

ID # 168269 CU  
20072

**WHITE HOUSE  
CORRESPONDENCE TRACKING WORKSHEET**

O - OUTGOING

H - INTERNAL

I - INCOMING

Date Correspondence Received (YY/MM/DD)    /    /   

Name of Correspondent: Bill Barr

MI Mail Report

User Codes: (A)    (B)    (C)   

Subject: Applicability of 18 U.S.C. § 208  
to General Policy Deliberations  
Decisions, and Actions Relating to  
Iraq's Recent Invasion of Kuwait

ROUTE TO:

ACTION

DISPOSITION

Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
	<u>Cuyc</u>	ORIGINATOR	<u>9/8/08</u>			<u>9/8/08</u> PS
		Referral Note:	<u>  </u>			<u>  </u>
			<u>  </u>			<u>  </u>
		Referral Note:	<u>  </u>			<u>  </u>
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			<u>  </u>			<u>  </u>
		Referral Note:	<u>  </u>			<u>  </u>

**ACTION CODES:**

- A - Appropriate Action
- C - Comment/Recommendation
- D - Draft Response
- F - Furnish Fact Sheet to be used as Enclosure

- I - Info Copy Only/No Action Necessary
- R - Direct Reply w/Copy
- S - For Signature
- X - Interim Reply

**DISPOSITION CODES:**

- A - Answered
- B - Non-Special Referral
- C - Completed
- S - Suspended

**FOR OUTGOING CORRESPONDENCE:**

- Type of Response = Initials of Signer
- Code = "A"
- Completion Date = Date of Outgoing

Comments: \_\_\_\_\_

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Prime Subject Code: \_\_\_\_\_ Secondary Subject Codes: \_\_\_\_\_

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## PRESIDENTIAL REPLY

Code	Date	Comment	Form
C	_____	_____	P.
DSP	_____	_____	Media:
	Time: _____	Time: _____	

### SIGNATURE CODES:

- Cpn - Presidential Correspondence
- n - 0 - Unknown
- n - 1 - George Herbert Walker Bush
- n - 2 - George Bush
- n - 3 - George
- CLn - First Lady's Correspondence
- n - 1 - Barbara Bush
- n - 2 - Barbara
- n - 3 - Bar
- n - 4 - Mrs. Barbara Bush
- Cbn - Presidential & First Lady's Correspondence
- n - 1 - Barbara & George Bush
- n - 2 - Barbara & George

- MEDIA CODES:
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  - C - Copy
  - D - Official document
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  - H - Handcarried
  - L - Letter
  - M - Mailgram
  - O - Memo
  - P - Photo
  - R - Report
  - S - Sealed
  - T - Telegram
  - V - Telephone
  - X - Miscellaneous
  - Y - Study

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- Remainder of case not scanned.
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- Enclosure(s) not scanned. → *Entire case not scanned*
- Proclamation not scanned.
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- Statement not scanned.
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Comments:

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# Withdrawal/Redaction Sheet (George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01. Memorandum	Case Number 168269CU From J. Michael Luttig to C. Boyden Gray re: Applicability of 18 U.S.C. Section 208 to General Policy Deliberations, Decisions, and Actions Relating to Iraq's Recent Invasion of Kuwait (18 pp.)	08/08/90	<del>P-5</del>	

**Collection:**

**Record Group:** Bush Presidential Records  
**Office:** Records Management, White House Office of (WHORM)  
**Series:** Subject File - General  
**Subseries:** Scanned  
**WHORM Cat.:** CO072  
**File Location:** 164306 to 169972

**Open on Expiration of PRA  
(Document Follows)**  
 By JL (NLGB) on 2/14/05

<b>Date Closed:</b> 8/19/2004	<b>OA/ID Number:</b> 00002-001
<b>FOIA/SYS Case #:</b> 1998-0099-F	<b>Appeal Case #:</b>
<b>Re-review Case #:</b> 2004-1908-S	<b>Appeal Disposition:</b>
<b>P-2/P-5 Review Case #:</b>	<b>Disposition Date:</b>
<b>AR Case #:</b>	<b>MR Case #:</b>
<b>AR Disposition:</b>	<b>MR Disposition:</b>
<b>AR Disposition Date:</b>	<b>MR Disposition Date:</b>

### RESTRICTION CODES

**Presidential Records Act - [44 U.S.C. 2204(a)]**

- P-1 National Security Classified Information [(a)(1) of the PRA]
- P-2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P-3 Release would violate a Federal statute [(a)(3) of the PRA]
- P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Removed as a personal record misfile.

**Freedom of Information Act - [5 U.S.C. 552(b)]**

- (b)(1) National security classified information [(b)(1) of the FOIA]
- (b)(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- (b)(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- (b)(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- (b)(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- (b)(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- (b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- (b)(9) Release would disclose geological or geophysical information



Office of the  
Assistant Attorney General

Washington, D.C. 20530

August 8, 1990

MEMORANDUM FOR C. BOYDEN GRAY  
Counsel to the President

Re: Applicability of 18 U.S.C. § 208 to General  
Policy Deliberations, Decisions, and Actions  
Relating to Iraq's Recent Invasion of Kuwait

This memorandum responds to your request for our opinion on whether the federal criminal conflict of interest statute, 18 U.S.C. § 208, bars Cabinet officers and other senior advisers with ownership interests in entities engaged in the production, sale or shipment of oil or other energy-related products from participating, without a waiver, in general policy deliberations, decisions, and actions concerning the United States response to Iraq's August 2 invasion of Kuwait. We conclude that section 208 does not bar these officials from participating in such general policy deliberations, decisions, and actions.<sup>1</sup>

Section 208 prohibits an executive branch officer or employee from participating "personally and substantially" in a "particular matter" in which, "to his knowledge," he has a "financial interest." Although general policy deliberations, decisions, and actions are not categorically beyond the reach of section 208, most such deliberations, decisions, and actions do not relate to "particular matter[s]" within the meaning of the statute. The term "particular matter" encompasses only matters where there is deliberation, decision, or action that is focused upon the interests of specific individuals or entities, or upon a discrete and identifiable class of individuals or entities. The term does not extend to the consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of individuals or entities, even where the consideration or action incidentally affects the interests of specific individuals or entities, or a class of discrete and identifiable individuals or entities. We do not believe that participation in the general policy deliberations, decisions, and actions concerning the United States response to Iraq's invasion

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<sup>1</sup> This memorandum memorializes the oral advice that this Office provided at the outset of deliberations concerning the United States response to the Iraqi invasion.

of Kuwait described below would constitute participation in "particular matter[s]" as so defined.

### DISCUSSION

Section 208 was enacted in 1962 as part of a general revision of the conflict of interest laws. Pub. L. No. 87-849, § 1(a), 76 Stat. 1119, 1124 (1962).<sup>2</sup> By its terms, section 208 prohibits an executive branch officer or employee from participating "personally and substantially" in a "judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter" in which, "to [the officer's

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<sup>2</sup> Section 208 provides in relevant part:

(a) Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or an officer or employee of the District of Columbia, including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest --

Shall be subject to the penalties set forth in section 216 of this title.

18 U.S.C. § 208(a). Subsection 208(b) provides for a waiver of the prohibitions in subsection 208(a) in certain circumstances, and for exemption of certain financial interests from the statute pursuant to regulation. A number of the departments have promulgated such regulations under the authority of subsection 208(b). See, e.g., 28 C.F.R. § 45.735-5(b) (Department of Justice).

or employee's] knowledge," he or she "has a financial interest."  
18 U.S.C. § 208(a) (emphasis added).<sup>3</sup>

The lone nonspecific term in the catalog of matters covered by section 208, "other particular matter," follows a list of specific proceedings and actions, each of which entails governmental deliberation, decision, or action that is focused upon the interests of specific individuals or entities or a discrete and identifiable class of individuals or entities. Under the rule of ejusdem generis, a long accepted canon of statutory construction, "a general statutory term should be understood in light of the specific terms that surround it." Hughey v. United States, 110 S. Ct. 1979, 1984 (1990).<sup>4</sup> That is, the scope of the more general term -- here, "particular matter" -- must take its meaning from the more specific, enumerated

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<sup>3</sup> Under existing authorities, section 208 applies to an officer or employee only if, in addition to meeting the other requirements of the statute, the officer or employee participates in a deliberation, decision, or action concerning a "particular matter" that will have a "direct and predictable effect" upon the officer's or employee's financial interest. Because we conclude that the general policy deliberations, decisions, and actions under consideration do not constitute "particular matters" within the meaning of section 208, we do not address whether such deliberations, decisions, and actions would have a "direct and predictable effect" upon oil or other energy-related financial interests.

<sup>4</sup> See also Black's Law Dictionary 464 (5th ed. 1979) (ejusdem generis means "that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are . . . to be held as applying only to persons or things of the same general kind or class as those specifically mentioned"); B. Garner, A Dictionary of Modern Legal Usage 209 (2d ed. 1987) (ejusdem generis "is a canon of statutory construction providing that when general words follow the enumeration of persons or things of a specific meaning, the general words will be construed as applying only to persons or things of the same general class as those enumerated"); 2A N. Singer, Sutherland Statutes and Statutory Construction § 47.17, at 166 (4th ed. 1984) ("Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."). The rule of ejusdem generis is inapplicable where its application would defeat the plain purpose of the legislation. Gooch v. United States, 297 U.S. 124, 128 (1936).

matters that surround it.<sup>5</sup> Indeed, the principle of eiusdem generis applies with special force in this context, because the more general term, "particular matter," is itself specific. The statute does not refer to "other matters," but to "other particular matters."<sup>6</sup>

To define the scope of the "other particular matter[s]" included within the reach of section 208, it is necessary to discern the common characteristics of the matters enumerated in the section that render each "particular" as distinguished from

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<sup>5</sup> Congress intended the principle of eiusdem generis to govern construction of the provision:

The bill would extend the[] scope [of the conflict of interest laws] to include the vast range of administrative proceedings and other similar matters which comprise a great part of the work of the Government departments and agencies today.

108 Cong. Rec. 21,981 (1962) (summary of the bill prepared by the Department of Justice and described by Senator Kefauver as "an excellent analysis of the bill") (emphasis added).

This Office, in an opinion written by then-Assistant Attorney General William H. Rehnquist, invoked the rule of eiusdem generis in interpreting the term "particular matter" as used in 18 U.S.C. § 207:

The term "particular matter" derives its meaning from the enumeration of other matters eiusdem generis that precedes it in each of the subsections (i.e., "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest").

Letter from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel to the Honorable Walter J. Hickel, Secretary of the Interior (July 14, 1969), at 4.

<sup>6</sup> See 5 C.F.R. § 2637.204(d) (discussing comparable language in 18 U.S.C. § 207(c)) ("the restriction does not encompass every kind of matter, but only a particular one similar to those cited in the statutory language, i.e., any judicial or other proceeding, application, request for a ruling or determination, contract, claim, controversy, investigation, charge, accusation, or arrest").

"general."<sup>7</sup> An examination of the matters specifically enumerated in section 208 reveals that each involves a determination of the interests of specific individuals or entities or a discrete and identifiable class of individuals or entities. In essentially every "judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, [or] arrest," an executive branch officer or employee considers taking action, or takes action, that is focused upon the interests of specific individuals or entities, or one or more discrete and identifiable classes of individuals or entities. Therefore, the term "other particular matter" must be construed to reach only those deliberations, decisions, and actions that are comparably focused upon the interests of specific individuals or entities, or a discrete and identifiable class of individuals or entities.<sup>8</sup>

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<sup>7</sup> The adjective "particular" also modifies each of the enumerated matters in the section. As Professor Bayless Manning observed in Federal Conflict of Interest Law (1964) [hereinafter "Manning"], section 208 "matches the language contained in Section 203" which, in turn, "is restricted to 'particular matters' such as a particular contract, a particular case, a particular proceeding, or a particular claim." Id. at 55, 134; see also United States v. Williams, 705 F.2d 603, 622 (2d Cir.) (construing "particular" to modify all terms in 18 U.S.C. § 203, which closely parallels section 208), cert. denied, 464 U.S. 1007 (1983).

<sup>8</sup> See, e.g., R. Jordan, Ethical Issues Arising From Present or Past Government Service, in Professional Responsibility 171, 177 (1978) [hereinafter "Jordan"] ("The purpose of this [particular matter] language throughout the federal conflict of interest laws is to limit application of the laws to actions focusing upon particular, distinct, and identifiable sets of facts with reasonably measurable implications and consequences.") (footnote omitted); Memorandum from Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel to the Solicitor of the Interior (Jan. 12, 1987) [hereinafter "Alito Memorandum"], at 3 ("the specific proceedings enumerated in section 208(a) all suggest the likely involvement of a numerically limited class of affected interests"); id. at 11 ("the statutory disqualification requirement [in section 208] extends to all discrete matters that are the subject of agency action"); Memorandum Opinion for the Chief Counsel, Food and Drug Administration from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, 2 Op. O.L.C. 151, 153 (1978) [hereinafter "Harmon Memorandum"] ("§ 208(a) applies to any discrete or identifiable decision, recommendation, or other matter").

(continued...)

Broad policy deliberations, decisions, and actions that are directed to the interests of a large and diverse group of individuals or entities are not sufficiently "particular" or narrow in focus to come within the scope of the statute.<sup>9</sup>

Thus, for example, a decision to pursue an administrative enforcement action against a specific company or group of companies is sufficiently focused upon the interests of a specific entity or a discrete and identifiable group of entities as to be comparable in particularity to an "investigation," a "judicial proceeding," or a "contract" negotiation. Consideration of a private bill to provide relief to a specific person or group of persons would also be a "particular matter" for the same reason. In contrast, deliberations on the general merits of an omnibus bill, such as the Tax Reform Act of 1986, are too diffuse in their focus to be analogous to an "application," "request for a ruling," or a "claim." Similarly, a decision by the Attorney General that the investigation and prosecution of white collar crime will receive greater resources also would not constitute a "particular matter." In sum, whether or not the object of deliberation, decision, or action constitutes a "particular matter" will depend upon how closely analogous the object of deliberation, decision, or action is to the object of a typical "judicial proceeding," "claim," "application," or other matter enumerated in section 208.

The phrase "other particular matter" in 18 U.S.C. § 208 is not qualified by the phrase "involving a specific party or parties" that appears in its sister provisions, 18 U.S.C. §§ 203, 205, and 207(a) & (b). Although the precise significance of that

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<sup>8</sup>(...continued)

It is worth noting in this regard that the reported prosecutions for violations of section 208 involved specific parties and "particular matters" of the types specifically enumerated in the statute.

<sup>9</sup> Our conclusion that the term "particular matter" extends only to matters focused upon the interests of specific individuals or entities, or a discrete and identifiable class of individuals or entities, rather than upon the interests of a large and diverse group of individuals or entities, is consistent with the ordinary meaning and usage of the word "particular." See, e.g., Random House Dictionary of the English Language 1414-15 (2d ed. 1987) ("particular" means "of or pertaining to a single or specific person, thing, group, class, occasion, etc., rather than to others or all; special rather than general").

omission is unclear,<sup>10</sup> this Office has historically taken the view that section 208 does not embody a "specific party" requirement.<sup>11</sup> The definition we set forth today should not be understood as including a "specific party" requirement. There is a distinction between a "specific party" and the members of a "discrete and identifiable class." The term "specific party" connotes an identified individual or entity that has a part in, or takes part in, a specific transaction or proceeding.<sup>12</sup> The term "discrete and identifiable class" comprises a class of individuals or entities that may or may not be identified, but who are identifiable. Thus, governmental action such as legislation or policymaking that is narrowly focused upon the interests of a specific industry or a specific profession is concerned with a "discrete and identifiable class" and may implicate section 208, yet neither the industry nor the

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<sup>10</sup> Compare R. Perkins, The New Federal Conflict-of-Interest Law, 76 Harv. L. Rev. 1113, 1127 (1963) (it is "doubtful" that "minor variations" in description of proceedings covered under various sections of the conflict of interest law, such as the presence or absence of the "specific parties" language, "carry any substantive difference") and Jordan, supra note 8, at 177 n.21 ("The omission of this additional language [referring to specific parties] from Section 208(a) could be read as making the definition of 'particular matter' broader in Section 208 . . . [, but] there is no basis in the legislative history for such a reading, and the omission appears to have been unintentional.") (citing Perkins) with Federal Personnel Manual, Chapter 735, Appendix C, at 4 ("The matters in which special Government employees are disqualified by section 208 are not limited to those involving a specific party or parties in which the United States is a party or has an interest, as in sections 203, 205, and 207. Section 208 therefore undoubtedly extends to matters in addition to contracts, grants, judicial and quasi-judicial proceedings, and other matters of an adversary nature.") and Manning, supra note 7, at 204 ("The significance of the phrase 'involving a specific party or parties' must not be dismissed lightly or underestimated. [The conflict of interest statute] discriminates with great care in its use of this phrase.").

<sup>11</sup> See, e.g., Alito Memorandum, supra note 8, at 6; Harmon Memorandum, supra note 8, at 154.

<sup>12</sup> See, e.g., Black's Law Dictionary 1010 (5th ed. 1979) (defining "party" as "[a] person concerned or having or taking part in any affair, matter, transaction, or proceeding, considered individually").

profession would be considered a "party" to the governmental action.<sup>13</sup>

The only conceivable definition of "particular matter" other than the one we adopt herein is any "given" deliberation, decision, or action. There are statements in one of our opinions from 1978 that could be read as defining the term in this manner. For example, one passage in that opinion reads that "the word 'particular' was included to make clear that an individual would not be disqualified from an entire area or range of activities merely because he might have a financial interest in a certain decision, proceeding, transaction, or recommendation arising within that area or range; disqualification is only required in the 'particular' matter, not as to the entire area or range." Harmon Memorandum, supra note 8, at 153 (emphasis added).<sup>14</sup> We doubt that that opinion intended such a definition. While it may be true that this interpretation gives a meaning to the word "particular," it does not accord the term its most commonly understood meaning. The word "particular" is most commonly understood as in contradistinction to the term "general." Nor does the interpretation ascribe to the term the meaning intended by Congress. As we note above, see discussion supra at 3-4 & note 5, Congress' intent (and the consistent view of this Office even prior to the 1978 opinion) was that the term be defined by

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<sup>13</sup> This distinction is recognized in regulations promulgated under 18 U.S.C. § 207(c), which, like section 208, encompasses "particular matter[s]" and does not include an express "specific party" requirement. The regulations state in part that a covered matter

need not be one "involving specific parties," and thus is not limited to disputed proceedings or contracts in which a party has already been identified.

5 C.F.R. § 2637.204(d) (emphasis added).

<sup>14</sup> The 1978 opinion, almost as an afterthought, attempted to introduce a particularity requirement through the "direct and predictable" strand of the section 208 analysis, see discussion supra note 3, by adding in a footnote that a matter does not have a direct and predictable effect unless an individual or an individual entity is affected "distinctively, and not merely as a member of the general public or as part of the entire business community." Harmon Memorandum, supra note 8, at 155 n.4. This is to adopt, in effect, the definition that we articulate herein. See discussion supra at 5-6. The flaw in the analysis, however, is the implicit suggestion that the distinctiveness of the effect is an element of the "direct and predictable effect" requirement, rather than the "particular matter" requirement.

reference to the enumeration of the preceding matters eiusdem generis.

Apart from its obvious incorrectness as a matter of law, such an interpretation would have crippling practical consequences for the government. If "particular matter" were so defined, participation in every matter, however general in scope, would be prohibited if the matter would have the requisite effect upon the employee's financial interest. If a President asked a Secretary of Defense who owned one share of stock in a single United States company whether he thought the United States should "get tough on Iraq," the Secretary arguably could not respond without fear of implicating section 208. A Secretary of the Treasury in all likelihood could not participate without a waiver in discussions about, and negotiations over, the size of the federal budget deficit. We cannot impute to Congress such an intent.

Even were this latter or another significantly broader construction of the term "particular matter" than the one embraced herein defensible, we would be hesitant to adopt it because section 208 is a penal statute and, as such, must be construed strictly. United States v. Chemical Foundation, Inc., 272 U.S. 1, 18 (1926) (predecessor statute to section 208 "is a penal statute and is not to be extended to cases not clearly within its terms or to those exceptional to its spirit and purpose") (emphasis added); Memorandum from Laurence H. Silberman, Deputy Attorney General to Richard T. Burrell, Office of the President (Aug. 28, 1974), at 5 (section 208 is a criminal statute requiring strict construction); see also Crandon v. United States, 110 S. Ct. 997, 1001-02 (1990) (stating that "it is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of [18 U.S.C. § 209]'s coverage"). As Chief Justice John Marshall observed:

The rule that penal laws are to be construed strictly is perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department.

United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820).  
Strict construction of penal statutes is

not merely a convenient maxim of statutory construction. . . . [The practice] is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited. Thus, to ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts

must decline to impose punishment for actions that are not plainly and unmistakably proscribed.

Dunn v. United States, 442 U.S. 100, 112 (1979) (emphasis added). Interpreting the phrase "other particular matter" to include matters that are not sufficiently similar to those specifically enumerated by Congress would violate this longstanding rule.

The legislative history of section 208 supports our conclusion as to the meaning of the term "other particular matter." Assistant Attorney General Katzenbach, testifying before Congress, stated that

[T]he word "particular" would modify "other matter" . . . to emphasize that the restriction applies to a specific case or matter and not to a general area of activity.

Federal Conflict of Interest Legislation, 1961: Hearings Before the Antitrust Subcomm. of the House Comm. on the Judiciary, 87th Cong., 1st Sess. 38 (1961) (statement of Assistant Attorney General Katzenbach) (addressing identical language in section 203) (emphasis added). The House Report expresses the same understanding of the limiting effect of the word "particular:"

Also, the word 'particular' would be inserted before 'other matter' to emphasize that the restriction applies to a specific case or matter and not to a general area of activity.

H.R. Rep. No. 748, 87th Cong., 1st Sess. 20 (1961).<sup>15</sup>

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<sup>15</sup> The legislative history on this point is otherwise sparse. For example, the Senate Report accompanying the statute states that "particular matter" covers "the whole range of matters in which the government has an interest." S. Rep. No. 2213, 87th Cong., 2d Sess. 12 (1962), reprinted in 1962 U.S. Code Cong. & Admin. News 3852, 3861. Similarly, the House Report states that "the enumeration is comprehensive of all matters that come before a Federal department or agency." H.R. Rep. No. 748, 87th Cong., 1st Sess. 20 (1961). These statements merely underscore that no form of governmental action is categorically excluded from the scope of section 208; they provide no insight into the purpose of the "particular matter" limitation.

The predecessor statute to section 208, formerly codified at 18 U.S.C. § 434 (1958), applied to conflicts of interest involving the "transaction of business," and was construed as not extending to "overall policymaking, planning, and advice." Staff of House Comm. on the Judiciary, 85th Cong., 2d Sess., Report on (continued...)

Our construction of the term "particular matter" also effectuates Congress' intention that the statute sweep broadly enough to reach all genuine conflicts of interest, yet not so broadly as to paralyze the federal government. In enacting section 208, Congress was acutely aware of the need to avoid restrictions that would expose executive branch officers and employees to criminal punishment without fair notice and deprive the President of the services of able men and women. See, e.g., H.R. Rep. No. 748, 87th Cong., 1st Sess. 2 (1961); see also id. at 6 ("[L]egal protections against conflicts of interest must be so designed as not unnecessarily or unreasonably to impede the recruitment and retention by the Government of those men and women who are most qualified to serve it.").

Finally, the construction we set forth is not inconsistent with our prior opinions on the scope of section 208. This Office has repeatedly taken the position that Congress' decision to modify the word "matter" with the adjective "particular" imposes a significant limitation on the reach of the section. In 1969, then-Assistant Attorney General William H. Rehnquist said of section 208's applicability to rulemaking:

[T]here are obvious limits to the term "particular matter" even when it is not modified by the language relating to parties. . . . If a sufficiently small and discrete enough group of persons or entities would be affected by the proposed rule-making, such a proceeding could very well be encompassed within the provisions of section 208. Were the affected groups sufficiently large . . . the limits of the term "particular matter" . . . would doubtless somewhere be reached.

Memorandum to the Files from William H. Rehnquist, Assistant

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15 (...continued)

Federal Conflict of Interest Legislation 42 (Comm. Print 1958). Section 208 was clearly intended to have a broader scope than its predecessor. The wider scope was achieved primarily through replacement of the "transaction of business" requirement with the more general language requiring only "participation," see, e.g., id. at 60, the effect of which is that section 208 reaches unilateral actions, such as the rendering of advice in a particular matter or unilateral governmental action upon the interests of another, whether or not the action could be considered commercial in character. There is nothing whatever in the legislative history to suggest that the purpose of expanding the "transaction of business" requirement in section 208 was to ensure that such non-particular matters as "overall policymaking" were per se included within the section.

Attorney General, Office of Legal Counsel (July 28, 1969), at 3.

This Office in 1974 addressed the application of section 208 to the Council of Economic Advisers and opined:

The initial question is whether the functions of the Council of Economic Advisers include the consideration of "particular matters" so as to bring into play the prohibitions of 18 U.S.C. 208(a). According to the U.S. Government Organization Manual, the activities of the Council are as follows:

"The Council analyzes the national economy and its various segments; advises the President on economic developments; appraises the economic programs and policies of the Federal Government; recommends to the President policies for economic growth and stability; and assists in the preparation of the economic reports of the President to the Congress."

It is doubtful on the basis of the description of the activities of the Council that it ever undertakes the consideration of particular matters covered by section 208(a).

Memorandum from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel to Dudley Chapman, Associate Counsel to the President (July 10, 1974), at 1 (emphasis added). Our opinion that the Council's recommendations to the President on such subjects as "policies for economic growth and stability" did not constitute "particular matters" for purposes of section 208 is illustrative of our opinions generally, which have construed the section as not reaching policy decisions of general impact. See also Memorandum for Kenneth A. Lazarus from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel (July 12, 1976), at 3-4 (government actions that affect the private sector "in only a generalized manner" most often are beyond the reach of section 208).

In 1978, this Office addressed the applicability of section 208 to private sector members of advisory committees in the Food and Drug Administration. Harmon Memorandum, supra note 8. In that opinion, we noted that subsection 208(a) "appl[ies] to rule-making proceedings or advisory committee deliberations of general applicability where the outcome may have a 'direct and predictable effect' on a firm with which the Government employee is affiliated, even though all other firms similarly situated will be affected in a like manner." Id. at 155. We explained, however, that "the outcome of the particular matter must affect the firm distinctively, and not merely as a member of the general

public or as part of the entire business community." *Id.* at 155 n.4 (emphasis added). Thus, if governmental action does not "distinctively" affect the interests of an identifiable class of firms, but rather affects those interests only as a consequence of its effects upon the interests of the public at large or the entire business community, section 208 would not apply.<sup>16</sup>

Most recently, in a 1987 opinion addressing the applicability of the section to general rulemaking and the formulation of general policy decisions, we emphasized that, although no form of governmental action is "categorically exclude[d]" from section 208, see Alito Memorandum, supra note 8, at 7; see also id. at 4-5, 7 n.10, "[t]his is not to say that the word 'particular' does not introduce some limiting principle into the statute's coverage. . . . [T]he term was intended to signify that an official need not be disqualified from participating in a 'general area of activity' just because he has a financial interest that would be affected by a 'specific' matter." *Id.* at 7.

Neither the 1978 opinion nor the 1987 opinion defines the term "particular matter." Nor does either opinion explain the relationship between the term "particular matter" and the "direct and predictable effect" requirement. See discussion supra note 3. This failure to define the term "particular matter" and, perhaps most important, the precise relationship between the term "particular matter" and the "direct and predictable effect" requirement has caused substantial (and understandable) confusion throughout the government. Because of the imprecision in the two opinions, government officers and employees and their ethics advisers have the mistaken impression that every matter is a "particular matter" for purposes of the statute, and that the only inquiry is whether action with respect to the matter will have a "direct and predictable effect" upon the officer's or employee's "financial interest." There is language in both opinions that suggests as much. For example, the 1978 opinion states that "§ 208(a) applies to a 'matter of any type' in which the employee has a financial interest." Harmon Memorandum, supra

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<sup>16</sup> See also Memorandum from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel re: General Restrictions Regarding Future Employment of Government Officers and Employees (Nov. 12, 1976), at 4 n.4 ("Of course, the matter must affect the [firm] distinctively, and not merely as a member of the general public or as part of the entire business community. For example, negotiations regarding future employment would not disqualify a government employee from participating in the framing of tax legislation that would eliminate the business expense deduction for entertainment expenses.").

note 8, at 155; see also discussion supra at 8-9 & note 14.<sup>17</sup> Similarly, the 1987 opinion states that "Congress intended the disqualification requirement in section 208 to apply to all governmental proceedings and actions." Alito Memorandum, supra note 8, at 3. On the other hand, passages in both opinions reaffirm that "particular matter" is indeed a separate inquiry and that the word "particular" itself imposes a significant limitation on what otherwise would be the reach of the section. See id. at 7 ("section 208's disqualification requirement should be limited . . . to the 'discrete and identifiable' matter that affects an official's financial interest, and not extended to related matters that do not have this effect") (emphasis added); Harmon Memorandum, supra note 8, at 153 ("the word 'particular' was included to make clear that an individual would not be disqualified from an entire area or range of activities merely because he might have a financial interest in a certain decision . . . arising within that area or range").

We believe that the fairest reading of both opinions is that they state only that any type of governmental action (e.g., legislation, rulemaking, policymaking) may constitute a "particular matter," and that whether it does or does not must be determined case-by-case. In our 1987 opinion, for example, we were asked "whether and, if so, to what extent [the] term ['particular matter'] includes 'general rulemaking and the formulation of general policy decisions.'" Alito Memorandum, supra note 8, at 1 (quoting opinion request from the Solicitor of

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<sup>17</sup> The 1978 opinion also states that "we have consistently interpreted § 208(a) to apply to rule-making proceedings or advisory committee deliberations of general applicability where the outcome may have a 'direct and predictable effect' on a firm with which the Government employee is affiliated. . . ." Harmon Memorandum, supra note 8, at 155 (emphasis added). Almost immediately thereafter, the opinion states that "[i]nterpreting the term 'particular matter' in the manner described above is consistent with the purposes of § 208(a)." Id. at 156 (emphasis added). The first of these statements refers to "deliberations of general applicability" and states that section 208 "applies" to them if they would have a "direct and predictable effect upon the employee's interest." The statement is categorical; it does not in any way suggest that the section would be implicated only if the deliberations were in fact "particular matter[s]." The second statement then characterizes the first statement as an interpretation of the term "particular matter." The juxtaposition of the two statements thus clearly gives rise to an implication that section 208 prohibits participation in any matter that will have a "direct and predictable effect" on an official's financial interest, whether or not the matter is "particular," seemingly reading out of the term "particular matter" the qualifying word "particular."

the Interior). We opined, consistent with our longstanding view, simply that general policymaking decisions are not per se excluded from the scope of section 208. Our opinion was not, however, that all such matters are necessarily "particular matter[s]" within the meaning of section 208. A conclusion that all such matters by definition are "particular matter[s]" would, contrary to congressional intent, give the section a sweep so all-encompassing that it would significantly impede the functioning of the Executive Branch. Under such a reading of the section, for example, an executive branch officer or employee who owned stock in any business located in the United States could not participate without a waiver in deliberations, decisions, or actions relating to a civil rights bill affecting private employers.

To the extent, however, that any of these passages was intended to suggest or imply that there is no requirement that a matter be "particular" or that the "particular matter" requirement is synonymous with the "direct and predictable effect" requirement, we reject the suggestion or implication. There is a "particular matter" requirement in section 208 separate and apart from the "direct and predictable effect" requirement, and the definition of "particular matter" is as set forth herein.

Turning to your specific request, you have advised that our opinion should assume that there could be deliberations, decisions, and actions (including discussions both within the government and with foreign governments) with respect to such broad policy matters as the possible imposition of economic sanctions on Iraq; the freezing of Iraqi and Kuwaiti assets; the interruption of arms shipments; the possible increase or decrease of the levels of foreign oil production; the deployment and stationing of armed forces in and around the areas of conflict; the blockading, in whole or in part, of the Persian Gulf; or interference with Iraqi and Kuwaiti oil export capabilities (including the closing of oil pipelines). We do not believe that these and similar deliberations, decisions, and actions to develop and implement an overall United States response to the Iraqi invasion of Kuwait constitute "particular matter[s]" within the meaning of section 208.

The formulation and implementation of a comprehensive American response to the invasion of Kuwait requires consideration of, and decisions with respect to, the full panoply of United States political, military, diplomatic, and economic interests. These all-encompassing strategic deliberations, decisions, and actions are not focused upon the interests of a discrete and identifiable class of individuals or entities. They are directed to the stabilization of the world economies, including that of the United States, and the preservation of political stability worldwide. Their focus is upon the aggregate

interests of the United States as a nation, and the composite interests of all countries. The actions under consideration would affect the interests of every sector of the United States economy and every individual and entity within the United States; they would affect virtually every economic sector and individual in probably every foreign country as well. The effects would not be distinctive upon any individual, group, or sector; each would be affected only as a consequence of the effects on the nation as a whole and the world at large. The effects of these described deliberations, decisions, and actions are global. Indeed, it would be difficult to conceive of a circumstance where the interests at stake could be more diffuse and generalized. As with any broad policy matter of this scope, a great number of companies and individuals will be incidentally, and perhaps even substantially, affected by the development and implementation of the comprehensive United States response. This, however, does not render the deliberations, decisions, and actions any less diffuse in their focus. These are far-reaching issues of not only national but global interest. As such, they bear no resemblance whatever to the consideration of actions focused upon the interests of specific individuals or entities, or a discrete and identifiable class of individuals or entities, which is characteristic of the "particular matter[s]" covered by section 208.

Accordingly, we conclude that section 208 does not apply to participation in the above-described and similar deliberations, decisions, and actions (including discussions both within the government and with foreign governments) concerning the development and implementation of an overall American strategy for responding to the Iraqi invasion. Executive branch officials who have ownership interests in oil, oil-related, or other energy-related entities therefore may participate in general deliberations, decisions, and actions concerning the impact of the Iraqi invasion on oil supplies, the price of oil, and international economic conditions; participate in deliberations, decisions, and actions concerning the imposition of economic sanctions on Iraq, the freezing of Iraqi and Kuwaiti assets, the interruption of arms shipments, the increase or decrease in the levels of foreign oil production, or the closing of Turkey's or Saudi Arabia's pipelines with Iraq; analyze and act upon the various military options, such as the deployment and stationing of armed forces in, and the blockading of, the Persian Gulf; and otherwise engage in overall consideration of and action upon various diplomatic or economic measures.

During development of the overall American response, there may come times when consideration is given to taking actions that are focused upon the interests of specific individuals or entities, or a class of discrete and identifiable individuals or entities. For example, there could be deliberation upon whether to close a particular company's pumping station or pipeline by

force or otherwise; a decision to occupy a certain oil field managed by a particular company or to seize one or more identified oil tankers; or action targeted narrowly at a discrete industry or sub-industry of the economy. These kinds of deliberations, decisions, and actions, focused on the interests of specific individuals or entities, or a discrete and identifiable class of individuals or entities, arguably could constitute "particular matter[s]" within the meaning of the statute depending upon the particular facts, and should be addressed accordingly.<sup>18</sup>

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<sup>18</sup> Deliberations, decisions, or actions on a general policy matter often, of course, evolve into deliberations, decisions, or actions on "particular matter[s]." This Office opined in 1963 that individuals who served as, among other things, directors of banks, oil and chemical companies, various manufacturing concerns, and an airline could serve as special advisers to the President on the development of supersonic transport without running afoul of section 208. The special advisers' task was "to review the present status of the planning for the supersonic transport program and to make recommendations to the President on all aspects of such planning, including the proper roles and inter-relationships of the Government, airframe and engine manufactures, airlines and financial institutions." Memorandum from Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel, for the Honorable Myer Feldman, Deputy Special Counsel to the President (Aug. 14, 1963), at 1. Even though banks, oil companies and an airline could be described at a minimum as having a generalized financial interest in the content of recommendations to the United States Government on such issues, Assistant Attorney General Schlei opined that neither the advisers, nor the companies they advised, had a sufficiently immediate financial interest to come within section 208. *Id.* at 3. He advised, however, that when the advisers "arrive at the point of formulating recommendations for the allocation or grant of business to specific companies" section 208 could well be implicated. *Id.* at 4 (emphasis added).

CONCLUSION

We conclude for the reasons set forth above that Cabinet officers and other senior advisers may participate in the described and similar general policy deliberations, decisions, and actions relating to the United States response to the recent Iraqi invasion of Kuwait, consistently with the proscriptions of 18 U.S.C. § 208, without first obtaining a waiver under 18 U.S.C. § 208(b).



J. Michael Luttig  
Acting Assistant Attorney General  
Office of Legal Counsel