Subsidy Layering--Delegation to HCAs

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Subject: Subsidy Layering--Delegation to HCAs

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MEMORANDUM FOR: Nicolas P. Retsinas, Assistant Secretary for Housing-Federal Housing Commissioner, H

FROM: Nelson A. D¡az, General Counsel, G

SUBJECT: Effect of Former President Bush's Signing Statement on the Implementation of Section 911 of the Housing and Community Development Act of 1992

This memorandum responds to your request regarding the implementation of Section 911 of the Housing and Community Development Act of 1992 ("1992 HCD Act"), which section deals with the subsidy layering review process for housing projects receiving both HUD assistance and low-income housing tax credits. As you are aware, when signing H.R. 5334, the "Housing and Community Development Act of 1992," into law, former President Bush issued a statement containing an interpretation of Section 911. Adherence to his statutory reading, however, would preclude the full implementation of Section 911 as the Office of Housing thinks it was envisioned by Congress and as they would prefer to implement it. In this regard, the Office of Housing has prepared and published guidelines that provide for full delegation to housing credit agencies ("HCAs") to perform the subsidy layering review and certification in accordance with the HUD-established guidelines and subject to HUD monitoring. As set forth in more detail below, we believe that there are sufficient arguments to support the Office of Housing's recent issuance of guidelines to that effect, even though such guidelines do not expressly follow the interpretation set forth in former President Bush's signing statement. In a memorandum dated February 19, 1993 from George L. Weidenfeller to James Schoenberger, OGC took the position that Presidential statements on the constitutionality of Federal statutes are binding on the Federal Government, but that agencies could always request a reconsideration of such determinations. OGC further recommended that the Office of Housing get an opinion from the Department of Justice's Office of Legal Counsel, the office charged with handling constitutional issues for the government, on its desired implementation. Since a request for an opinion was never transmitted to DOJ, we will revisit in this memorandum the legal issues connected with this matter.

-Background-

Section 102(d) of the Department of Housing and Urban Development Reform Act of 1989 ("HUD Reform Act"),

42 U.S.C. Section 3545, provides that the Secretary shall certify that assistance within the jurisdiction of HUD "shall not be more than is necessary to provide affordable housing after taking account of [other government] assistance." Section 102(b)(1) of the HUD Reform Act defines "other government assistance" as ". . . any related assistance from the Federal Government, a State, or a unit of general local government, or any agency or instrumentality thereof, that is expected to be made available with respect to the project or activities for which the applicant is seeking assistance. Such related assistance shall include but not be limited to any loan, grant, guarantee, insurance, payment, rebate, subsidy, credit, tax benefit, or any other form of direct or indirect assistance." Section 102(d) has been implemented for housing projects at 24 C.F.R. Sections 12.50 and 12.52. 24 C.F.R. Section 12.52(a) provides that "[b]efore HUD makes any assistance subject to this subpart [D] available with respect to a housing project for which other government assistance is, or is expected to be, made available, HUD will determine, and execute a certification, that the amount of the assistance is not more than is necessary to make the assisted activity feasible after taking account of the other government assistance." 24 C.F.R. Section 12.50 makes clear that mortgage insurance for multifamily projects, under 24 C.F.R. subtitle B, chapter II, is assistance that triggers the subsidy layering review and certification requirements. In addition, prior to the recent publication of new Administrative Guidelines for Subsidy Layering at 59 Fed. Reg. 9332 (Feb. 25, 1994), the Office of Housing followed Administrative Guidelines for subsidy layering that it had previously published at 56 Fed. Reg. 14436 (April 9, 1991).

Section 911(a) of the 1992 HCD Act provides that the Secretary shall establish guidelines for HCAs to implement the requirements of Section 102(d) of the HUD Reform Act for projects receiving assistance within the jurisdiction of HUD and under Section 42 of the Internal Revenue Code of 1986 ("Code), i.e., low-income housing tax credits. Section 911(c) further provides that "[a]s of January 1, 1993, a[n HCA] shall carry out the responsibilities of Section 102(d) ... for projects allocated a low-income housing tax credit ... if such agency certifies to the Secretary that it is properly implementing the guidelines established under subsection (a). The Secretary may revoke the responsibility delegated in the preceding sentence if the Secretary determines that a[n HCA] has failed to properly implement such guidelines."

When former President Bush signed the 1992 HCD Act, he issued a statement saying, among other things, that: "[t]o avoid the constitutional difficulties that would arise if Section 911 were understood to vest in housing credit agencies the exercise

of significant authority under Federal law, I interpret Section 911 to permit the Secretary to formulate guidelines under which he will retain the ultimate authority to make the determinations required by Section 102(d)."

The foregoing language in former President Bush's signing statement was not drafted by HUD. The issuance of this Presidential signing statement did, however, raise a question about whether or not the Office of Housing could in fact issue

guidelines that do not follow the interpretation of former President Bush, but rather provide for full delegation to the HCAs to perform the subsidy layering review. To resolve this question, three issues must be considered, namely: (1) absent former President Bush's signing statement, whether the Office of Housing's implementation is supported by the statute and the Congressional legislative history; (2) the legal import and effect of the signing statement; and (3) whether there is a real constitutional problem with the duties assigned to HUD and the HCAs under Section 911 of the 1992 HCD Act and Section 102(d) of the HUD Reform Act which must be avoided.

I. Absent Former President Bush's Signing Statement, Is the Office of Housing's Implementation that Fully Delegates the Subsidy Layering Review to the HCAs Supported by the Statute and the Congressional Legislative History?

-Statute-

We believe that the language of Section 911 and the Congressional legislative history can be read to support the Office of Housing's full delegation to the HCAs to perform the subsidy layering review and certification in accordance with HUD established guidelines and with HUD monitoring of the HCAs' performance. In this regard, the statute itself, in Section 911(c), states that an HCA "shall carry out the responsibilities of Section 102(d)" for projects allocated tax credits if such HCA certifies that it is properly implementing the HUD established guidelines. Clearly, one of the "responsibilities of Section 102(d)" is the ultimate certification that no more assistance than is necessary is provided to housing projects with HUD insured mortgages. Further, it is clear that this certification cannot be made without first performing the subsidy layering review because it is the review that provides the information necessary to make that final certification about the lack of excessive subsidy.

There is arguably an ambiguity in Section 911. In this regard, Section 102(d) was not repealed or expressly amended Section 911 appears to have originated as Section 103 of S. 3031. The Senate Report contains an explanation of this predecessor provision, which explanation states that the Senate was amending Section 102(d) of the HUD Reform Act. See S. Rep. No. 102-332, July 23, 1992, p. 124. As with the language in Section 911 itself, however, there was no language in Section 103 of S. 3031, i.e., the predecessor section, which actually amended Section 102(d) of the HUD Reform Act. by Section 911 and, thus, there still exists a statute that requires the Secretary to perform the subsidy layering review and issue a subsidy layering certification. Section 911 also does not expressly state that HCAs will be the ultimate determiner on these issues. Finally, the interpretation offered by former President Bush suggests that the statute can be read in more than one way.

These facts, however, do not necessarily preclude the Office of Housing's implementation. Regarding the fact that Section 102(d) was not repealed, Regarding former President Bush's

interpretation, which raises the possibility of constitutional concerns, we discuss later in this memorandum why his reading should not hinder the Office of Housing's implementation. we first point out that Section 911 is a more recent statute and, thus, is Congress' latest word on the matter. Section 911 also relates only to tax credit projects. There can, however, exist projects with other kinds of government assistance. Therefore, one could argue that it makes sense that Section 102(d) was not repealed because the Secretary's authority to provide the subsidy layering certification for these other projects had to be maintained. It also was necessary to maintain the Secretary's authority under Section 102(d) in order for the Secretary to perform the subsidy layering review and certification functions where an HCA does not certify that it will comply with HUD's guidelines or where the Secretary revokes an HCA's Section 911 responsibilities.

-Legislative History-

In addition to the statute itself, the Congressional legislative history supports a reading consistent with the approach preferred by the Office of Housing. Both the Senate and the House Reports indicate that Congress was interested in getting the Department "out of the loop" on the subsidy layering process and in avoiding duplication of effort and delays in such process. As noted, Section 911 appears to have originated as Section 103 of S. 3031. In connection with Section 103, the committee stated that it was deeply concerned that HUD's implementation of Section 102(d) had led to unnecessary project delays and had discouraged developers from

undertaking the more difficult projects which need additional federal subsidies. S. Rep. No. 102-332, July 23, 1992, p. 11. The committee also expressed concern with the "inordinate time delays" associated with HUD's review process for subsidy layering. Id. at p. 11. The Senate Report also said HCAs would be delegated the responsibility for carrying out Section 102(d) if certified to be properly implementing HUD's guidelines. (Emphasis added.) Id. at 124. See also H.R. Rep. 102-760, July 30, 1992, pp. 54, 160-161 and Congr. Rec., Aug. 5, 1992, p. H 7458. Further, the September 10, 1992 Congressional Record, which memorialized the debates on S. 3031 (the original Senate Bill), contains a "Statement of Administration Policy" which indicates that the Bush Administration was opposed to the Senate's proposed legislation due to the apparent delegation to the HCAs. More specifically, this Statement of Policy says that "S. 3031 would weaken the HUD Reform Act by allowing subsidy layering decisions to rest with State housing finance agencies rather than [HUD.]" (Emphasis added.) Congr. Rec., Sept. 10, 1992, p. S 13255. We would note that, at some point after this Statement of Policy was issued, provision was made in Section 911 to empower the Secretary to revoke an HCA's authority where it failed to properly implement HUD's guidelines.

In view of these facts, we conclude that the Office of Housing's implementation of Section 911 is supported by the statutory language and the Congressional history of that section.

II. What Is the Legal Import and Effect of the Signing

Statement?

In statutory construction there are three major source materials: (1) the statute itself; (2) "intrinsic" aids; and (3) "extrinsic" aids. Sutherland, Statutes and Statutory Construction, 45.14 (1992). Intrinsic aids are those which derive meaning from the internal structure of the text of the statute and conventional or dictionary meanings. Id. Extrinsic aids consist of information which comprises the background of the text, such as legislative history. Id. Clearly, if Presidential signing statements are to be utilized at all in statutory construction, they would be considered as an extrinsic aid.

Generally, extrinsic aids are only considered when a statute is ambiguous and unclear. Sutherland 48.01. As discussed above, there arguably is an ambiguity in the instant case. Accordingly, we need to consider what weight, as an "extrinsic" aid, former President Bush's signing statement carries. As discussed in more detail below, we conclude that there are strong arguments for concluding that former President Bush's signing statement concerning Section 911 should not be dispositive for implementing that section.

-Case Law-

We did locate decisions in which courts considered Presidential signing statements as one of the factors to be used in construing a statute. Although the courts have considered signing statements in deciding cases, they do not appear to have given them any special or uniform weight and have not expressly analyzed the constitutional concerns raised by their use.

In some cases, a Presidential signing statement is simply noted but is not expressly relied upon in the decision. See, e.g., United States v. Pippin, 903 F.2d 1478, 1480, n 2 (11th Cir. 1990); Bowsher v. Synar, 478 U.S. 714, 719, n 1 (1986); United States v. Lovett, 328 U.S. 303, 313 (1946); Cohen v. Georgia-Pacific Corp., 819 F. Supp. 133, 139 (D.N.H. 1993); U.S. v. Charleus, 871 F.2d 265, 269 (2nd Cir. 1989); and National Parks and Conservation Ass'n v. Kleppe, 547 F.2d 673, 678, n 16 (D.C. Cir. 1976). Other cases reflect a reliance upon Presidential signing statements in reaching decisions, although the decisions do not discuss the constitutional implications of such reliance. See, e.g., Berry v. Dept. of Justice, 733 F.2d 1343, 1349 (9th Cir. 1984); Equal Employment Opportunity Commission v. Home Insurance Company, 672 F.2d 252, 265 (2nd Cir. 1982); Church of Scientology, Etc. v. U.S. Dept. of Justice, 410 F.Supp. 1297 (D. Cal. 1976); and Clifton D. Mayhew, Inc. v. Wirtz, 413 F.2d 658, 661 (4th Cir. 1969).

A few cases do set forth some considerations noted by courts when using Presidential signing statements. For example, in United States v. Tharp, 892 F.2d 691 (8th Cir. 1989), the court referred to former President Reagan's signing statement for the Sentencing Reform Act and found that "[t]he President ... has a part in the legislative process, too, except as to bills passed over his veto, and his intent must be considered relevant to

determining the meaning of a law in close cases." Similarly, in United States v. Story, 891 F.2d 988, 994 (2nd Cir. 1989), the court, although noting that in some circumstances there is room for doubt about the weight to be accorded a Presidential signing statement, found that former "President Reagan's views [on the application of the Sentencing Reform Act to straddle offenses, i.e., offenses like conspiracies that can be in existence before the date of enactment of said Act and continue after such date of enactment] are significant here because the Executive Branch participated in the negotiation of the compromise legislation."

It is crucial to point out, however, that although these cases recognized a Presidential role in the legislative process, the signing statements were not the only factor relied upon by the courts in reaching their decisions. Rather, the signing statements were one of several pieces of information (including the language of the statute itself and Congressional legislative history, such as Congressional reports) that were considered by

the courts in reaching their decisions. Further, we located at least one case where the court explicitly rejected a request to give deference to a Presidential signing statement, namely, former President Bush's signing statement for the Civil Rights Act of 1991, which signing statement declared that said Act was to be applied prospectively. See Crumley v. Delaware State College, 797 F.Supp. 341, 347-348 (D. Del. 1992). In Crumley, the court took the view that the signing statement carried no more interpretive weight than an Equal Employment Opportunity Commission ("EEOC") Policy Statement on the issue, which Policy Statement the court had earlier determined was not entitled to deference because it had hinged its conclusions on interpretations of certain Supreme Court cases and, in the court's view, the EEOC's expertise did "not encompass analysis of Supreme Court cases."

-Law Review Articles-

In addition to the case law, we do note that the utilization of Presidential signing statements in statutory construction has been the subject of recent legal scholarship, most of which has taken a negative view of such use. Two law review articles have challenged the constitutional legitimacy of Presidential signing statements. See Garber & Wimmer, Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power, 24 Harv. J. on Legis. 363 (1987) and Note, Let Me Tell You What You Mean: An Analysis of Presidential Signing Statements, 21 Geo. L. Rev. 755 (1987). These articles basically argue that to rely on Presidential signing statements as an aid in statutory construction would violate the Constitution's separation of powers doctrine by giving the President the power to make law and by allowing the President to usurp the judiciary's role of interpreting statutory meaning. There are law review articles that have offered some support, but such support has been limited in scope. A third article took a less negative view of signing statements.
See Cross, The Constitutional Legitimacy and Significance of Presidential "Signing Statements," 40 Admin. L. Rev. 209, 212 (1988). Cross supports "the legitimacy of some role for Presidential signing statements in statutory

interpretation" on three grounds: (1) there can be an independent role for signing statements as part of the legislative history when the President drafts or influences a statutory provision; (2) the President's interpretation is entitled to weight as an independent executive statutory interpretation, much like a federal agency might interpret its enabling statute; and (3) there can be Presidential interpretive power in a limited number of substantive areas which involve a special claim of Presidential power, such as foreign relations. A fourth article, while concluding that in most instances courts should not rely on Presidential legislative history to interpret statutes, did find some potential instances where their use could be justified. See Popkin, Judicial Use of Presidential Legislative History: A Critique, 66 Ind. L.J. 699 (1991). Popkin indicated that Presidential legislative history should be an interpretive aid only when it records agreements with legislators and cites traditional legislative history, such as committee reports. Further, he concluded that the only other instance in which the

President arguably possesses an interpretive power involves signing statements attached to statutes that threaten to infringe on the President's express constitutional powers, such as statutes pertaining to the appointments or foreign relations powers. In our view, even the positions expressed in these more supportive law review articles would not warrant the use of former President Bush's signing statement in the matter at hand. The Cross approach does not support use of the signing statement in this case. First, Cross emphasizes that signing statements should not be dispositive. Second, he was of the view that when the President opposed the provision being interpreted, his signing statements lacked persuasive authority. As noted earlier in this memorandum, the Statement of Administration Policy published in the September 10, 1992 Congressional Record indicates that former President Bush opposed vesting authority to perform the subsidy layering review with the HCAs. The Popkin approach also does not support utilization of the signing statement in this case. The signing statement in question did not cite traditional legislative history to affirm its position. Further, as discussed in the next section of this memorandum, we think that there are sufficient arguments to support a position that Section 911 also does not improperly encroach upon the President's constitutional powers.

III. Is There a Real Constitutional Problem With the Duties Assigned to HUD and the HCAs Under Section 911 of the 1992 HCD Act and Section 102(d) of the HUD Reform Act?

We have identified a constitutional concern in connection with the duties assigned to HUD and the HCAs under Sections 911 and 102(d). This concern stems from the fact that in Section 911 Congress is delegating administrative authority outside of the Federal Government. To address this concern we must consider two issues: (1) whether this delegation is a violation of the nondelegation doctrine; and (2) whether this delegation violates the constitutional principle of separation of powers. As discussed in more detail below, we believe that there are sufficient arguments to support the Office of Housing's course of action involving full delegation.

-Nondelegation Doctrine-

Article I, Section 1 of the Constitution provides that

"[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." The nondelegation doctrine, which is rooted in this constitutional provision and in the perceived need to preserve the separation of governmental powers, has stood for the proposition that limits must be imposed on Congress' authority to delegate its legislative power. Brown, Separated Powers and Ordered Liberty, 139 U. Pa. L. Rev. 1513, 1553-1554 (1991). Thus, Section 911 could be subject to challenge under the nondelegation doctrine because it provides for the delegation of legislative power (i.e., the ability to

enforce or implement a legislative objective such as subsidy layering reviews) from Congress to both HUD and the HCAs. We think that a challenge on this ground could be rebutted by the Department.

Despite the nondelegation doctrine, the Supreme Court's longstanding principle has been that Congress satisfies its constitutional duties when sufficient guidelines confine its delegate's discretion in implementing the Congressional mandate. See, e.g., Skinner v. Mid-America Pipeline Co., 109 S. Ct. 1726, 1731 (1989) ("[S]o long as Congress provides an administrative agency with standards guiding its actions such that a court could `ascertain whether the will of Congress has been obeyed,' no [improper] delegation of legislative authority has occurred...") See also American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946) and J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).

Thus, we see only two issues regarding the nondelegation doctrine and Section 911. First, did Congress provide sufficient guidelines to its delegates? Second, does it matter that the delegation, in part, runs to an entity outside of the Federal Government? Again, we think that these questions can be answered satisfactorily.

In the instant case we think that the Department can argue that Congress provided adequate guidance to the HCAs. Section 911(c) instructs the HCAs that they must "carry out the responsibilities of Section 102(d)," namely, to determine that assistance within the jurisdiction of HUD "shall not be more than is necessary to provide affordable housing after taking account of [other government] assistance." Although such a delegation does not offer step-by-step directions, the Supreme Court often has upheld delegations where there was limited specificity. See e.g., Lichter v. United States, 334 U.S. 742, 778-786 (1948) (upholding delegation of authority to the War Department to recover "excessive profits" earned on military contracts). See also Yakus v. United States, 321 U.S. 414, 420, 426-427 (1944) and FPC v. Hope Natural Gas Co., 320 U.S. 591, 600-0601 (1944). Further, in accordance with Section 911(a), HUD has established guidelines for the HCAs to follow. The direction to the Department in establishing these guidelines, of course, came from Section 102 itself (as it has since that statute was enacted in 1989) as well as from the additional mandates about amounts of equity capital and project costs that are contained in Section 911(b).

Regarding the second issue, the courts have upheld delegations involving state and local officials as well as private parties. See Mulroy v. Block, 569 F. Supp., 256, later op 574 F. Supp. 194, aff'd 736 F.2d 56, cert. denied, 105 S. Ct. 907 (1985). In Mulroy, the court found that a

provision of the milk price support law authorizing the Secretary of Agriculture to seek the assistance of state and county officials in carrying out an assessment against the proceeds of commercially marketed milk was not an unlawful delegation of power to non-federal employees. The court stated that "because the statute merely authorizes the Secretary to seek the assistance of non-federal employees in `carrying out' the program, and not in any policy-making capacity, the contested provision does not exceed lawful bounds.". See also United States v. Frame, 885 F.2d 1119 (3d Cir. 1989), cert. denied 110 S. Ct. 1168 (1990). In Frame, the court found that Congress did not unlawfully delegate its legislative authority to members of the beef industry merely because, under a beef promotion statute, a board comprised with industry representatives, was authorized to take the initiative in implementing a beef promotion program. The court found the delegation lawful because the amount of federal agency oversight of the board was considerable, and no law-making authority was entrusted to the members of the beef industry. See also Krent, Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government, 85 Nw. U.L. Rev. 62, 71 (1990).

In view of the foregoing, we think that Section 911 is supportable against a challenge under the nondelegation doctrine. First, we have concluded that there likely is adequate guidance in the statute. Second, the HCAs will be "carrying out" the responsibilities of Section 102(d) in accordance with HUD-established guidelines. Therefore, the HCAs are not accorded policy-making, or law-making, roles under Section 911. Finally, HUD intends to monitor the HCAs to ensure guideline compliance. This monitoring would be consistent with the fact that the HCAs must certify to HUD that they will properly implement the HUD guidelines as well as with the fact that HUD is authorized to revoke the subsidy layering responsibilities where it determines that an HCA has failed to properly implement the guidelines. Thus, there will be federal oversight in this scheme, and the HCAs will not be accorded "carte blanche" and completely unsupervised authority.

-Separation of Powers-

A final constitutional challenge that might be asserted against Section 911 is that it violates the principle of separation of powers because it vests responsibility for the execution of a statute in officials independent of the President's authority. Article II imposes a duty on the President to "take Care that the Laws be faithfully executed." In addition, under Article II the President has the power to appoint officers of the United States and the derivative power to

remove all officers exercising executive-type duties. Thus, the argument against Section 911 would be that, by vesting

responsibilities for subsidy layering reviews in the HCAs, Congress has impinged upon the President's responsibility to superintend the implementation and enforcement of the statutory authority for subsidy layering reviews and certifications as delegated from Congress in the law. See Krent, supra at 72. Although separation-of-powers is an area of jurisprudence notable for its tortuousness, we think that sufficient arguments can be made that Section 911 does not violate the doctrine of separation-of-powers. See Hui, Note: A "Tier-ful" Revelation: A Principled Approach to Separation of Powers, 34 Wm & Mary L. Rev. 1403 (1993).

An examination of the principal Supreme Court decisions on separation-of-powers evidences support for the position that Section 911 does not present a case of unconstitutional legislative aggrandizement at the expense of the executive branch. The court has upheld delegations to state agencies, emphasizing the "partnership" between state and federal agencies. See Harris v. McRae, 448 U.S. 297, 308 (1980). In addition, it appears that the court has allowed Congress to restrict the freedom of the executive branch to execute the law where Congress does not overly insinuate itself into the process and where Congress permits the executive branch to retain some level of control over the delegate.

Regarding the issue of "over-insinuation," the court has struck down, as unconstitutional, statutes such as a portion of the Balanced Budget and Emergency Deficit Control Act of 1985 because the Act required the Comptroller General to interpret provisions of the Act and yet, under the statute, only Congress could remove the Comptroller General from office. See Bowsher v. Synar, 478 U.S. 714 (1985). ("To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws." Id. at 726.) In the instant case, however, Congress will not be controlling the process of implementing Section 911. In fact, HUD has established the guidelines, in accordance with statutory requirements, that the HCAs will follow. Further, Congress will not control the removal of the delegations to the HCAs. Instead, HUD has the authority to revoke the delegation if the guidelines are not complied with.

Other cases suggest that, where Congress permits the executive branch to retain some level of control, no substantial separation-of-powers issue is raised. For example, in Morrison, Independent Counsel v. Olson, 487 U.S. 654 (1987) the court upheld Congress' creation of an "independent counsel" even though the independent counsel could be removed by the Attorney General, an executive officer, only for good cause or disability. ("[W]e [do not] think that the `good cause' removal provision at issue here impermissibly burdens the President's power to control

or supervise the independent counsel, as an executive official,

in the execution of his or her duties under the Act. This is not a case in which the power to remove an executive official has been completely stripped from the President, thus providing no means for the President to ensure the `faithful execution' of the laws." Id. at 692.) As already discussed, Section 911 expressly provides that HUD will establish the guidelines under the statute and will have authority to revoke the delegation for non-compliance. Thus, under Section 911, the executive branch (through the agency) is able to retain some measure of control over execution of the subsidy layering statutory requirements.

Finally, we think that it is useful to note that the low-income housing tax credit program established by section 42 of the Code presently authorizes and requires HCAs to carry out a number of responsibilities in connection with that Federal program. In this regard, HCAs are responsible for initiating plans with specified criteria for allocating credits among projects, allocating only necessary credits, and making project evaluations. See Section 42(m) of the Code. We note that, in particular, the allocation authority bestowed upon HCAs by section 42 is a significant grant of authority. Further, section 42(m)(2) of the Code requires that HCAs determine that "the housing credit dollar amount allocated to a project shall not exceed the amount the [HCA] determines is necessary for the financial feasibility of the project and its viability as a qualified low-income housing project throughout the credit period." Thus, under section 42, HCAs already perform and are responsible for a process that is similar in objective to section 102(d)'s subsidy layering requirements. We believe that the existence of section 42, and the low-income housing tax credit program presently operating under its statutory authority, further supports the permissibility of a full delegation to the HCAs under section 911.

-Conclusion-

As discussed above, we conclude that: (1) the Office of Housing's implementation providing for full delegation is supported by the statute and the Congressional legislative history; (2) former President Bush's signing statement is not dispositive for purposes of statutory construction; and (3) although the full delegation to the HCAs under Section 911 could be challenged as an unconstitutional delegation of legislative power or as an unconstitutional infringement of the executive branch, we believe that there are sufficient arguments under current case law to respond to any such challenge.

Finally, we wish to point out that under the present regulations at 24 C.F.R. Part 12, Subpart D, HUD is required to perform the subsidy layering review and to make the certification that there is no excess subsidy. Since the Office of Housing has

issued guidelines that delegate these functions to the HCAs, we recommend (for sake of clarity) that when 24 C.F.R. Part 12 is next amended, the regulations at Subpart D also be amended to take the delegation into account. Such an amendment to Subpart D could make clear that, pursuant to section 911, HCAs will perform

the subsidy layering function for projects receiving HUD assistance and receiving or allocated low-income housing tax credits, as set forth in Departmental guidelines.