85-006
February 14, 1985

To:
County Commissioners of Charles County

MARYLAND HEALTH AND HIGHER EDUCATION FACILITIES AUTHORITY

BONDS—HOSPITALS.

The opinion analyzes several questions relating to the payment by the Maryland Health and Higher Education Facilities Authority of outstanding hospital obligations, under Article 43C, §16A of the Maryland Code, in the event of default by a delicensed hospital.

Opinion No. 85-032 To:
The Honorable John N. Bambacus
December 18, 1985 *Senate of Maryland*

OFFICE ON AGING

CONTINUING CARE FACILITIES—STATE HEALTH PLAN—CERTIFICATE OF NEED REQUIREMENTS.

The Office on Aging may not approve a feasibility study under Article 70B, §10(d) unless the number of all comprehensive, domiciliary, or extended care beds in the continuing care facility is determined to be "not inconsistent with the State health plan", whether or not those beds are exempt from certificate of need requirements.

Opinion No. 85-024 To:
Ms. Rosalie S. Abrams
October 16, 1985 *Director, Office on Aging*

PERSONNEL

OVERTIME COMPENSATION—ADMINISTRATIVE, EXECUTIVE, AND PROFESSIONAL EMPLOYEES.

Under Article 100, §76(b), the Secretary of Personnel has full authority and discretion to designate which "bona fide admininstrative, executive, and professional employees" of the State shall be ineligible to receive overtime compensation; and, under Article 100, §76(a), those administrative, executive, and professional employees not so designated by the Secretary shall be eligible and fully entitled to receive overtime compensation in the same manner as other State employees.

Opinion No. 85-008 To:
The Honorable Timothy F. Maloney
The Honorable Gary Alexander
March 1, 1985 *Maryland House of Delegates*

PUBLIC INFORMATION

FINANCIAL "ASSETS, HISTORY, OR ACTIVITIES"—MUNICIPAL BOND HOLDERS.

The names of municipal bond holders are exempt from public disclosure given the provisions of SG §10-617(f), which require a custodian to deny public inspection of a part of a public record that contains information about an individual's financial assets or activities.

Opinion No. 85-011 To:
Victor Cushwa, Chairman
April 15, 1985 *Local Government Bond Law Task Force*

PUBLIC OFFICERS

SALARIES—LOCAL GOVERNMENT—MUNICIPAL CORPORATIONS.

Section C-402.C of the Charter of the Town of Ocean City conflicts with Article III, §35 of the Maryland Constitution; consequently, §C-402.C may not be used to permit the payment of in-term salary increases to incumbent officeholders.

Opinion No. 85-012 To:
Guy R. Ayers, Esquire
April 23, 1985 *City Solicitor*

PUBLIC SAFETY

CRIMINAL INJURIES COMPENSATION BOARD—PERSONNEL.

The Secretary of Public Safety and Correctional Services has the authority to remove the Executive Director/Secretary of the Criminal Injuries Compensation Board without the Board's concurrence.

Opinion No. 85-009 To:
Jeffrey R. Schmieler, Commissioner
March 8, 1985 *Criminal Injuries Compensation Board*

SHERIFFS

DEPUTIES—LAW ENFORCEMENT OFFICERS' BILL OF RIGHTS.

Correctional officers employed by the Harford County Sheriff's Department are not "law enforcement officers" as defined in Article 27, §272(b) of the Maryland Code. Hence, the Law Enforcement Officers' Bill of Rights does not apply to those deputies.

Opinion No. 85-027	To:
	The Honorable Theodore S. Moyer
November 20, 1985	*Sheriff of Harford County*

TAXATION

CONSTITUTIONAL LAW—VEHICLE LAWS—ROAD TAX ON MOTOR CARRIERS.

A law reducing the road tax registration fee for certain buses, such as proposed by Senate Bill 800 (1984), would be constitutional.

Opinion No. 85-003	To:
	The Honorable Laurence Levitan
January 23, 1985	*Senate of Maryland*

VEHICLE LAWS

ALCOHOLIC BEVERAGES—DRINKING ON PUBLIC PROPERTY.

Addressing certain questions regarding proposed legislation to prohibit the consumption of alcoholic beverages while driving on public roads in Montgomery County, the opinion advises that:

1) Article 2B, §§210 through 213 of the Maryland Code ("Drinking in Certain Places") may reasonably be interpreted as prohibiting the consumption of alcoholic beverages while driving.

However, there are suggestions in the language of those provisions that they were not intended to address that particular problem and, therefore, legislative clarification would be helpful.

2) Under the proposed law, the term "consume" would be given its ordinary dictionary meaning of (in this context) "drink".

3) In a prosecution under the proposed law, as in any other criminal prosecution, the State would be required to prove each element of the offense—including a defendant's actual consumption of an alcoholic beverage—beyond a reasonable doubt.

Opinion No. 85-002 To:
The Honorable Ida G. Ruben, Chair
January 15, 1985 *The Honorable S. Frank Shore*
Montgomery County Delegation

BUMPERS—ENFORCEMENT.

Both TR §22-105(a), which generally prohibits alterations to vehicles that reduce bumper effectiveness, and TR §22-105(b), which prohibits bumpers above a certain height, are effective and may be enforced.

Opinion No. 85-034 To:
Bernard D. Crooke, Chief of Police for
December 27, 1985 *Montgomery County*

ZONING AND PLANNING

LOCAL GOVERNMENT—PLANNING COMMISSION—MEMBERSHIP.

The Town of Mount Airy may provide by ordinance for the appointment of an alternate member of the Town Planning Commission.

Opinion No. 85-013 To:
Charles O. Fisher, Esquire

April 26, 1985

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