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MEMORANDUM FOR THE PRESIDENT

Re: Constitutionality of attempt by Congress to prohibit an officer in the Executive branch from continuing to hold one of two offices to which he was appointed by and with the advice and consent of the Senate.

In 1961, Sargent Shriver was appointed Director of the Peace Corps by President Kennedy, by and with the advice and consent of the Senate; in 1964, he was appointed by you, by and with the advice and consent of the Senate, to be Director of the Office of Economic Opportunity. The Senate, when it approved his second nomination, was fully aware of the fact that Mr. Shriver would hold both offices at the same time. (Nomination, Hearings before the Senate Committee on Labor and Public Welfare, 88th Congress, 2d Session, on Robert Sargent Shriver, Jr., to be Director of the Office of Economic Opportunity.) Title III of the Dual Compensation Act of August 19, 1964, P.L. 88-448, 78 Stat. 488, permits the appointment of one person to more than one office, but provides in effect that he can receive compensation only for one position.

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Legislation has been introduced which would have the effect of prohibiting the same person from occupying the office of Director of the Peace Corps and of Director of the Office of Economic Opportunity. In my view such legislation, if construed as applicable to Mr. Shriver, the incumbent, would be invalid because it would constitute an attempt by Congress to remove from office an officer of the Executive branch in a manner not authorized by the Constitution. Under the Constitution, the power to remove an officer of the Executive branch is vested exclusively in the President. Congress can oust such an officer only by the process of impeachment. And while Congress can impose reasonable qualifications for civil offices, it may not impose such qualifications retroactively so that its action has the effect of removing the incumbent from office.

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The Constitution provides that the President shall nominate, and, by and with the advice and consent of the Senate, shall appoint the officers of the United States, except those inferior officers whose appointments the Congress may vest in the President alone, in the courts of

law, or in the heads of departments. The Congress, during a famous debate of 1789, recognized that the power of removing the officers of the Executive branch was vested in the President alone and that the Congress could not limit this power by providing that removal, like appointment, required Senatorial advice and consent. The Constitutional principle that the power of removal of Executive officers is vested in the President alone was judicially recognized in Myers v. United States, 272 U.S. 52 (1926).[1] The only Constitutional way in which Congress can bring about the removal of an Executive officer, without abolishing his office, is by way of impeachment -- a process which involves a trial by the Senate and conviction by two-thirds of the Senators present.

The Presidents have on several occasions successfully defended from Congressional encroachment their exclusive power to remove Executive officers. When, in 1924, in connection with the Teapot Dome scandal, the Senate passed a resolution calling for the removal of Secretary of the Navy Denby (65 Cong. Rec. 2245), the President declined to comply

[1] Congress can limit the President's power to remove quasi-legislative or quasi-judicial officers. Wiener v. United States, 357 U.S. 349; Humphrey's Executor v. United States, 295 U.S. 602. The offices of the Director of the Peace Corps and of the Office of Economic Opportunity do not, however, fall into those categories.

with that request. He stated:

> "The dismissal of an officer of the Government, such as is involved in this case, other than by impeachment, is exclusively an Executive function. I regard this as a vital principle of our Government." 65 Cong. Rec. 2335.

In December 1930, the Senate confirmed the nomination of three members of the Federal Power Commission and ordered that the resolution of confirmation be forwarded to the President, who thereupon appointed those officers. After the Christmas recess, the Senate voted to reconsider the nomination and asked the President to return the resolution of nomination. President Hoover refused to comply with that request. He said:

> "I am advised that these appointments were constitutionally made, with the consent of the Senate formally communicated to me, and that the return of the documents by me and reconsideration by the Senate would be ineffective to disturb the appointees in their offices. I cannot admit the power in the Senate to encroach upon the Executive functions by removal of a duly appointed executive officer under the guise of reconsideration of his nomination."

The Supreme Court upheld the President's refusal to permit the removal by the Senate of validly appointed officers.[2]

[2] United States v. Smith, 286 U.S. 6, fn. 3 at 28-29; see also 36 Op. A.G. 382. The opinion of the Court deals primarily with interpretation of the Senate Rules rather than with the question here involved.

Section 304 of the Urgent Deficiency Appropriation Act of 1943, 57 Stat. 431, 450, provided that no funds could be used to pay the salaries of three named Government officials. When President Roosevelt signed the bill, he stated:

> "The Senate yielded, as I have been forced to yield, to avoid delaying our conduct of the war. But I cannot so yield without placing on record my view that this provision is not only unwise and discriminatory, but unconstitutional.
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> "This rider is an unwarranted encroachment upon the authority of both the executive and the judicial branches under our Constitution. It is not, in my judgment, binding upon them." 89 Cong. Rec. 7521.

In United States v. Lovett, 328 U.S. 303, the Supreme Court held that this attempt to remove the three officials by cutting off their salaries was unconstitutional. While the Court relied on the bill-of-attainder Clause of the Constitution, which would probably not be applicable in the present case, its reasoning rested in part on the proposition that the legislative branch has available to it only one procedure, namely impeachment, for the removal of officers of the Executive branch.

When the Economic Opportunity Act was before Congress last year it was generally known that Mr. Shriver would be

appointed to administer that Act; when Mr. Shriver was appointed Director of the Office of Economic Opportunity it was known to the Senate that he would hold the two offices. Had it wished to do so at that time, Congress could have provided in the legislation that the Director of the Office of Economic Opportunity could not be Director of the Peace Corps, or the Senate could have refused confirmation for that reason. For Congress may impose reasonable qualifications, applicable prospectively, upon those who would hold executive posts it has created. But if Congress could impose qualifications retroactively, thereby ousting the incumbent, it could remove any officer whose performance, however satisfactory to the President, was unsatisfactory to it. The Constitution is certainly not susceptible of any such interpretation.

In view of the fact that Mr. Shriver has been appointed, by and with the advice and consent of the Senate, to both of the offices which he now holds, the Congress may not constitutionally undo either appointment by legislation. So long as both posts continue to exist, the incumbent can be removed only by Presidential action or by impeachment.

Attorney General