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ID # 450694 CU

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### WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

O - OUTGOING

H - INTERNAL

I - INCOMING

Date Correspondence Received (YY/MM/DD) 1 / 1

Name of Correspondent: Samuel A. Alito, Jr.

MI Mail Report

User Codes: (A) \_\_\_\_\_ (B) \_\_\_\_\_ (C) \_\_\_\_\_

Subject: Office of Legal Counsel Opinion; Federal Retirement  
Trust Investment Board

#### 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>Cuholl</u>	ORIGINATOR	<u>86109123</u>		<u>C</u>	<u>8609129</u>
	Referral Note:				
<u>Cuwall</u>	<u>I</u>	<u>86109123</u>		<u>C</u>	<u>8609129</u>
	Referral Note:				
		<u>1 / 1</u>			<u>1 / 1</u>
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	Referral Note:				

#### 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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U.S. Department of Justice  
Office of Legal Counsel

Office of the  
Deputy Assistant Attorney General

Washington, D.C. 20530

SEP 23 1986

450691 *CU*

MEMORANDUM FOR PETER J. WALLISON  
COUNSEL TO THE PRESIDENT

Re: Federal Retirement Thrift Investment Board

On July 30, 1986, you requested our views on several issues involving<sup>1</sup> the Federal Retirement Thrift Investment Board (Board). Many of these questions, including the problem of personal liability of Board members, have been resolved informally but we address below the two remaining issues.

You asked whether Board members would be entitled to representation by the Department of Justice<sup>2</sup> if they were sued for damages in their personal capacities. As a general matter, the Attorney General's Representation Policy Guidelines (Guidelines) provide for representation in those cases where the individual's actions "reasonably appear to be within the scope of his employment" and where representation would be in the interest of the United States. 28 C.F.R. 50.15(a)(2). The Civil Division has advised us that they consider Board members to be eligible to receive representation by Department of Justice attorneys pursuant to the provisions of the Guidelines. If considerations of professional ethics preclude such representation, the Department of Justice has the option of hiring private counsel for the Board member. *Id.* Representation is not available in federal criminal proceedings. 28 C.F.R. 50.15(a)(4). It would also not appear to be available if the suit were brought by the Secretary

<sup>1</sup> The Board was established by the Federal Employees' System Retirement Act of 1986, Pub. L. No. 99-335, sec. 101, 100 Stat. 514, 578 (1986), to be codified at 5 U.S.C. 8472. The Board, whose members are appointed by the President, will manage the Thrift Savings Fund that will contain the retirement savings of most future federal employees.

<sup>2</sup> The Department of Justice will represent all officers of the United States who are sued in their official capacity. 28 U.S.C. 516.

of Labor as provided for in 5 U.S.C. 8477(e); representation of a Board member in a suit brought against him by the government presumably would not be "in the interest of the United States." 28 C.F.R. 50.15(a). It should be noted, however, that the Guidelines are structured so that final decisions on representation are made on an individual basis by the Department's Representation Committee.

Second, you asked whether a current federal employee may be appointed to the Board. We believe that a federal employee may be appointed. As a general rule, a federal employee may hold more than one job with the Government, provided the jobs are not incompatible, although he may not be paid for more than one. 5 U.S.C. 5533. More specifically, the Act contains no prohibition against employment of a federal employee by the Board. In fact, certain administrative provisions of the Act appear to contemplate that officers and employees of the government may be employed as Board members. For example, the new section 8476 of title 5 provides, in relevant part:

(d)(1) Each member of the Board who is not an officer or employee of the Federal Government shall be compensated at the daily rate of basic pay for grade GS-18 of the General Schedule for each day during which such member is engaged in performing a function of the Board.

. . .

(e) The accrued annual leave of any employee who is a member of the Board or the Council shall not be charged for any time used in performing services for the Board or the Council.

We believe that these provisions indicate that Congress intended to follow the general rule and permit the appointment of federal employees to the Board.

Please let me know if we can be of further assistance.



Samuel A. Alito, Jr.  
Deputy Assistant Attorney General  
Office of Legal Counsel

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