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Memorandum 68-57

Subject: Study 65 - Inverse Condemnation (Unintended Physical Damage)

We have sent you Part IV of the research study on Inverse Condemnation. This part of the research study deals with the most important problems in this field and will require careful study prior to the meeting. At the meeting, we plan to go through the study in some detail to discuss the existing law and the consultant's suggestions. The Commission can then determine how it wishes to proceed on this aspect of the study of inverse condemnation.

The following is a summary outline of the study that may be useful in guiding our discussion at the meeting. Page references are to the research study.

I. THE DOCTRINAL DEVELOPMENT OF INVERSE LIABILITY FOR UNINTENDED PHYSICAL DAMAGE (pages 1-20)

For want of more precise guidance, the courts have invoked analogies from the law of torts and property as keys to inverse condemnation liability. The decisional law contains numerous allusions to concepts of "nuisance," "trespass," and "negligence," as well as to notions of strict liability without fault. Seldom do judicial opinions seek to reconcile the divergent approaches.

In some kinds of cases (e.g., landslide, water seepage, stream diversion, concussion), present rules appear to impose inverse liability without regard to fault; in others (e.g., drainage obstruction, flood control, pollution), an element of fault is required to be pleaded and proved by the claimant.

A. Inverse Liability Without "Fault" (pages 2-8)

The leading recent California case, Albers v. County of Los Angeles, held that, in general, "any physical injury to real property proximately caused by the improvement as deliberately designed and constructed is compensable under article I, section 14, of our Constitution whether foreseeable or not."

The Albers case is not a blanket acceptance of strict liability without fault:

(1) The case supports liability absent foreseeability of injury (i.e., without fault) only when inverse liability would obtain on the same facts plus foreseeability (i.e., plus fault). This limitation assumes that inverse liability ordinarily exists--but not invariably--where fault is established. The nature of the "fault" referred to, and thus the dimensions of inverse liability under Albers where fault is not present, are rooted in decisional law that is less than crystal clear.

(2) The liability is limited to "direct physical damage"; non-physical "consequential" damage is excluded.

(3) The damage must be "proximately caused" by the public improvement as designed and constructed. Ordinarily, foreseeability of injury is the test of whether an act or omission is sufficiently "proximate" that liability may attach. However, the term "proximate cause" must have a special meaning as used in Albers: Proof that the injurious consequences followed in the normal course of subsequent events, and were predominately produced by the improvement, seems to be the focus of judicial inquiry.

Thus, Albers rejects foreseeability as an element of the public entity's duty to pay just compensation when its improvement project directly sets in motion the natural forces (i.e., landslide) that produces a damaging of private property. Foreseeability may still be a significant operative factor in determining liability in other types of cases, however, such as cases in which independently generated forces, not induced by the entity's actions, contribute to the injury. But, to the extent that the intervention of independent natural forces is reasonably foreseeable, the entity's failure to incorporate adequate safeguards for private property into the improvement plan remains a proximate, although concurrent, cause of the resulting damage and thus a basis of inverse liability.

B. Fault as a Basis of Inverse Liability (pages 8-11)

Most of the pre-Albers decisions sustaining inverse liability for unintended physical injury to property are predicated expressly on a fault rationale grounded upon foreseeability of damage as a consequence of the construction or operation of the public project as deliberately planned. Other cases seemingly affirm the proposition that negligence is not a material consideration if, in fact, a taking or damaging for public use has occurred. The consultant attempts to reconcile these cases. See pages 9-11 of the study. He points out that negligence is only a particular kind of fault and that it is not materially significant whether an "inherently wrong" plan was the product of inadvertence, negligent conduct, or deliberation, for the same result--inverse liability--follows in any event, absent a sufficient showing of legal justification for infliction of the harm. Albers recognizes an additional occasion

for inverse liability by holding that lack of foreseeability does not preclude recovery for directly caused physical damage which would have been recoverable under a fault rationale had that damage been foreseeable.

C. Damnum Abseque Injuria (pages 11-18)

Two lines of California cases create exceptions to the otherwise unqualified language of the constitutional command that just compensation be paid when physical damage is inflicted upon private property for a public purpose:

(1) The "police power" cases. (pages 11-17) In Albers, the Supreme Court explicitly distinguished "cases . . . like Gray v. Reclamation District No. 1500 . . . where the court held the damage noncompensable because inflicted in the proper exercise of the police power." In the absence of a compelling emergency, the police power doctrine will not shield a public entity from inverse liability where physical damage to private property could have been avoided by proper design, planning, construction, and maintenance of the improvement. The consultant concludes that the kind of emergency which will preclude inverse liability is so narrowly circumscribed that the police power exception is of negligible significance.

(2) The "legal right" cases. (pages 17-18) Albers reaffirmed the rule that, when a private person would be legally privileged to inflict like damage without tort liability, a public entity may do so without obligation to pay just compensation. This rule is applied to deny inverse liability in a variety of situations. Examples include cases involving damages caused by public improvements designed to accelerate the flow of a natural watercourse, control the overflow and spread of

flood waters, and collect and discharge surface storm waters through natural drainage channels. The rationale of these "legal right" cases, however, does not imply that the absence of a cause of action against a private person necessarily or invariably precludes a claim for inverse compensation against a public entity. Example is Albers where the assumption was that a private person in the position of the defendant county would not be liable. Thus, Albers represents an interpretation of the just compensation clause of the Constitution as imposing a broader range of public liability than the law of private torts.

D. Private Law as a Basis of Inverse Liability (pages 18-21)

Inverse liability of public entities has often been sustained on the ground that the entity breached a legal duty, derived from private law, which it owed to the plaintiff. These cases confirm the notion that inverse condemnation was merely a remedy to enforce substantive standards found in the law of private torts at a time when sovereign immunity still existed. Albers qualified this conception, reaffirming the original position that inverse liability has an independent substantive content which obtains even when private tort liability does not. The result of the enactment of the governmental tort liability statute is that, to the extent the legal principles applied in inverse condemnation litigation remain tied to private tort law analogies, a significant incongruity and source of confusion can be observed between the scope of governmental tort and inverse liabilities. Example is tort immunity for plan or design which is not recognized in inverse cases.

II. SCOPE OF INVERSE LIABILITY: THE EXPERIENCE (pages 21-54)

Cases involving unintended physical damages have been grouped and discussed by consultant in the following four categories discussed below.

A. Water Damages (pages 22-23)

In the water damage cases, the courts tend to rely on the rules of private water law. The consultant believes that a review of the cases suggests that treating public agencies as if they were private individuals, for the purpose of applying rules of water law, has often proved unsatisfactory and confusing. In a number of situations, the courts have departed from the strict letter of the private rules where overriding policy reasons have been perceived for according special treatment to public agencies.

(1) Surface water. (pages 23-28) Water which is "diffused over the surface of the land, or contained in depressions therein, and resulting from rain, snow, or which rises to the surface in springs" is classified as surface water. California follows the "civil law rule" which recognizes a servitude of natural drainage as between adjoining lands and postulates liability for interference therewith. Under this rule, the duty of both upper and lower landowners is to leave the flow of surface water undisturbed. The rule is consistent with the normal expectation that buyers should take land subject to the burdens of natural drainage. But the Keys case, a recent leading California case, held that the application of the rule is governed by a test of reasonableness, judged in light of the circumstances of each case. Under this modified civil law rule, factors to be taken into account include extent of the damage, foreseeability of the harm, the actor's purpose or motive, and relative

utility of the actor's conduct as compared to the gravity of the harm caused by his alteration of the surface water flow. In the past, the courts have generally applied the civil law rule in a somewhat mechanical manner, apparently without weighing the competing interests identified as relevant to the Keys rule of reason. It is possible that different results might have been reached had the balancing process been used. In some cases, however, the label "police power" was used to make a judicial balancing of interests similar to the test of reasonableness established by the Keys case.

It is difficult to determine the effect of the Keys case on the earlier surface water decisions. It is probable, however, that future cases in this area will be resolved by a balancing of interests rather than by mechanical application of arbitrary rules. The principal uncertainties appear to revolve around the degree of weight that will be judicially assigned to the public interest objectives behind governmental improvement projects, and the extent to which the courts will undertake review of the reasonableness of the governmental plan or design which exposed the owner's land to the risk of surface water damage.

(2) Flood water. (pages 28-33) Flood waters are the extraordinary overflow of rivers and streams, including waters overflowing artificial banks or levies maintained over a substantial period of time.

The rule is that flood waters are a common enemy against which the owner of land subject to overflow by those waters may protect his land by the erection of defensive barriers and that he is not liable for damages caused to lower and adjoining lands by the exclusion of the flood waters from his own property, even though the damage to other lands is increased thereby. As far as public entities are concerned, it should

be noted that no liability is incurred merely because flood control improvements do not provide protection to all property owners.

The "common enemy" rule is not an unlimited rule of privileged self-help. Mindful of the enormous damage-producing potential of defective public flood control projects, the courts have insisted that public agencies act reasonably in the development of construction and operational plans so as to avoid unnecessary damage to private property. Reasonableness, in this context, is not entirely a matter of negligence, but represents a balancing of public need against the gravity of private harm. This tendency to reject an unqualified application of the "common enemy" rule may be attributed, in part, to the difficulty of making a sharp factual distinction between flood waters and other waters.

(3) Stream water. (pages 33-37) The decisions appear to distinguish between governmental improvements that designedly divert stream waters onto private lands, improvements that obstruct the stream and thus result in overflow and flooding of private lands, and the downstream consequences of natural channel improvement--i.e., changes in the force or direction of the current with resulting erosion of channel banks.

(a) Diversion. When waters are diverted by a public improvement from a natural watercourse onto adjoining lands, the public entity is liable for the damage to or appropriation of such lands where the diversion was the necessary or probable result even though no negligence could be attributed to the installation of the improvement. Permanently established artificial watercourses are treated like natural ones under this rule if substantial reliance interests have been generated by passage of time. Liability without fault in the diversion cases appears to reflect the strength of the interests of property owners who have acquired and developed land in justifiable reliance upon the continuance

of existing watercourses as means of natural drainage. Analysis and weighing of the respective interests in light of the particular facts before the court is not characteristic of the diversion decisions; the rule of liability for diverting stream waters is generally applied in a strictly formal fashion.

(b) Obstruction. Obstructing a natural or artificial watercourse by the construction of a public improvement has ordinarily been regarded as a basis of inverse liability only when some form of fault is established. It is necessary to establish a negligently conceived plan or a deliberate taking of lands inundated or water rights destroyed. Mere routine negligence in maintenance that is not part of a deliberately conceived program for controlling the flow of storm waters is not a basis for inverse liability.

Regardless of whether the case is characterized as a "diversion" case or an "obstruction" case, inverse liability for interference with stream waters depends upon a showing of proximate causation. Thus, no liability exists for damage caused by the intervention of a superseding force consisting of an extraordinary and unprecedented storm.

(c) Downstream consequences of natural channel improvement. Where the narrowing and deepening of a natural watercourse greatly increases the total volume, velocity, and concentration of water running in the channel, thereby creating a substantial risk of downstream damage due to overflow or intensified erosion of the stream banks, inverse liability does not exist (at least insofar as downstream damage results from increased volume of water) unless the improvement is constructed according to an inherently defective or negligently conceived plan.

(d) Importance of classification of the facts. A deliberate program intended to alter the course of a stream for a public purpose is ordinarily

treated as a "diversion" and liability exists without a showing of fault. An unintended flooding is usually attributed to a negligently planned project that creates an "obstruction" and liability is based on a showing of fault. The distinction, however, is not a sharply defined one. If natural channel improvements are regarded as causing an alteration in the direction or force of the normal current within the channel, they may readily be thought of as having "diverted" the stream and liability without fault becomes the test. By describing the channel improvements as measures to fight off the common enemy of flood waters, attention is focused upon the issue of fault and the alleged defective nature of the improvement plan. The result is that liability turns ostensibly upon the unarticulated premises that control the classification process, rather than upon a conscientious weighing of public advantage and private harm in the particular factual situation.

(4) Other escaping water cases. (pages 37-39) There are other cases that do not fall neatly into the foregoing categories.

(a) Overflow. Damage resulting from overflow of sewers is recoverable in inverse condemnation if the plaintiff establishes that the sewers were deliberately or negligently designed so as to be inadequate to accomodate the volume of sewage and storm waters reasonably foreseeable in their service area. Fault is the basis of liability.

(b) Seepage. Many decisions approve inverse condemnation liability for property damage caused by seepage of water from irrigation canals "with or without negligence."

(c) Sudden escape. The sudden escape, as distinguished from gradual seepage, of water from public conduits has been held actionable only upon proof of defective design or operational plan.

(d) Importance of classification of the facts. Inverse liability for water that escapes from irrigation channels or other conduits is sometimes based on fault and sometimes obtains without fault; the choice of the rule appears to be a function of classification of the facts, rather than the application of a consistent theoretical rationale.

B. Interference With Land Stability (pages 39-41)

As in water damage cases, the judicial process has had little success in bringing order and consistency to the law of inverse condemnation for damages caused by a disturbance of soil stability. Here, too, the California cases exhibit a schizophrenic tendency to vacillate between a theory of liability based on fault and one that admits liability without fault.

In Reardon v. San Francisco, the earliest California decision interpreting the "or damaged" clause, the court held that the act of the city in depositing large quantities of earth and rock upon the street surface to raise its grade, thereby causing the unstable subsurface to shift and damage the foundations of plaintiff's abutting buildings, resulted in liability in inverse condemnation, whether or not the city was negligent. This approach, making fault immaterial to inverse liability for physical damage directly caused by public improvement projects, has been followed extensively in subsequent California decisions, but in an uneven pattern. Yet, numerous other California decisions exist that seem to affirm fault as an essential prerequisite, even in cases closely analogous to Reardon, to inverse liability.

C. Loss of Advantageous Conditions (pages 41-47)

The value of real property is often directly dependent upon advantageous conditions physically associated with it, such as an adequate

supply of good water. Private property law concepts are of crucial significance in the disposition of cases involving the impairment or termination of the existence of such physical attributes as a result of governmental activities.

(a) Reasonable beneficial use test as criterion of compensable water rights. The leading recent state Supreme Court case, Joslin v. Marin Municipal Water District, uses the reasonable beneficial use test as the criterion of compensable water rights. Thus, the critical determination whether a particular use of water is reasonable and beneficial "is a question of fact to be determined according to the circumstances in each particular case."

The inherent uncertainty of this test as a criterion of compensable water rights has been substantially reduced by statutory provisions. The existing statutory structure appears to provide a stable and orderly basis for determination of water rights and, in connection therewith, for the evaluation of claims to inverse liability based upon loss of enjoyment of rights in stream waters due to governmental activities.

(b) Pollution. California case law provides support for governmental liability for environmental pollution on a tort theory of nuisance. However, the 1963 governmental liability act was intended to eliminate nuisance as a theory of governmental liability and liability now apparently exists in pollution cases either as a dangerous condition of public property (tort) or inverse liability. The law in this area is uncertain.

D. Miscellaneous Physical Damage Claims (pages 48-54)

(1) Concussion and vibration. (pages 48-49) California imposes liability without fault for injuries caused by blasting in a populated

area but requires a showing of negligence as a basis of liability where the blasting occurred in a remote or unpopulated area.

(2) Escaping fire and chemicals. (pages 49-51) Mere routine negligence in permitting a fire to escape will not support inverse liability, but a deliberately adopted plan of use which includes the prospect of property damage as a necessary consequence of the use of fire for a public purpose would result in inverse liability. The same approach is used where damage results from drifting of chemical sprays employed for weed or insect control.

The escaping fire and chemical drift cases illustrate the overlap of tort and inverse remedies against public entities.

(3) Privileged entry upon private property. (pages 51-53) This is the subject of a separate tentative recommendation.

(4) Physical occupation or destruction by mistake. (pages 53-54) Absent an overriding emergency, the intentional seizure or destruction of private property by a governmental entity acting in furtherance of its statutory powers subjects it to inverse condemnation liability. Where such seizure or destruction is based upon a negligent, or otherwise mistaken, assumption that the government owns the property taken, inverse liability generally exists. The overlap of the tort and inverse remedies in these situations results in inconsistencies that should be reviewed.

III. CONCLUSIONS AND RECOMMENDATIONS (pages 55-83)

A. Basis of Liability (pages 55-67)

(1) Generally. As previously noted, in some kinds of cases (e.g., landslide, water seepage, stream diversion, concussion), present rules appear to impose inverse liability without regard for fault; in others

(e.g., drainage obstruction, flood control, pollution), an element of fault is required to be pleaded and proven by the claimant. Only occasionally have reported opinions explicitly noted, ordinarily without attempting to reconcile, the interchangeability of the "fault" and "no fault" approaches to inverse liability. Even the Albers decision, which at least set the record straight by revitalizing the position that inverse liability may be imposed without fault, did not undertake a thorough canvass of the law but left many doctrinal ends dangling. Uniform statutory standards for invocation of inverse condemnation responsibility would thus be a significant improvement in California law, both as an aid to predictability and counseling of claimants and as a guide to intelligent planning of public improvement projects.

(2) General approach to liability. The consultant suggests that the "risk theory" of inverse liability would provide a possible approach to uniform guidelines that would eliminate arbitrary distinctions based on fault, absence of fault, and varieties of fault. In substance, the "risk theory" bases liability on the fundamental notion that a public entity should be liable if, by adopting and implementing a plan of improvement or operation, the entity either negligently or deliberately exposes private property to a risk of substantial but unnecessary loss. If preventive measures (including possible changes in design or location) are technically and fiscally possible, the infliction of avoidable damage is not "necessary" to the accomplishment of the public purpose. On the other hand, if the foreseeable damage is deemed technically impossible or grossly impracticable to prevent within the limits of the fiscal capacity of the public entity, the magnitude of the public necessity for the project at the particular location, with the particular design or plan conceived for it, must be assessed in comparison to available alternatives

for accomplishing the same underlying governmental objective with lower risks, but presumably higher costs (i.e., higher construction and/or maintenance expense, or diminished operational effectiveness). The importance of the project to the public health, safety, and welfare, in relation to the degree of unavoidable risk and magnitude of probable harm to private property, thus constitute criteria for estimating the reasonableness of the decision to proceed.

In addition to the concept of liability stated above, liability should also exist where a substantial damage does in fact eventuate "directly" from the project and is capable of more equitable absorption by the beneficiaries of the project (ordinarily either taxpayers or customers of service paid for by fees or charges) rather than by the injured ovner, even though such damage is not foreseeable. This is the Albers case. The absence of fault is treated as simply an insufficient justification for shifting the unforeseeable loss from the project that caused it to the equally innocent owner. Absence of foreseeability, like other factual elements in the balancing process, is, in effect, merely a mitigating but not necessarily exonerating circumstance.

The consultant believes that the risk analysis approach reconciles most of the seemingly inconsistent judicial pronouncements as to the need for fault as a basis of inverse liability. For possible statutory approach, see the discussion of the tentative draft of the Restatement of Torts (2d) on absolute liability (study at 66-67) and the discussion of the Massachusetts statutes (study at 67).

The consultant also recommends revisions of the insurance provisions to make it clear that insurance may be obtained to cover all types of inverse liability. The installment payment of judgments provisions also should be revised to make it clear that they apply to all types of inverse liability. The problem of "catastrophe" liability should also be given further attention. See footnote 285 of the research study.

B. Private Law Analogies (pages 67-78)

(1) Generally. The existing judicial gloss on the just compensation clause is, to a considerable degree, a reflection of legal concepts derived from the private law of property and torts. The analogies, however, are unevenly drawn, sometimes disregarded, and occasionally confused. The consultant concludes that there is no compelling reason why rules of law designed to determine cases between private persons should necessarily control the rights and duties prevailing between government and its citizenry. The present uneasy marriage between private law and inverse condemnation has none of the indicia of a comprehensively planned or carefully developed program of legal cohabitation. Its current development is the product of episodic judicial development by a process which often regards factual similarity as more important than doctrinal consistency. Assimilation of private concepts into inverse condemnation law produces governmental immunity in circumstances where there probably should be liability and governmental liability in circumstances of dubious justification. Not only are the private law rules to some extent unsatisfactory as applied between private persons, but also such rules fail to accord appropriate weight to the special interests that attend the activities of governmental agencies.

(2) Suggestions by consultant. The consultant makes the following suggestion for an initial approach to drafting legislation in particular areas.

(a) Water damage cases. Liability in water damage cases should not be reached by mechanical application of private law formulas, but

should be based on a conscientious appraisal of the overall public purposes being served, the degree to which the loss is offset by reciprocal benefits, the availability to the public entity of feasible preventive measures or of adequate alternatives with lower risk potential, the severity of the damage in relation to risk-bearing capabilities, the extent to which damage of the kind sustained is generally regarded as a normal risk of land ownership, the degree to which like damage is distributed at large over the beneficiaries of the project or is peculiar to the claimant, and other factors which in particular cases may be relevant to a rational comparison of interests.

Recent Supreme Court decisions indicate that a balancing approach along these lines will henceforth be taken in cases involving loss of stream water supply and claims of damage resulting from interference with surface water. But it is far from clear whether, absent legislative standards, the balancing process in such cases would take into account all of the peculiar factors appropriate to governmental, but irrelevant, to private nonliability.

(b) Concussion and explosives cases. It can be argued that prevailing private law rules governing liability for damage due to concussion and explosives may be unrealistically severe as applied in an inverse condemnation context.

(c) Environmental pollution. A statutory rule of strict inverse liability may arguably be regarded as a desirable incentive to development of on-going intragovernmental anti-pollution programs supported by widespread cost distribution and thus preferable to the application of the somewhat ambiguous legal concepts which have developed in comparable private litigation.

(d) Loss of soil stability and deprivation of lateral support. The law of inverse condemnation liability is here in need of clarification by legislation. A rational approach might well substitute a statutory rule of strict inverse liability in place of rules developed for private controversies and predicated upon fault.

(e) Drifting chemical sprays. In connection with damage claims arising from drifting chemical sprays used in governmental pest abatement work, where current statutory provisions appear to impose a large measure of strict liability, legislation would be helpful to clarify applicability of the relevant provisions to public entities.

(f) Generally. Development of uniform inverse liability guidelines that would avoid reliance upon established private legal rules would improve predictability and rationality of decision-making. In addition, the rules developed for public entities might be made applicable to both public entities and private persons. Consideration also should be given to the possible justification, if any, for retention of inconsistent standards such as those governing the liability of private persons for damage to public property.

(g) Statutory presumptions tied to existing liability criteria. A possible legislative approach might provide that property damage newly caused by a public improvement is presumptively recoverable in inverse condemnation if private tort liability would follow on like facts, but is subject to a defense by the public entity grounded upon the existence of overriding justification. Conversely, property damage which public improvements (e.g., flood control works) were intended, but failed, to prevent could be declared, by statute, presumptively non-recoverable,

if that result would obtain under private law, in the absence of persuasive evidence adduced by the claimant that the inadequacy of the improvement was attributable to the unreasonable taking by the entity of a calculated risk that such damage would not result.

C. Overlap of Tort and Inverse Condemnation Law (pages 78-83)

The abrogation of sovereign immunity in California, and the enactment of the governmental liability statute, have produced inconsistencies between tort and inverse liabilities of governmental entities which are a source of confusion, possible uncertainty, and occasional injustice.

For example, the precise status of nuisance as a source of inverse liability is a prime example of law in need of legislative clarification. In addition, where property damage has resulted from a dangerous condition of public property, inverse liability may exist notwithstanding a clearly applicable statutory tort immunity. Lack of conceptual symmetry is also seen in the fact that damages for personal injuries or death are often wholly unrecoverable (due to a tort immunity) even though full recovery for property losses is assured by inverse condemnation law upon precisely the same facts. Procedural disparities also deserve legislative treatment. Greater flexibility of remedial techniques should be available to the courts in inverse actions. Legislative clarification of the rules of damages applicable in inverse condemnation proceedings would be appropriate (note 347 of study).

CONCLUSION

It appears reasonably probable that much of the artificiality of inverse condemnation law, derived largely from its use as a device to evade sovereign immunity, can be eliminated in the process of codification of statutory standards. Moreover, in cases where unintended physical property damage is the basis of the claim, it is now both possible (due to the demise of sovereign immunity) and desirable (in the interest of greater certainty and predictability) to develop a single legislative remedy with adequate scope and flexibility to supplant the judicially developed action in inverse condemnation with all its uncertainties and inconsistencies.

The staff suggests that the Commission attempt to prepare comprehensive legislation covering all aspects of inverse liability for unintended physical damage. The consideration and discussion of this memorandum and the research study at the meeting should give you some understanding of the magnitude of the proposed undertaking. If this suggestion is adopted, the staff will make an analysis of the study to determine how it can be divided into relatively small parts which can then be intensively studied and will present memoranda for your consideration at future meetings.

Respectfully submitted,

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Executive Secretary