



OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

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MEMORANDUM FOR NINA E. OLSON
NATIONAL TAXPAYER ADVOCATE

FROM: Carol A. Campbell *CA*
Counsel to the National Taxpayer Advocate
CC:NTA

SUBJECT: Authority for the National Taxpayer Advocate to File Amicus Briefs
with the Courts of the United States

Issues

Can the National Taxpayer Advocate submit an amicus brief to the courts of the United States?

Conclusions

No. A specific grant of legislative authority would be required in order to allow the National Taxpayer Advocate (NTA) to submit an amicus brief to the courts of the United States. The Constitution would not seem to prohibit the Congress from authorizing the NTA to submit an amicus brief to any of the courts of the United States. However, there would be no authority to file an amicus brief unless specifically authorized by statute. Although, Congress has given limited authority to the Chief Counsel for Advocacy of the Small Business Administration to file amicus briefs in any U.S. court in the Nation when a federal rule is at issue that affects small entities, to date, that authority has not been exercised; however, the constitutionality of this grant of authority has been questioned.

Discussion

The United States District Courts have original jurisdiction over all civil actions, suits or proceedings that are commenced by the United States, its agencies or the officers of an agency that is expressly authorized to sue by an Act of Congress. 28 U.S.C. § 1345 (2002). The conduct of litigation for the United States is reserved to the Department of Justice. 28 U.S.C. § 516 (2002).

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The authority of the Department of Justice and the Attorney General are found in Title 28, Part II, Chapter 31 of the U.S. Code. With three exceptions¹, all functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General. 28 U.S.C. § 509 (2002). 28 U.S.C. § 510 (2002) authorizes the Attorney General to authorize any other officer, employee or agency of the Department of Justice to perform any function of the Attorney General that he considers appropriate.

28 U.S.C. §§ 516-519 address the role of the Attorney General and the Department of Justice in litigation involving the United States and/or its interests. Under 28 U.S.C. § 516 (2002), the conduct of litigation is reserved to the Department of Justice. Specifically, 28 U.S.C. § 516 provides:

Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or an officer thereof is a party, or is interested and securing evidence therefore, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

The Attorney General is directed to supervise all litigation to which the United States, an agency, or officer thereof is a party, except as otherwise authorized by law. 28 U.S.C. § 519 (2002). The Solicitor General, or any officer of the Department of Justice may be sent by the Attorney General to any State or district in the United States to attend to the interest of the United States in any suit pending in federal or state court, or to attend to any other

¹28 U.S. C. § 509 (2002) provides:

All functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General except the functions -

(1) vested by subchapter II of chapter 5 of title 5 in administrative law judges employed by the Department of Justice;

(2) of the Federal Prison Industries, Inc., and

(3) of the Board of Directors and officers of the Federal Prison Industries, Inc.

interest of the United States. 28 U.S.C. § 517 (2002). Unless the Attorney General directs otherwise, the Attorney General and Solicitor General shall conduct and argue suits and appeals in the Supreme Court. 28 U.S.C. § 518 (2002). These provisions are further complemented by 5 U.S.C. § 3106 (2002) which provides in general that, except as otherwise authorized by law, the head of an executive or military department may not employ an attorney to conduct litigation in which the U.S., an agency or its employee is a party or has an interest. Instead, the matter must be referred to the Department of Justice.

While it is clear that the statutory scheme reserves the conduct and oversight of litigation to the Department of Justice, there are exceptions to the general rule. For example, pursuant to I.R.C. § 7452, the Secretary of the Treasury is represented by the Chief Counsel of the Internal Revenue Service or his delegate in proceedings before the United States Tax Court.² See also Comptroller of Currency v. Lance, 632 F. Supp. 437 (N.D. GA 1986) (holding that the Comptroller of Currency was authorized to bring suit to enforce §§ 13(a) and 14(a) of the Securities Exchange Act (15 U.S.C. §§78m(a) and 78n(a)) because the suit was within the exception set forth in 28 U.S.C. § 516 for situations "otherwise authorized by law"); Cooper v. Tennessee Valley Auth., 723 F. 2d 1560 (Fed. Cir. 1983) (holding that the Tennessee Valley Authority had the authority to be represented by its own attorneys before the Claims Court, and that it was not required to be represented by the Department of Justice. The Federal Courts Improvement Act of 1982, Pub. L. No. 97-164,

²I.R.C. § 7452 is not specifically identified as an exception to 28 U.S.C. § 516, although the reason is not clear. Prior to 1926, legal counsel for the Bureau of Internal Revenue was located in the Office of the Solicitor of Internal Revenue in the Department of Justice. As part of the Revenue Act of 1926 Congress created the Office of General Counsel for Internal Revenue within the Department of Treasury and abolished the Office of the Solicitor of Internal Revenue. Revenue Act of 1926, Pub. L. No. 69-20, § 1201(a), 44 Stat. 126-28 (1926) ; Internal Revenue Service, Pub. No. 1694, IRS Historical Fact Book: A Chronology 1946 -1992 112 (1992). The General Counsel was required to perform all of the duties previously performed by the Office of the Solicitor of Internal Revenue. H. Rep. No. 69-1, at 21 (1925); S. Rep. No. 69-52 at 14 (1926). In 1932, there was apparently legislation enacted that was intended to shift all tax litigation work, except cases before the Board of Tax Appeals, back to the Department of Justice. This legislation was followed by an executive order on June 10, 1933, allowing the civil division of the Office of General Counsel to gradually turn over civil internal revenue cases arising in the District Courts, U.S. Court of Claims and the Supreme Court to the Department of Justice. See Chommie, John C., The Internal Revenue Service 170-71 (1970); Internal Revenue Service, Pub. No. 1694, IRS Historical Fact Book: A Chronology 1946 -1992 120 (1992). In 1934, the Tax Division was created within the Department of Justice to carry out these duties.

96 Stat. 51 (1982), which provided for the Attorney General and the Solicitor General to conduct and argue suits and appeals in the Supreme Court, the United States Claims Court, the Federal Circuit Court of Appeals and the Court of International Trade, did not affect the authority of the TVA to represent itself by attorneys of its choosing under the Tennessee Valley Authority Act of 1933). Other statutes that grant agencies the authority to employ outside counsel or to use their own attorneys to represent them in Court include: 49 U.S.C. § 16(11) (Interstate Commerce Commission); 16 U.S.C. § 825m(c) (Federal Power Commission); 12 U.S.C. § 1464(d)(1) (Federal Home Loan Bank Board); and 29 U.S.C. § 154(a) (National Labor Relations Board). Unless there are clear legislative directives granting express exclusive authority to an agency to conduct its own litigation, the Attorney General, and hence the Department of Justice, has plenary authority and responsibility over all litigation to which the United States or one of its agencies is a party. 6 Op. O.L.C. 47 (Jan. 4, 1982).

In addition to the exceptions involving the conduct of litigation, Congress has also previously granted statutory authority to an officer of the United States to appear as an amicus curiae. Title 5 of the United States Code addresses the statutes related to government organization and employees. Under Chapter 6, also known as the Regulatory Flexibility Act, Congress has granted the Chief Counsel for Advocacy of the Small Business Administration the authority to appear as amicus curiae in any action brought in a court of the United States to review a rule. 5 U.S.C. § 612(b). In any such action, the Chief Counsel for Advocacy of the Small Business Administration is authorized to present his or her views regarding compliance with Chapter 6 (of Title 5, U.S.C.), the adequacy of the rulemaking record with respect to small entities and the effect of the rule on small entities.³

The Office of Advocacy of the Small Business Administration was created in 1976. Small Business Investment Act, Pub. L. No. 94-305, Title II, § 201, 90 Stat. 668 (1976). The office has numerous statutory "primary functions" which include examining the role of small business in the American economy and the contributions that small businesses can make, assessing the effectiveness of existing Federal subsidies and assistance programs for

³The Office of Senate Legal Counsel is similarly authorized to appear as an amicus curiae (or to intervene) in the name of the Senate, or in the name of an officer, committee, subcommittee, or chairmen of a committee or subcommittee of the Senate in any legal action or proceeding pending in any court of the United States, or of a State or political subdivision thereof, in which the powers and responsibilities of Congress under the Constitution are placed in issue. However, because the Senate is part of the legislative branch of the government, and not the executive branch, the authority of the Senate Legal Counsel would not present quite the same issues as granting an officer of the executive branch the authority to file an amicus brief in any court proceeding.

small business, measuring the direct costs and other effects of government regulation on small businesses and determining the impact of the tax structure on small businesses. 15 U.S.C. § 634b (2002). However, perhaps the most visible responsibility of the Office of Chief Counsel for Advocacy of the Small Business Administration is to oversee agency compliance with the Regulatory Flexibility Act. See Greater Dallas Home Care Alliance v. United States, 36 F. Supp. 2d 765 (N.D. Tex. 1999) (Discussing the Regulatory Flexibility Act and describing the Chief Counsel for Advocacy of the Small Business Administration as "the watchdog for agency compliance with the RFA" 36 F. Supp. 2d at 766, n.8)

In 1980, Congress authorized the Chief Counsel for Advocacy to file an amicus brief to present his views with respect to the effect of the rule at issue on small entities. 5 U.S.C. § 612(b); Regulatory Flexibility Act, Pub. L. No. 96-354, § 3(a), 94 Stat. 1170 (1980). In 1996, Congress clarified 5 U.S.C. § 612(b) to allow the Chief Counsel for Advocacy to also file an amicus brief to present his or her views with respect to compliance with Chapter 6 of Title 5 and the adequacy of the rulemaking record. Contract with America Advancement Act of 1996, Pub. L. No. 104-121, Title II, Subtitle D, § 243(b), 110 Stat. 866 (1996). Despite the fact that the Chief Counsel for Advocacy has had the authority to file an amicus brief since 1980, that office has only filed an amicus brief on one occasion, and that brief was eventually withdrawn.

In Lehigh Valley Farmers v. Block, 640 F. Supp 1497 (E.D. Pa. 1986) affd. 829 F. 2d 409 (3d. Cir. 1987), the Chief Counsel for Advocacy requested permission to file an amicus brief. The Court granted the request. Although not reported in the opinion, the brief was apparently filed. According to a committee report accompanying a predecessor to the legislation that clarified the issues on which the Chief Counsel for Advocacy could submit an amicus brief, there was a great deal of wrangling between the Department of Justice and the Chief Counsel for Advocacy. The Department of Justice apparently thought that the provision granting the Chief Counsel for Advocacy the authority to file an amicus brief violated the Constitution because it would impair the ability of the executive branch to fulfill its constitutional functions.⁴ Eventually, the Chief Counsel for Advocacy withdrew the brief. As a result, no court has ruled on the issue of whether the Congress can grant an officer of

⁴The Office of Legal Counsel in the Department of Justice apparently takes the view that it is not appropriate for an agency to take a position contrary to the Department of Justice in court, whether or not the agency has statutory litigating authority independent of the Department of Justice, because disputes between executive agencies should be settled by the executive branch, not by a court. See 12 Op. O.L.C. 21 (Jan. 15, 1988) (citing Memorandum from Assistant Attorney General Olson to the Assistant Attorney General, Civil Division, "Amicus Curiae Role of the Small Business Administration's Chief Counsel for Advocacy Under the Regulatory Flexibility Act," May 17, 1983.)

the administration the authority to file an amicus brief. See H. Rep. No. 104-49, Part 1 (1995)(Attached)⁵.

In conclusion, although the National Taxpayer Advocate is not currently authorized to file a amicus curiae brief in any court, Congress could amend I.R.C. § 7803 to provide the National Taxpayer Advocate with that authority. If Congress granted the National Taxpayer Advocate the authority to file an amicus brief, it is possible that the Department of Justice would attempt to challenge the constitutionality that authority if it were ever actually exercised.

Attachments:

H. Rep. No. 104-49, Part 1 (1995).

⁵See also Memorandum of the American Law Division (Congressional Research Service) of the Library of Congress, Oct. 22, 1993 (Setting forth a Constitutional Analysis of § 612(b) of the Regulatory Flexibility Act authorizing the Chief Counsel to Advocacy of the Small Business Administration to appear as Amicus Curiae in any court action to review and agency rule), attached as Appendix D to H. Rep. No. 104-49, Part 1 (1995).